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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

191, 192, 193, 194 U. S.

BOOK 48,
LAWYERS' EDITION,
CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

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HON. RUFUS W. PECKHAM,

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JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

March 9, 1903.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT
OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 47 L. ed., Appendix IX. p. 1201.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1902-1903.	COMMI- SIONED.	SWORN IN.
ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
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ASSOCIATE JUSTICE JOSEPH McKENNA, California.	President McKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA,* HAWAII.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1903.

1]*JOSEPH J. MARTIN, Alfred M. Fuller, and Thomas B. Schriver, Copartners, Trading as Martin, Fuller, & Co., Libellants, *Petitioners*.

v.

STEAMSHIP SOUTHWARK, Whereof the International Navigation Company is Owner, *Resp't.*†

(See S. C. Reporter's ed. 1-17.)

Carriers—Harter act—seaworthiness — due diligence—burden of proof—stipulation to relieve carrier from statutory duty.

1. The furnishing of a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef which a vessel has undertaken to carry, is within the obligation to use due diligence to provide a seaworthy vessel, imposed upon the owner by the Harter act (Feb. 13, 1893) as a condition precedent to the enjoyment of the benefits of that act in limiting the owner's liability as provided therein.
2. The burden of proof which rests upon the shipowner to show the discharge of his in-

itial duty under the Harter act to use due diligence to provide a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef which he has undertaken to carry, is not sustained by evidence of a superficial inspection shortly before sailing, which disclosed no defect, where the testimony also shows that the machinery broke down very shortly after leaving port, and after being repaired broke down again, and during the voyage did not reduce the temperature sufficiently to preserve the meat, and tends to show that the proper temperature had not been produced when the cargo was received, and that the break-down occurred in an attempt to reduce it to the proper degree.

3. Stipulations in a bill of lading cannot relieve a carrier from the discharge of his initial duty under the Harter act to use due diligence to furnish a seaworthy vessel.

[No. 12.]

Argued March 3, 1903. Decided October 19, 1903.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Pennsylvania, exonerat-

†This case is reported by the Official Reporter under the title of "The Southwark."

NOTE.—On the implied warranty of seaworthiness—see note to *The Carib Prince*, 15 C. C. A. 388.

As to statutory exemptions of shipowners from liability—see note to *Nord-Deutscher Lloyd v. Insurance Co.* 49 C. C. A. 11.

Respecting the limitation of shipowner's liability—see note to *The Longfellow*, 45 C. C. A. 387.

On the validity of agreement to restrict carrier's liability—see notes to *Deming v. Merchants' Cotton-Press & Storage Co.* 13 L. R. A. 518; *Missouri P. R. Co. v. Ivey*, 1 L. R. A. 500; *Hartwell v. Northern Pacific Exp. Co.* 3 L. R. A. 342; *Richmond & D. R. Co. v. Payne*, 6 L. R.

A. 849; *Adams Exp. Co. v. Harries*, 7 L. R. A. 214; *Duntley v. Boston & M. R. Co.* 9 L. R. A. 452; *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 419; *Pacific Exp. Co. v. Foley*, 12 L. R. A. 799; and *Chicago, M. & St. P. R. Co. v. Solan*, 42 L. ed. U. S. 688.

On the construction of the limited liability act—see note to *Lawton v. Comer*, 7 L. R. A. 55.

As to the right of a carrier to limit its common-law liability by contract, in the absence of negligence—see note to *Little Rock & Ft. S. R. Co. v. Cravens*, 18 L. R. A. 527.

On the power of a carrier to limit amount of liability in cases of negligence—see note to *Bal-lou v. Earle*, 14 L. R. A. 433.

ing a vessel from fault for the loss of a cargo of dressed beef. *Reversed* and remanded to the District Court, with instructions to enter a decree for libellants.

See same case below, 48 C. C. A. 123, 108 Fed. 880.

Statement by Mr. Justice Day:

This case originated in a libel *in rem* filed in the district court of the United States for the eastern district of Pennsylvania, to recover for the loss of a quantity of dressed beef, shipped by the libellants on the steamer Southwark, a vessel belonging to the respondent, the International Navigation Company. The meat was required to be kept chilled during the passage, and the ship was engaged in the business of carrying such freight and was fitted with a refrigerating apparatus for the purpose. The meat was received under a bill of lading acknowledging the receipt thereof in apparent good order and condition, and undertaking to deliver the same at Liverpool in like good order and condition. Across the bill of lading there was this printed stipulation: "It is expressly provided that the goods shipped hereunder are absolutely at the risk of the owners in every respect, and that the carrier is responsible for no loss, delay, or damage thereto, however arising, including stowage, and all risks of breakdown or injury, however caused, whether to its refrigerator or its machinery, even though arising from defect existing at or previous to the commencement of the voyage; also that, in case of the meat becoming, from any cause, in the opinion of the master of the vessel, putrid, dangerous or offensive to the passengers or the crew, it may be thrown overboard or otherwise disposed of without liability to the carrier for the consequent loss."

Upon the arrival of the ship at Liverpool, the meat was found to be in bad condition, mouldy and slimy, resulting in a considerable loss to the shipper. The libel seeks a recovery because the refrigerating apparatus was out of repair at the time of sailing, and was not repaired during the voyage, so that the temperature of the compartment in which the meat was carried could not be reduced to the proper degree for its safe transportation.

The answer avers that the Southwark left [3] Philadelphia with *the refrigerating apparatus in perfect order after due inspection, and all necessary repairs were duly and promptly made while on the voyage.

Upon hearing in the district court, a decree was entered exonerating the vessel from fault, which decree was affirmed in the circuit court of appeals. 104 Fed. 103, 48 C. C. A. 123, 108 Fed. 880.

Mr. John Frederick Lewis argued the cause, and, with Mr. H. L. Cheyney, filed a brief for petitioners:

In the absence of a special contract the warranty of the refrigerating machinery is identical with, and probably included in, the warranty of the seaworthiness of the ship itself.

The Maori King v. Hughes, 8 Asp. Mar. L. Cas. 65 [1895] 2 Q. B. 550; *The Prussia*, 35 C. C. A. 625, 93 Fed. 837.

The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.

The Silvia, 171 U. S. 402, 43 L. ed. 241, 19 Sup. Ct. Rep. 7.

Whether the warranty of seaworthiness covers the refrigerating machinery is unimportant, as it must be admitted that, in the absence of a special contract, the warranty in both cases is the same, and covers even latent defects.

The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537; *The Maori King v. Hughes* [1895] 2 Q. B. 550; *The Prussia*, 35 C. C. A. 625, 93 Fed. 837.

Exceptions in a bill of lading ought, if in reason it be possible to do so, to receive a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken.

The Carib Prince, 170 U. S. 659, 42 L. ed. 1186, 18 Sup. Ct. Rep. 753.

The burden is upon the shipowner to show that he has used the required degree of diligence.

International Nav. Co. v. Farr & B. Mfg. Co. 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591.

The Harter act applies to bills of lading issued for fresh meat.

The Prussia, 35 C. C. A. 625, 93 Fed. 837.

There is a warranty of the initial fitness of the vessel in all respects to carry the cargo received.

Queensland Nat. Bank v. Peninsular & Oriental Steam Nav. Co. [1898] 1 Q. B. 567; *Tattersall v. National S. S. Co.* L. R. 12 Q. B. Div. 297.

A mere observation of a machine in motion is not an inspection, and does not relieve the carrier from liability.

The Aggi, 93 Fed. 484; *The Phœnicia*, 90 Fed. 116.

Where a vessel soon after leaving port becomes leaky without stress of weather or adequate cause of injury, the presumption is that she was unseaworthy before sailing.

Ceballos v. The Warren Adams, 20 C. C. A. 486, 38 U. S. App. 356, 74 Fed. 413; 163 U. S. 679, 41 L. ed. 316, 16 Sup. Ct. Rep.

1199; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* 94 Fed. 196.

The Harter act does not relieve the warranty of initial seaworthiness which the law imposes upon the shipowner; and that act merely permits the shipowner to contract against the obligation of seaworthiness, and substitute therefor the duty of due diligence.

The Irrawaddy, 171 U. S. 192, *sub nom. Flint v. Christall*, 43 L. ed. 132, 18 Sup. Ct. Rep. 831; *The G. R. Booth*, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. Rep. 9; *The Kensington*, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; *Knott v. Botany Worsted Mills*, 179 U. S. 71, 45 L. ed. 93, 21 Sup. Ct. Rep. 30; *Rouson v. Atlantic Transport Co.* [1903] 1 K. B. 114.

A shipowner is chargeable with any negligence of his agents appointed to inspect a steamer to exercise the due diligence required by the Harter act.

Switzerland Marine Ins. Co. v. The Flamborough, 69 Fed. 470.

Where the bill of lading acknowledges the receipt of the cargo in apparent good order and condition, and requires its delivery in like good order and condition, this stipulation places an obligation on the shipowner to provide a ship fit to carry the cargo to its destination.

The Maori King v. Hughes, 8 Asp. Mar. L. Cas. 67.

Where an account of circumstances leading to a loss is entirely within the control of one side of the controversy, there is more burden upon such party than where the matter has been open to the other side for an ascertainment of the facts.

The Manitou, 116 Fed. 61.

Where cargo is injured after it is received on board a vessel and before its delivery, the burden of proof rests upon the carrier to show that the vessel was in all respects seaworthy at the commencement of the voyage before it can even invoke the provisions of the Harter act.

The C. W. Elphicke, 117 Fed. 279.

Mr. N. Dubois Miller argued the cause, and, with Messrs. Howard H. Yocum and J. Rodman Paul and Messrs. Biddle & Ward, filed a brief for respondent:

The concurrent findings of two lower courts on questions of fact will not be disturbed.

Morewood v. Encquist, 23 How. 495, 16 L. ed. 516; *The Marcellus*, 1 Black, 417, *sub nom. Baxter v. Camp*, 17 L. ed. 217; *The Hypodame*, 6 Wall. 223, 18 L. ed. 796; *The Richmond*, 103 U. S. 543, 26 L. ed. 451; *The City of New York*, 147 U. S. 72, *sub nom. Alexandre v. Machan*, 37 L. ed. 84, 13 Sup. Ct. Rep. 211; *The E. A. Packer*, 140 U. S. 360, 35 L. ed. 453, 11 Sup. Ct. Rep. 794; *The Sylvia Handy*, 143 U. S. 513, 36 L. 191 U. S.

ed. 246, 12 Sup. Ct. Rep. 464; *The Eclipse*, 135 U. S. 599, 34 L. ed. 269, 10 Sup. Ct. Rep. 873; *The Gazette*, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. Rep. 139; *The Maggie J. Smith*, 123 U. S. 349, 31 L. ed. 175, 8 Sup. Ct. Rep. 159; Act of April 16, 1875, chap. 77; *The Carib Prince*, 170 U. S. 658, 42 L. ed. 1185, 18 Sup. Ct. Rep. 753.

A clause in a bill of lading exempting the shipowner from responsibility for loss arising from defect or insufficiency, either before or after shipment, in any part of the refrigerating apparatus, must be given full effect.

The Prussia, 35 C. C. A. 625, 93 Fed. 837.

A deed, a will, or other instrument can in part be good, although another part is void because in contravention of positive law.

Savage v. Burnham, 17 N. Y. 561.

The same rule has been applied even to statutes which were in part unconstitutional.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1015, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.

Where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870.

Any implied warranty of reasonable fitness is modified by the special contract in this case,—at least to the extent of relieving the shipowner from all consequences of defects and breakdowns prior to sailing, which are not due to his negligence or the negligence of those for whom he is responsible.

The Laertes, L. R. 12 Prob. Div. 187; *The Caledonia*, 157 U. S. 134, 39 L. ed. 647, 15 Sup. Ct. Rep. 537; *The Prussia*, 35 C. C. A. 625, 93 Fed. 840.

Where goods are shipped and the usual bill of lading given promising to deliver them in good order, the dangers of the seas excepted, and they are found to be damaged, the *onus probandi* is upon the owners of the vessel to show that the injury was occasioned by one of the excepted causes.

Clark v. Barnwell, 12 How. 272, 13 L. ed. 985.

When it has been shown that the injury was occasioned by an excepted cause the *onus probandi* is shifted upon the shipper to show negligence.

Ibid.; *Carver*, Carr. § 78; *Hutchinson*, Carr. § 767; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160; *The Victory & The Plymothian*, 168 U. S. 410, 42 L. ed. 519, 18 Sup. Ct. Rep. 149; *The Powhatan*, 21 Blatchf. 18, 12 Fed. 876; *The Timor*, 14 C. C. A. 412, 35 U. S. App. 278, 67 Fed. 356;

The Hindoustan, 14 C. C. A. 650, 35 U. S. App. 173, 67 Fed. 794; *The Lennox*, 90 Fed. 308; *Zahniser v. Pennsylvania Torpedo Co.* 190 Pa. 350, 42 Atl. 707.

The settled principles of law and evidence are not changed or restricted by the operation of the Harter act further than its express terms require.

The Irrawaddy, 171 U. S. 187, *sub nom. Flint v. Christall*, 43 L. ed. 130, 18 Sup. Ct. Rep. 831; *The Carib Prince*, 170 U. S. 658, 42 L. ed. 1185, 18 Sup. Ct. Rep. 753.

It does not forbid, but by implication permits, modification of the strict warranty of seaworthiness.

Carver, Carr. 3d ed. § 103c; *The Prussia*, 35 C. C. A. 625, 93 Fed. 840.

The agreement or understanding that the machinery necessary to preserve commodities which, by their own intrinsic principle of decay, would otherwise be destroyed on the voyage, shall be fit and proper, is not a warranty of seaworthiness.

The Maori King v. Hughes [1895] 2 Q. B. 550; *Queensland Nat. Bank v. Peninsular Oriental Steam Nav. Co.* [1898] 1 Q. B. 567.

The preservation of meat during a voyage by the creation of an artificial atmosphere is an undertaking apart from the duty of a common carrier by sea, and the shipowner's duty therein is that of a cold-storage warehouseman.

Wheeler, *Modern Law of Carriers*, 98; Hutchinson, Carr. § 768a; Carver, *Carriers*, § 12; Wharton Neg. § 563; *The Prussia*, 88 Fed. 531.

A somewhat similar, but not strictly analogous, line of cases are those relating to the transportation of live animals. The analogy here is not perfect, because in the latter case no artificial machinery is required to keep the animals alive. Proper accommodation and ventilation are all that is necessary; yet even here the cases have held that the ordinary obligations of a common carrier are relaxed and modified.

Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466; *Cragin v. New York C. R. Co.* 51 N. Y. 61, 10 Am. Rep. 559; *Carr v. Lancashire & Y. R. Co.* 7 Exch. 708.

A carrier by special agreement becomes, with reference to the particular transaction, an ordinary bailee and carrier for hire.

York Mfg. County v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170.

The owner by entering into the contract virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of an

ordinary bailee for hire, and answerable only for misconduct or negligence.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465.

A cold-storage warehouseman—i. e., a bailee for hire—may by contract stipulate for exemption from liability, as in this case from a breakdown of this plant,—at least where no negligence is shown; and he may thereby place upon the bailor the burden of proving negligence.

Taussig v. Bode, 134 Cal. 260, 54 L. R. A. 774, 66 Pac. 259; *Holt Ice & Cold Storage Co. v. Arthur Jordan Co.* 25 Ind. App. 314, 57 N. E. 575; *Farnham v. Camden & A. R. Co.* 55 Pa. 53; *Gay v. Bates*, 99 Mass. 263; *Marsh v. Horne*, 5 Barn. & C. 322; *Cochran v. Dinsmore*, 49 N. Y. 249; *Story, Bailments*, § 278.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

Before the passage of the act of Congress of February 13, 1893 (27 Stat. at L. 445, chap. 105, U. S. Comp. Stat. 1901, p. 2946), known as the Harter act, it was the settled law of this court that, in the absence of special contract, there was a warranty upon the part of the shipowner that the ship was seaworthy at the beginning of her voyage. The warranty was absolute, and did not depend upon the knowledge of the owner, or the diligence of his efforts to provide a seaworthy vessel. *The Caledonia*, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537; *The Edwin I. Morrison*, 153 U. S. 199, 38 L. ed. 688, 14 Sup. Ct. Rep. 823; *The Irrawaddy*, 171 U. S. 187, *sub nom. Flint v. Christall*, 43 L. ed. 130, 18 Sup. Ct. Rep. 831.

After its passage, this act became the rule of law for cases coming within its terms. In § 2 it is expressly provided that it shall be unlawful for any vessel transporting property or merchandise from or between ports of the United States and foreign ports to insert in any bills of lading or shipping documents any covenant or agreement whereby the obligation of the owner to use due diligence to properly equip, man, provision, and outfit said vessel, and to make the vessel seaworthy and capable of performing her intended voyage, shall in anywise be lessened, weakened, or avoided. In this connection, Mr. Justice Brown, in speaking of the nature and origin of this law, in the case of *The Delaware*, 161 U. S. 471, 40 L. ed. 776, 16 Sup. Ct. Rep. 516, used this language: "The act was the outgrowth of *attempts made in recent years to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and

other forms of liability, which had been held by the courts of England, if not of this country, to be valid as contracts, and to be respected even when they exempted the ship from the consequences of her own negligence. As decisions were made by the courts from time to time, holding the vessel for nonexcepted liabilities, new clauses were inserted in the bills of lading to meet these decisions, until the common-law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand, and suggested amendments to the maritime law in line with those embodied in the Harter act." This language, no doubt, had reference to the prohibitive provisions of § 2 of the act.

Section 3 must be read with § 2 to effectuate the purpose of the act, and shows an intention upon the part of Congress to relax, in certain respects, the harshness of the previous rules of obligation upon shipowners, provided the owner shall exercise due diligence to make the vessel seaworthy in all respects, in which event neither the vessel nor the owner shall be liable, among other things, for faults of management or from loss from inherent defect, quality, or vice of the thing carried. Of this feature of the law it was said by Mr. Justice Shiras, delivering the opinion of the court in the case of *The Irrawaddy*, 171 U. S. 192, 193, *sub nom. Flint v. Christall*, 43 L. ed. 132, 18 Sup. Ct. Rep. 833: "Plainly, the main purposes of the act were to relieve the shipowner from liability for latent defects not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation, or in the management of the vessel. . . . Although the foundation of the rule that *forbade shipowners to contract for exemption from liability for negligence in their agents and employees was in the decisions of the courts that such contracts were against public policy, it was, nevertheless, competent for Congress to make a change in the standard of duty, and it is plainly the duty of courts to conform in their decisions to the policy so declared."

[8] The effect of this law is not to relieve the owner from the general duty of furnishing a seaworthy ship, but to limit his liability in certain particulars and upon the condition named in the statute. *The Carib Prince*, 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753. Before the passage of the act, the initial obligation could be limited in certain particulars by special contract not involving negligence of the owner. Since the

passage of the act, as to cases coming within its terms, before the owner can have the benefit of the relief provided by § 3 he must have exercised due diligence to provide a seaworthy vessel, capable of performing her intended voyage. Obviously, a cargo of dressed beef to be shipped a long distance is one which, from the inherent quality of the thing carried, is liable to loss unless properly stowed in rooms artificially chilled for the purpose of preserving it.

We proceed to inquire whether the furnishing of a refrigerating apparatus in good order and repair, competent for the purpose required, was within the obligation imposed by the Harter act as a condition precedent to the enjoyment of the benefits of the act in limiting the owner's liability as provided therein.

Bouvier's Law Dictionary, vol. 2, p. 506, defines "seaworthiness" to be: "In maritime law, the sufficiency of the vessel in materials, construction, equipment, officers, men, and outfit for the trade or service in which it is employed." And the same author further says: "It can never be settled by positive rules of law how far this obligation of seaworthiness extends in any particular case, for the reason that improvements and changes in the means and modes of navigation frequently require new implements or new forms of old ones; and these, though not *necessary at first, become so [9] when there is an established usage that all ships of a certain quality, or those to be sent on certain voyages or used for certain purposes, shall have them." In the case of *The Sylvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7, Mr. Justice Gray said: "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport." This is the commonly accepted definition of seaworthiness. As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect. But for the special appliances furnished by the vessel, perishable cargoes, such as dressed beef, could not be shipped on long voyages in hot weather.

The trade of shipping dressed beef abroad has grown constantly in volume until it has become a most important part of our foreign commerce. For the purpose of properly discharging the duties involved in such transportation, vessels provided with refrigerating apparatus have been put into service, and compete with others for this branch of the carrying trade. The owners of such ves-

sels hold them out to shippers and invite their trade upon the representation, actual or implied, that the apparatus provided is fit to receive and carry the meat in proper condition to its destination. For this service freight charges are doubtless made commensurate with the advantage furnished. The shipper has no control over the apparatus. It is under the supervision and care of the vessel owner, inspected and operated by those in his employ. This view is sustained by the English as well as by the American authorities. Maclellan on the Law of Merchant Shipping, 410, quotes from *Stanton v. Richardson*, L. R. 7 C. P. 421, Brett, J.: "It seems to me that the obligation of the shipowner is to supply a ship that is seaworthy in relation to the cargo which he has undertaken to carry. I do not think, however, that this proposition [10] completely *expresses his liability, though the proposition I am about to state with regard to such liability in many cases may amount to the same thing only in effect. I think the obligation of the shipowner is to supply a ship reasonably fit to carry the cargo stipulated for in the charter party."

In *Lyon v. Mells*, 5 East, 428, Lord Ellenborough said: "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so; the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so."

In *Rowson v. Atlantic Transp. Co.* [1903] 1 K. B. 114, butter was shipped on defendant's ship, New York to London. The bill of lading provided that it should be subject to all the terms and provisions of, and all the exemptions from liability contained in, the Harter act. The butter, which was sound when shipped in New York, was delivered in London in a damaged condition. It was carried in certain insulated chambers, connected with the refrigerating apparatus with which the ship was supplied for the purpose of enabling her to carry perishable goods during the summer months. At the time of the shipment these chambers were cooled down to a proper temperature for the reception of the butter, and the refrigerating machinery was in good working order. The damage to the butter was caused by the

negligence of the crew in the management of the refrigerating apparatus during the voyage, whereby the chambers were not kept at a sufficiently low temperature. It was contended by defendants that the negligence in the management of the refrigerating *appa- [11] ratus was not a fault or error of management within the Harter act. Kennedy, J., says: "That act gives protection only upon condition of the ship being seaworthy. Now, a vessel which has to carry cargo which can only be safely carried if its refrigerating machinery is in proper order is one which, at the present day, according to a series of decisions, both in this country and in America, cannot properly be regarded as seaworthy unless it has that machinery in proper order. The term 'seaworthiness' is one which was originally, no doubt, used in days when refrigerating apparatus and other modern appliances for the safe carriage of cargo were unknown. In a sense it is obviously not a happy term to use, except with regard to that condition of the vessel which enables the owner to avoid exposure of the cargo to the perils of the sea. But the more extended use of the term has come to be well recognized. In the American case of *The Thames*, in the course of the judgment of the court, it is said: 'A ship may be seaworthy as to one sort of cargo and unseaworthy as to another. When a customary and well-known article of commerce is received on board ship and carried on a voyage, the master guarantees the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board. A ship is impliedly warranted to be seaworthy *quoad* that article, and if damage occurs in consequence of the unfitness of the ship for carrying that article, the ship is liable, and cannot exonerate itself by proving the *non sequitur* that it is capable of carrying safely and without damage some other article of a different character.'"

In *The Maori King v. Hughes* [1895] 2 Q. B. 550, it was held that a vessel offering to carry frozen meat impliedly warranted that the refrigerating machinery was, at the time of shipment, fit to carry such cargo in safety.

The case of *The Thames*, from which Judge Kennedy quotes, is reported in 10 C. C. A. 232, 8 U. S. App. 580, 61 Fed. 1014, and *was [12] decided by the circuit court of appeals for the fourth circuit. In that case, it was held that the vessel in question was not seaworthy in respect to a cargo of flour which it had undertaken to transport.

The further question arises in case of loss, Upon whom rests the burden of proof as

to the discharge of this initial duty by the shipowner? This question was before the court in the case of *International Nav. Co. v. Farr & B. Mfg. Co.* 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591, in which the provisions of the Harter act were under consideration. In the course of the opinion, Mr. Chief Justice Fuller said: "We repeat, that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

In the district court, which judgment was affirmed by the circuit court of appeals, it was held that the burden of proof, in view of the stipulation of the bill of lading in this case, was not upon the carrier, but upon the shipper, and that there could only be a recovery in the event that the shipper had shown, by satisfactory evidence, negligence upon the part of the carrier. This case was decided before the opinion was delivered in the case of *International Nav. Co. v. Farr & B. Mfg. Co.* 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591, and upon this point is in direct opposition thereto, and fails to give proper weight to the provisions of the act making it incumbent upon the carrier to use due diligence to provide a seaworthy vessel.

It is urged that the findings in both the district court and the circuit court of appeals, that the loss did not arise from want of proper refrigerating apparatus, but was due to a break-down in the machinery after the voyage was begun, are findings of fact in the courts below which should be held conclusive here. There are observations in the opinions of the learned judges consistent with the view that it was found that *the loss was due to a break-down in the machinery after the voyage had begun, and ordinarily such findings as to matters of fact are followed in this court; but the case below was tried upon a theory which ignored the initial duty of the carrier to use due diligence to provide a seaworthy vessel, properly equipped for the purpose intended. The bill of lading was treated as a special contract, throwing upon the shipper, if he would recover, the burden of establishing negligence upon the part of the carrier. As we have before stated, the right of the carrier to be exonerated in the respects named in the Harter act depends upon the exercise of due diligence upon his part in discharging the primary duty of providing a seaworthy vessel. The burden of proof being upon the carrier to show that he has exercised due diligence to provide a seaworthy vessel at the time he received the meat and started

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upon the voyage, the question arises, Was this duty discharged? "This due diligence required," said the Chief Justice, in delivering the opinion in *International Nav. Co. v. Farr & B. Mfg. Co.* 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591, "diligence to make the ship in all respects seaworthy; and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced." An examination of the record convinces us that the respondent did not show by the weight of the testimony that this initial duty had been discharged. The testimony discloses an inspection upon the part of the carrier shortly before the sailing of the vessel, in which, by superficial observation, no defect in the refrigerating apparatus was discovered, but the testimony also shows that but a short time after the sailing of the ship, within one to three hours, the apparatus broke down and was repaired and then broke down again, and during the voyage to Liverpool did not reduce the temperature of the storage room sufficiently to preserve the meat, which was found to be in a very bad condition upon the opening of the refrigerating box at Liverpool. This sudden break-down when the *vessel was scarcely out of port would raise [14] the presumption of unseaworthiness at the time of the sailing, making it incumbent upon the vessel owner to prove seaworthiness, and this independently of the provisions of the Harter act. *Work v. Leathers*, 97 U. S. 379, 24 L. ed. 1012.

The practice existed, upon the part of vessel owners, of taking the temperature of the brine, which was the carrying medium for cooling the storage room, and also of the room itself, and keeping a record thereof. This record, so far as kept, is produced at the instance of the libellant, and it does not disclose that at any time the temperature was sufficiently low to preserve the meat. The machinery for reducing the temperature had been in operation forty-eight hours or more in advance of receiving the meat. The record of the temperature does not seem to have been kept after the machinery for reducing temperature was put into operation up to the time of the sailing of the ship, and that part of the log in evidence tends strongly to show that both before and after the inspection was made the temperature of the commercial box in which the meat was stored was never properly reduced. The refrigerating apparatus in use upon the Southwark was of the compression type, using ammonia gas as a refrigerating agent and brine as the circulating medium. The apparatus provided for the compression of the ammonia gas, in which form it was car-

ried to a high degree of heat. It is then carried into pipes and condensed by means of cooling water passed over the pipes, reducing the gas to a liquid form. The liquid is then carried through a series of coils or pipes, where, being suddenly relieved of pressure, it expands into a gaseous form, absorbing heat from the surrounding objects, and cooling the pipes or coils and brine with which the pipes are brought into contact. This brine being circulated in the pipes, about the commercial room provided for the reception of the meat, reduces the compartment to a proper degree of temperature for the reception and preservation of the cargo. Whether the room is fit to receive the meat

[15] may be tested by the simple process of *placing a thermometer therein, taking its temperature. Before the meat is taken, this temperature should be brought down to from 25 to 30 degrees, and should be maintained at a low degree in order to preserve the meat.

In the present case while the inspector did not take the temperature of this room, the depositions of the engineer and the assistant, or refrigerating engineer, were taken abroad, and it appears that the temperature of the room was taken frequently during the seventy-two hours in which these witnesses say the apparatus was being worked before the meat was received. There is no sufficient reason given why a record of these temperatures was not made. The refrigerating engineer says that it was not customary, that there were no orders to that effect, and there was no room in the log for such a record, although it appears a record was kept after the vessel sailed, and from that time throughout the voyage, of the averages of the temperature of the room. In a vague way these men say the room was cooling down all right. It would have been a very easy matter to have established this fact by keeping a record of such observations, which would have shown conclusively the temperature of the commercial room. A careful perusal of the testimony tends strongly to the inference that the commercial room was not of a proper temperature, and that the machinery broke down almost before leaving port in an attempt to reduce it to a proper degree. There is some testimony tending to show that the water in the port at Philadelphia, used to cool the pipes, at the time was so warm as to render it difficult to bring down the temperature of the room, but the weight of the testimony is that these refrigerating machines are intended to work and do work in warmer latitudes and in a higher degree of temperature than was shown to have existed at the time in question.

But whether fault can be affirmatively established in this respect, it is not necessary

to determine. The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in a fit condition to receive and *trans- [16] port the cargo undertaken to be carried; and if, by the failure to adopt such tests and to furnish such proofs, the question of the ship's efficiency is left in doubt, that doubt must be resolved against the shipowner, and in favor of the shipper. In other words, the vessel owner has not sustained the burden cast upon him to establish the fact that he has used due diligence to furnish a seaworthy vessel, and, between him and the shipper, must bear the loss. *The Edwin I. Morrison*, 153 U. S. 199-215, 38 L. ed. 688-694, 14 Sup. Ct. Rep. 823; *The Phœnicia*, 90 Fed. 117.

It is true the inspector said that he discovered no leak of ammonia gas such as was afterward discovered, but he seems to have relied upon external appearances and the lack of evidences of the leaking of the gas rather than upon proper tests of the apparatus and its actual workings. We perceive no reason why such tests should not have been made. We think it was the duty of the carrier to cause them to be applied and determine the working condition of the apparatus before receiving the cargo, which in hot weather and upon a long voyage would surely spoil unless a proper condition of refrigeration was established. The Harter act, as we understand it, relieves carriers from some of the harsher rules of obligation in force before its passage, but this relief is conditioned upon the discharge of the carrier's duty to use due diligence to provide that which it holds out to the shipper it is competent to furnish,—a seaworthy vessel, duly equipped and provided for the purposes of the voyage. This rule, in our judgment, should not be relaxed by judicial interpretation or construction, and in this case we think the burden imposed by the law upon the carrier, of making due proof of the discharge of its duty in this respect, was not sustained, and there was error in the courts below in holding otherwise.

It is argued that appellees are not claiming the benefit of the Harter act, but rely upon the contract in the bill of lading to exempt them from liability in the absence of affirmative proof of negligence.

To permit the stipulations of this bill of lading to cut down *the statutory require- [17] ments of § 2 of the Harter act would be to allow the parties to enforce a contract in violation of the positive terms of the statute. As was said by Mr. Justice White, of somewhat similar provisions in the contract before the court in *The Kensington*, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102: "It is apparent that they were void, since

they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel, for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or its servants."

We think, for the reasons stated, there was error in rendering a decree dismissing the libel, and *the decree of the District Court, as well as the judgment of affirmance of the Court of Appeals, will be reversed*, and the cause remanded to the District Court, with instructions to enter a decree in favor of the libellants.

CLARA PERRY, *Plff. in Err.*,
v.

CORNELIUS L. HAINES.†

(See S. C. Reporter's ed. 17-55.)

Admiralty jurisdiction—canal boats on Erie canal—repairs made in dry dock—enforcing lien in state courts.

1. The Erie canal, which, though lying wholly within the state of New York, forms a part of a continuous highway for interstate and foreign commerce by connecting Lake Erie with the Hudson river, is a navigable water of the United States as contradistinguished from a navigable water of the state.

†This case is reported by the Official Reporter under the title of "The Robert W. Parsons."

NOTE.—On the jurisdiction in admiralty to enforce liens created by state laws—see note to *The Electron*, 21 C. C. A. 21.

As to the limits of admiralty jurisdiction—see notes to *Allen v. Newberry*, 16 L. ed. U. S. 110; *The Curtis*, 3 L. R. A. 711, and *Case v. Loftus*, 5 L. R. A. 684.

Respecting liens on vessels under mechanics' lien laws—see note to *Balzley v. The Odorilla*, 1 L. R. A. 505.

What are navigable waters of the United States?

Those rivers are navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, which form in their ordinary condition by themselves, or unite with others and continue, highways over which commerce is, or may be, carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *United States v. Burlington & H. C. Ferry Co.* 21 Fed. 332.

A river which is not of itself a highway for commerce with other states or foreign countries, or does not form such highway by its connection with other waters, is not a navigable water of the United States. *The Montello*, 11 Wall. 411, 20 L. ed. 191.

A creek, which, though accessible from a water way connecting with the sea, has no terminus or landing by which the public, after entering it

2. Canal boats engaged in navigating the Erie canal and Hudson river, which are drawn by animal power while in the canal, and are taken in tow by steamers for the trip on the river, are ships or vessels, within the contemplation of the maritime law.
3. Proceedings *in rem* to enforce a lien for repairs furnished to a vessel which was at the time engaged in navigating the Erie canal are no less within the exclusive admiralty jurisdiction of the Federal courts because such repairs were made in dry dock.
4. The exclusive admiralty jurisdiction of the Federal courts extends to the enforcement by proceedings *in rem* of a lien for repairs furnished to a vessel engaged in navigating the Erie canal, although such vessel was employed wholly in commerce between ports in the same state.
5. An unconstitutional infringement upon the exclusive jurisdiction of the Federal courts over admiralty and maritime cases is made by N. Y. Laws 1897, chap. 418, §§ 30, 35, so far as such statute is construed by the courts of that state to provide for the enforcement in a state court by proceedings *in rem* of a lien for repairs made in dry dock to a canal boat engaged in navigating the Erie canal and Hudson river.

[No. 16.]

Argued March 11, 12, 1903. Decided October 26, 1903.

IN ERROR to the Supreme Court of the State of New York to review a judgment enforcing a lien for repairs furnished to a canal boat, entered pursuant to the affirm-

from such water way, may leave it, is not a navigable water of the United States. *Manigault v. Ward*, 123 Fed. 707.

The mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another is not sufficient to constitute a navigable water of the United States which the act of Congress of September 19, 1890, makes it a misdemeanor to obstruct, where such channel is not substantially useful to some purpose of interstate commerce. *Leovy v. United States*, 177 U. S. 621, 44 L. ed. 914, 20 Sup. Ct. Rep. 797. Hence, a pass or crevasse caused by the overflow of the Mississippi river, making a channel to the Gulf of Mexico, through which a few fishermen have occasionally gone with small vessels carrying oysters for planting, and through which one or two cargoes of willows and timber may have passed, but which has not been used for any purpose of interstate commerce, and the gulf end of which has become closed, does not constitute a navigable water of the United States in such a sense that a dam erected therein for the purpose and with the effect of reclaiming overflowed lands will constitute an obstruction within the prohibition of the act of September 19, 1890, against obstructions in navigable waters without authority of the Secretary of War. *Ibid.*

For the purpose of founding admiralty jurisdiction a canal may be held to be navigable water of the United States if it comes within the approved definition of such water. *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434.

ance of a final order of that court by the Appellate Division and the Court of Appeals. *Reversed.*

See same case below, in Appellate Division of Supreme Court, 57 App. Div. 636, 68 N. Y. Supp. 1139, in Court of Appeals, 168 N. Y. 586, 60 N. E. 1112.

Statement by Mr. Justice **Brown**:

[18] *This was a writ of error to review a judgment of the supreme court of the state of New York sustaining the jurisdiction of that court to enforce a lien for repairs made by Haines to the canal boat Robert W. Parsons, which was engaged at the time in navigating the Erie canal and Hudson river.

Defense, that the statute of the state of New York, giving a lien for such repairs, and providing a remedy for enforcing the same *in rem*, is unconstitutional, so far as concerns the remedy, and an infringement upon the exclusive jurisdiction of the courts of the United States in admiralty and maritime causes.

A motion to vacate the attachment, issued upon the petition of Haines, upon the ground that the court had no jurisdiction, was denied, an appeal taken to the appellate division of the supreme court, where the case was argued, and the order of the court below affirmed by a majority of the justices. *Re Haines*, 52 App. Div. 550, 65 N. Y. Supp. 350. From the final order of the court, subsequently entered, the owner, Clara Perry, again appealed to the appellate division, where the order was affirmed (*Re Haines*, 57 App. Div. 636, 68 N. Y. Supp. 1139), and again by the court of appeals. *Re Haines*, 168 N. Y. 586, 60 N. E. 1112. Whereupon a writ of error was sued out from this court.

Mr. Martin Clark argued the cause and filed a brief for plaintiff in error:

A waterway lying wholly within a state, and not connected with other waters leading to the sea, is not a navigable water of the United States. *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242.

A stream may be navigable in fact, but yet not be beyond the power of the state to destroy its navigation, as against the authority of the general government. *Peters v. New Orleans, M. & C. R. Co.* 56 Ala. 528.

The following waters have been held to be navigable waters of the United States:

East river in New York. *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228.

Grand river. *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999.

Rock river in the state of Illinois. *United States v. Moline*, 82 Fed. 592.

Wallamet river. *Wallamet Iron Bridge Co. v. Hatch*, 9 Sawy. 643, 19 Fed. 347.

The Ohio river. *Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143.

The Chicago river and its branches. *Escana-*

A contract for making repairs upon a boat is a maritime contract.

The General Smith, 4 Wheat. 438, 4 L. ed. 609; *The St. Lawrence*, 1 Black, 522, sub nom. *Meyer v. Tupper*, 17 L. ed. 180; *Peyroux v. Howard*, 7 Pet. 324, 8 L. ed. 700; *The Lottawanna*, 21 Wall. 558, sub nom. *Rodd v. Heartt*, 22 L. ed. 654.

The enforcement *in rem* of the lien upon a vessel, created by state statutes for repairs and supplies in her home port, is exclusively within the admiralty jurisdiction of the courts of the United States.

The Glide, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498.

A canal is public water of the United States, and within the legitimate scope of the admiralty jurisdiction, even though the canal is wholly artificial, and is wholly within the body of the state and subject to its ownership and control.

Ex parte Boyer, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434.

The character of the water upon which the boat is employed is made the guiding principle to determine as to whether or not the subject of the action is within the admiralty jurisdiction of the Federal courts.

Ex parte Boyer, 109 U. S. 632, 27 L. ed. 1057, 3 Sup. Ct. Rep. 434; *Re Garnett*, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; *The E. A. Shores, Jr.* 73 Fed. 342.

Admiralty jurisdiction is not divested because of any peculiarity in form, size, or means of propulsion. It matters not whether the boats be propelled by steam, wind, or animal power; if they are vehicles of commerce they are within the jurisdiction of the admiralty.

The Montello, 20 Wall. 430, 22 L. ed. 391; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *The General Cass*, 1 Brown Adm. 334, Fed. Cas. No. 5,307.

ba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185.

The St. Joseph river in Indiana. *St. Joseph County v. Pidge*, 5 Ind. 13.

The Savannah river between Augusta and Savannah. *Lawton v. Comer*, 7 L. R. A. 55, 40 Fed. 480.

Fox river. *The Montello*, 20 Wall. 430, 22 L. ed. 391.

But the Fox and Wolf rivers above Oshkosh in Wisconsin are not public waters of the United States. *Morse v. Home Ins. Co.* 30 Wis. 496, 11 Am. Rep. 580.

Jamaica bay, which is an inlet of the Atlantic ocean, and forms a continuous highway for commerce upon navigable waters, is a navigable water of the United States. *The Hazel Kirke*, 23 Blatchf. 292, 25 Fed. 601.

See, further, note to *United States v. The Montello*, 22 L. ed. U. S. 391; and, on the general question, What waters are navigable? see note to *Willow River Club v. Wade*, 42 L. R. A. 305.

Navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, are those which form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is, or may be, carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228.

The admiralty jurisdiction extends to all contracts of a maritime character to be performed upon navigable waters.

The Mary Washington, 1 Abb. U. S. 1, Fed. Cas. No. 9,229; *The Belfast*, 7 Wall. 624, 19 L. ed. 266; *The Leonard*, 3 Ben. 263, Fed. Cas. No. 8,256; *United States v. Burlington & H. C. Ferry Co.* 21 Fed. 331.

And this rule is followed, although the boat is built to navigate a canal, and has no means of locomotion in herself.

The E. M. McChesney, 8 Ben. 150, Fed. Cas. No. 4,463, Affirmed in 15 Blatchf. 183, Fed. Cas. No. 4,464; *The Wilmington*, 48 Fed. 566.

The Erie canal and connecting waters are public navigable waters of the United States over which the admiralty court has jurisdiction.

The Thomas Carroll, 23 Fed. 912; *The Ella B.* 24 Fed. 508; *Malony v. The City of Milwaukee*, 1 Fed. 611.

Jurisdiction over the Albemarle & Chesapeake canal was exercised in 1874 (*The Oler*, 2 Hughes, 12, Fed. Cas. No. 10,485); and over the Welland canal, in 1873 (*The Avon*, Brown Adm. 170, Fed. Cas. No. 680); and even as early as 1856 (*Scott v. The Young America*, Newberry, Adm. 101, Fed. Cas. No. 12,549).

Admiralty has assumed jurisdiction, not only over canal boats, but also over a dredge and sews.

The Alabama, 22 Fed. 449.

A raft of timber.

Muntz v. A Raft of Timber, 15 Fed. 555.

A steamer of less than 5 tons' burden, engaged in carrying freight and passengers upon navigable water.

The Pioneer, 21 Fed. 426.

A ferryboat plying between two ports in the same state in a navigable river.

United States v. Burlington & H. C. Ferry Co. 21 Fed. 331.

A dismantled steamboat being fitted for use as a wharf boat.

The Old Natchez, 9 Fed. 476.

A barge without sails or rudder, used for lightering.

Disbrow v. Walsh Bros. 36 Fed. 607.

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A bath house built on boats, and designed for transportation.

The Public Bath, No. 13, 61 Fed. 692.

A contract for the repair of sews used in carrying ballast to or from vessels.

Endner v. Greco, 3 Fed. 411.

It is not the form, the construction, the rig, the equipment, or the means of propulsion, that establishes the jurisdiction, but the purpose and business of the craft as an instrument of naval transportation.

Benedict, Adm. §§ 213, 221, 221a.

Mr. George F. Thompson argued the cause and filed a brief for defendant in error:

Ordinary domestic contracts for the furnishing of repairs and supplies to domestic craft, such as boats constructed and used on the inland canals of the state, are not maritime contracts within the meaning of the Constitution of the United States.

Sheppard v. Steele, 43 N. Y. 52, 3 Am. Rep. 660; *Mott v. Lansing*, 57 N. Y. 112; *Poole v. Kermit*, 59 N. Y. 555; *Wilson v. Lawrence*, 82 N. Y. 409; *Brookman v. Hamil*, 43 N. Y. 554, 3 Am. Rep. 731; *Fralich v. Betts*, 13 Hun, 632; *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. ed. 961; *Allen v. Newberry*, 21 How. 245, 16 L. ed. 111; *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058; *Maguire v. Card*, 21 How. 248, 16 L. ed. 118; *Happy v. Mosher*, 48 N. Y. 313; *Re Haines*, 168 N. Y. 586, 60 N. E. 1112; *Delaney v. Brett*, 51 N. Y. 78.

The admiralty is a maritime court instituted for the purpose of administering the law of the sea.

The Lottawanna, 21 Wall. 567, *sub nom.* *Rodd v. Heartl*, 22 L. ed. 654.

The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the vessel to get the vessel back for the benefit of all concerned,—that is, to complete her voyage.

The J. E. Rumbell, 148 U. S. 9, 37 L. ed. 346, 13 Sup. Ct. Rep. 498.

In all previous cases before this court there were involved sea-going ships or vessels plying between foreign countries or engaged in coasting trade between different states and territories, or steamboats enrolled and licensed and engaged in interstate commerce, and able of themselves to travel between ports and places of different states.

The St. Lawrence, 1 Black, 522, *sub nom.* *Meyer v. Tupper*, 17 L. ed. 180; *The Commerce*, 1 Black, 578, *sub nom.* *Commercial Transp. Co. v. Fitzhugh*, 17 L. ed. 109; *Peyroux v. Howard*, 7 Pet. 324, 8 L. ed. 700; *The Orleans v. Phœbus*, 11 Pet. 175, 9 L. ed. 677; *The General Smith*, 4 Wheat. 438, 4 L. ed. 609; *Waring v. Clarke*, 5 How. 452, 12 L. ed. 231; *New Jersey Steam Nav. Co. v. Mer-*

chants' Bank, 6 How. 392, 12 L. ed. 486; *The Genesee Chief v. Fitzhugh*, 12 How. 413, 13 L. ed. 1058; *Jackson v. The Magnolia*, 20 How. 298, 15 L. ed. 911; *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. ed. 961; *Allen v. Newberry*, 21 How. 245, 16 L. ed. 111; *Maguire v. Card*, 21 How. 250, 16 L. ed. 118; *Roach v. Chapman*, 22 How. 129, 16 L. ed. 294; *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451; *The Belfast*, 7 Wall. 637, 19 L. ed. 270; *The Eagle*, 8 Wall. 20, 19 L. ed. 368; *The Grapeshot*, 9 Wall. 129, 19 L. ed. 651; *The Lula*, 10 Wall. 197, 19 L. ed. 907; *The Kalorama*, 10 Wall. 205, 19 L. ed. 941; *The Custer*, 10 Wall. 215, 19 L. ed. 945; *New England Mut. Marine Ins. Co. v. Dunham*, 11 Wall. 21, 20 L. ed. 96; *Ex parte McNiel*, 13 Wall. 243, 20 L. ed. 627; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *The Lottawanna*, 21 Wall. 558, *sub nom. Rodd v. Heartt*, 22 L. ed. 654; *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434; *Re Garnett*, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; *Workman v. New York City*, 179 U. S. 553, 45 L. ed. 315, 21 Sup. Ct. Rep. 212; *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

Courts of admiralty cannot, and do not, exercise jurisdiction in any form over what are termed land contracts.

People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961; *Sheppard v. Steele*, 43 N. Y. 52, 3 Am. Rep. 660; *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731.

Mr. Justice **Brown** delivered the opinion of the court:

This case raises the question of the construction and constitutionality of the statutes of the state of New York, giving a lien for repairs upon vessels, and providing for the enforcement of such lien by proceedings [24] *in rem*. The statute conferring *the lien, so far as it is material, is given in the margin.† It will be noticed that it expressly excludes liens founded upon *maritime contracts*.

That a state may provide for liens in favor of material men for necessities furnished to a vessel in her home port, or in a

port of the state to which she belongs, though the contract to furnish the same is a maritime contract, and that such liens can be enforced by proceedings *in rem* in the district courts of the United States, is so well settled by a series of cases in this court as to be no longer open to question. *The General Smith*, 4 Wheat. 438, 4 L. ed. 609; *The Planter (Peyroux v. Howard)*, 7 Pet. 324, 8 L. ed. 700; *The St. Lawrence*, 1 Black, 522, *sub nom. Meyer v. Tupper*, 17 L. ed. 180. The remedy thus administered by the admiralty court is exclusive. *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397; *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451; *The Belfast*, 7 Wall. 624, 19 L. ed. 266; *The Lottawanna*, 21 Wall. 559, *sub nom. Rodd v. Heartt*, 22 L. ed. 654; *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 397, 30 L. ed. 447, 450, 7 Sup. Ct. Rep. 254; *The J. E. Rumbell*, 148 U. S. 1, 12, 37 L. ed. 345, 347, 13 Sup. Ct. Rep. 498; *Bird v. The Josephine*, 39 N. Y. 19; *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731; *Poole v. Kermit*, 59 N. Y. 554. If there were any doubts regarding this question, they were completely put to rest by the case of *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930, in which it was distinctly held, in an exhaustive opinion by Mr. Justice Gray, that the enforcement *in rem* of a lien upon a vessel for *repairs and supplies furnished in [25] her home port was exclusively within the admiralty jurisdiction of the courts of the United States.

It is equally well established that, for causes of action not cognizable in admiralty, either *in rem* or *in personam*, the states may not only grant liens, but may provide remedies for their enforcement. Contracts for the building of a ship are the most prominent examples of such as are not maritime in their character, and hence within this rule. *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. ed. 961; *Roach v. Chapman*, 22 How. 129, 16 L. ed. 294; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; *Sheppard v. Steele*, 43 N. Y. 52, 3 Am. Rep. 660.

It remains to consider whether the contract in this case, which was for repairs furnished to a canal boat in a port of the

†Laws of New York (1897), chap. 418.

"Sec. 30. A debt which is not a lien by the maritime law, and which amounts to \$50 or upwards, on a seagoing or ocean-bound vessel, or \$15 or upwards on any other vessel, shall be a lien on such vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariner's wages, if such debt is contracted by the master, owner, charterer, builder, or consignee of such ship or vessel, or by the agent of either of them, within this state, for either of the following purposes:

"1. For work done or material or other articles furnished in this state for, or towards, the building, repairing, fitting, furnishing, or equipping of such vessel."

(The other subdivisions are immaterial.)

"Sec. 35. If a lien, created by virtue of this article, is founded upon a maritime contract, it can be enforced only by proceedings in the courts of the United States, and in any other case, in the courts of this state, in the manner provided by the Code of Civil Procedure."

state to which she belonged, was a maritime contract. If it were, the position of the state courts was wrong. The denial of exclusive jurisdiction on the part of the admiralty court to enforce this lien must rest upon one of two propositions: Either because the cause of action arose upon an artificial canal, or because a canal boat is not a ship or vessel contemplated by the maritime law, and within the jurisdiction of the admiralty court.

1. At an early day, and following English precedents, it was held by this court in *The Thomas Jefferson*, 10 Wheat. 428, 6 L. ed. 358, that the admiralty courts could not rightfully exercise jurisdiction, "except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide." The opinion is a brief one by Mr. Justice Story, and contains little more than the announcement of the general principle, and with no attempt to distinguish the English cases. It lacks wholly any display of the abundant learning which, ten years before, had characterized his celebrated opinion in *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3,776. The case was a strong one for the adoption of English precedents, as it concerned a voyage from a port in Kentucky up the Missouri river and back again to [26]*the same port. It was, however, flatly overruled in *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058, and the modern doctrine established, to which this court has consistently and invariably adhered, that not the ebb and flow of the tide, but the actual navigability of the waters, is the test of jurisdiction. It is true, that case arose upon the Great Lakes, but the rule was subsequently extended to cases arising upon the rivers above the tidal effect. *Fretz v. Bull*, 12 How. 466, 13 L. ed. 1068; *The Magnolia*, 20 How. 296, 15 L. ed. 909. In *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999, it was held that Grand river, a navigable water wholly within the state of Michigan, being a stream capable of bearing, for a distance of 40 miles, a steamer of 123 tons burden, and forming, by its junction with Lake Michigan, a continuous highway for commerce, both with other states and with foreign countries, was a navigable water of the United States; and the rule was broadly announced that "those rivers must be regarded as public navigable rivers in law, which are navigable in fact," and that "they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is, or may be,

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carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water." The same principle was applied in *The Montello*, 20 Wall. 430, 22 L. ed. 391, to the Fox river in Wisconsin, although its navigability was interrupted by rapids and falls over which portages were required to be made, and to Chicago river in *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185. See also *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *Re Garnett*, 141 U. S. 8, 35 L. ed. 632, 11 Sup. Ct. Rep. 840.

The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes, though by no means always, are wholly within the limits of a particular state. We fail to see, however, that this creates any distinction in principle. They are usually constructed to connect waters navigable by nature, and to *avoid the port-[27] age of property from one navigable lake or river to another, or to improve or deepen a natural channel; and they are usually navigated by the same vessels which ply between the naturally navigable waters at either end of the canal. Examples of these are the St. Clair ship canal, connecting St. Clair river with the lake of the same name; the St. Mary's canal, connecting the waters of Lake Superior with those of Lake Huron; the Illinois & Michigan canal, connecting the waters of Lake Michigan with the Mississippi river; the Welland canal, between Lake Ontario and Lake Erie; the Suez canal, between the Mediterranean and the Red Sea; the Great North Holland canal, connecting Amsterdam directly with the German ocean; and the Erie canal, connecting Lake Erie with the Hudson river. Indeed, most of the harbors upon the lakes and Atlantic coast are made accessible by canals wholly artificial, or by an artificial channel broadening and deepening their natural approaches. Can it be possible that a cause of action which would be maritime, if occurring upon those connected waters, would cease to be maritime if arising upon the connecting waters? Must a collision which would give rise to a suit in admiralty, if occurring upon Lake Ontario, or Lake Erie, be prosecuted at common law, if happening upon the Welland canal? This question arose in this country in the case of *The Avon*, Brown, Adm. 170, Fed. Cas. No. 680, in which Judge Emmons, in a carefully considered opinion, took jurisdiction of a collision upon that canal, although it was wholly within British territory. While this was, with one exception (*Scott v. The Young America*, Newberry, Adm. 101, Fed. Cas. No. 12,549), the earliest case in this

country, it was no novelty in England, since, in *The Diana*, Lush. 539, Dr. Lushington assumed jurisdiction of a collision between two British vessels in the Great North Holland canal, rejecting altogether the contention that the legislature did not intend to give the court jurisdiction over matters occurring in foreign territorial waters. This jurisdiction has since been declared in England to extend to collisions between foreign vessels in the Bosphorus (*The Mali Ivo*, L. R. 2 Adm. & Eccl. 356), and in the Scheldt (*The Halley*, L. R. 2 P. C. 193). See also *The Thomas Carroll*, 23 Fed. 912; *The Oler*, 2 Hughes, 12, Fed. Cas. No. 10,485; *The E. M. McChesney*, 8 Ben. 150, Fed. Cas. No. 4,463, 15 Blatchf. 183, Fed. Cas. No. 4,464; *Malony v. The City of Milwaukee*, 1 Fed. 611; *The General Cass*, Brown, Adm. 334, Fed. Cas. No. 5,307. The tidal test was long since abolished by statute in England. 24 Viet. chap. 10; Marsden, Collisions, 210.

Finally, in *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434, such jurisdiction was held by this court to extend to collisions between two canal boats occurring in the Illinois & Lake Michigan canal, Mr. Justice Blatchford observing that "navigable water situated as this canal is, used for the purposes for which it is used,—a highway for commerce between ports and places in different states, carried on by vessels such as those in question here,—is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a state, and subject to its ownership and control." The case is the more noteworthy from the fact that the canal was but 60 feet wide and 6 feet deep. It has never been overruled or questioned, and must be treated as settling the jurisdiction of the admiralty court over the waters of any artificial canal which is the means of communication between ports and places in different states and territories. It is not intended here to intimate that, if the waters, though navigable, are wholly territorial and used only for local traffic,—such, for instance, as the interior lakes of the state of New York,—they are to be considered as navigable waters of the United States. *The Montello*, 11 Wall. 411, 20 L. ed. 191. In the case under consideration, however, the Erie canal, though wholly within the state of New York, is a great highway of commerce between ports in different states and foreign countries, and is navigated by vessels which also traverse the waters of Hudson river from the head of navigation to its mouth.

2. But the crucial question involved in this case is, whether *the exclusive admiralty[29] and maritime jurisdiction of the Federal courts attaches to canal-boats,—in other words, whether they are ships or vessels within the meaning of the admiralty law. If it be once conceded, as, for the reasons above given, we think it must be, that navigable canals used as highways for interstate or foreign commerce are navigable waters of the United States, it would be an anomaly to hold that such jurisdiction did not attach to the only craft used in navigating such canals. It is true that, in the more modern constructions, these canals are made wide and deep enough for the largest vessels; but it so happens that the Erie canal was built at an early day, and was adapted only for vessels of light draught and peculiar construction. The possibilities of the future were then scarcely foreseen, and, even if they had been, the state was too poor to provide for anything beyond the immediate present. For those purposes the canal was amply sufficient, and for twenty years was the principal means of communication with the northwest, and was not only the highway over which all the merchandise was carried between the Hudson river and the Great Lakes, but was largely used for the transportation of passengers in the great western immigration which immediately followed its construction. As late as 1850, large and handsomely equipped passenger vessels were run every day at stated hours, and the canal continued to be, even after the building of the railways, a favorite method of communication with the Great Lakes. While these boats were vessels of light draught, and were drawn by animal power, they were from 150 to 300 tons' capacity,—larger than those out of which arose the maritime law of modern Europe, and much larger than those employed by Columbus and the earlier navigators in their discovery of the new world. It is said by a writer in the *Quarterly Review* (Benedict, Adm. Pr. § 220), that "the first discoverers of America committed themselves to the unknown ocean in barks, one not above 15 tons; Frobisher, in two vessels of 20 or 25 tons; Sir Humphrey Gilbert, in one of 10 tons only." The ships in *which the Vikings of Scandinavia invaded[30] England, and ravaged the coasts of western Europe (specimens of which are still preserved at Christiana), were open boats, not exceeding 100 feet in length and 16 in breadth, and propelled partly by oars and partly by a single sail. In fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged.

The application of this criterion has ruled out the floating dry dock, the floating wharf, the ferry bridge hinged or chained to a wharf, the sailors' Bethel moored to a wharf (*Cope v. Valette Dry Dock Co.* 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336), and a gas float moored as a beacon (*The Whitton*, [1895] p. 301, [1896] p. 42, [1897] A. C. 337).

But it has been held in England to include a fishing coble, a boat of 10 tons' burden, 24 feet in length, decked forward only, though accustomed to go only 20 miles to sea, and to remain out twelve hours at a time (*Ex parte Ferguson*, L. R. 6 Q. B. 280); a barge (*The Malvina*, Lush. 493. Affirmed on appeal, Brown & L. 57); though not a dumb barge, propelled by oars only (*Everard v. Kendall*, L. R. 5 C. P. 428); and, in America, steamers of 5 tons' burden, engaged in carrying freight and passengers upon navigable waters (*The Pioneer*, 21 Fed. 426; *The Ella B.* 24 Fed. 508; *The Volunteer*, Brown, Adm. 159, Fed. Cas. No. 16,990, Affirmed in 15 Int. Rev. Rec. 59); a barge, without sails or rudder, used for transporting grain (*Woods v. The Wilmington*, 5 Hughes, 205, 48 Fed. 566); a floating elevator (*The Hezekiah Baldwin*, 8 Ben. 556, Fed. Cas. No. 6,449). See also *The Northern Belle*, 9 Wall. 526, 19 L. ed. 748; *The Alabama*, 22 Fed. 449; *Endner v. Greco*, 3 Fed. 411.

[31] Again, in *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434, this court held the jurisdiction of the admiralty court to extend to a collision between two canal boats of more than 20 tons burden, one of which was in tow and the other propelled by steam. If the jurisdiction of the admiralty court in the case under consideration *depends, as it must, upon the facts that the cause of action arose upon the canal, and upon canal boats navigating such canal, the *Case of Boyer* would seem to be decisive of this.

So far as the Congress of the United States and the Parliament of England have incidentally spoken upon the subject, they have fixed a criterion of size as to what shall be considered a vessel within the admiralty jurisdiction far below the tonnage of an ordinary canal boat. By the original judiciary act of 1789, § 9 (1 Stat. at L. 77, chap. 20, U. S. Comp. Stat. 1901, p. 455) jurisdiction was given to the district courts of all seizures made "on waters which are navigable from the sea by vessels of 10 or more tons' burden;" and by the act of February 26, 1845 (5 Stat. at L. 726, chap. 20, U. S. Comp. Stat. 1901, p. 461) (now obsolete, *The Eagle*, 8 Wall. 15, 19 L. ed. 365), admiralty jurisdiction was given to vessels navigating the Great Lakes and their con-

necting waters of 20 tons burden and upwards. By Rev. Stat. § 4311 (U. S. Comp. Stat. 1901, p. 2959), vessels of 20 tons and upwards, enrolled and licensed, and vessels of less than 20 tons, not enrolled, but licensed, shall be deemed vessels of the United States; and by § 4520 (U. S. Comp. Stat. 1901, p. 3073), all vessels of 50 tons or upwards are required to ship their seamen under written articles. By the English merchants' shipping act of 1854 [17 & 18 Viet. p. 248, chap. 104], the word "ship" shall include every description of vessel used in navigation, not propelled by oars;" and a similar description is given of vessels within the admiralty jurisdiction, in the admiralty court act of 1861.

It seems, however, to be supposed that the fact that boats engaged in traffic upon the Erie canal are drawn by horses is sufficient of itself to exclude them from the jurisdiction of the admiralty courts. This, however, is an argument which appeals less to the reason than to the imagination. So long as the vessel is engaged in commerce and navigation it is difficult to see how the jurisdiction of admiralty is affected by its means of propulsion, which may vary in the course of the same voyage, or with new discoveries made in the art of navigation. Thus, canal boats, upon their arrival at Albany, are at once relieved of their horses, and taken by a steamer in tow *to New York or Jersey City. [32] To hold that such boats are not within the admiralty jurisdiction of the courts, while on a trip down the Hudson river, would require us to overrule a large number of cases in this court, in which it was assumed by both parties and the court that for damages sustained by collision with other vessels they were entitled to pursue the wrongdoer in courts of admiralty. *The Quickstep*, 9 Wall. 665, 19 L. ed. 767; *The Syracuse*, 12 Wall. 167, 20 L. ed. 382; *The Atlas*, 93 U. S. 302, 23 L. ed. 863; *The L. P. Dayton*, 120 U. S. 337, 30 L. ed. 669, 7 Sup. Ct. Rep. 568; *The E. A. Packer*, 140 U. S. 360, 35 L. ed. 453, 11 Sup. Ct. Rep. 794. But it would seem like sticking in the bark to hold that a canal boat might recover for a collision while in tow of a tug, but might not recover while in tow of a horse. The case does not raise the question whether hay and oats furnished the horses are necessities within the meaning of the admiralty law, though a casuist might have difficulty in drawing a distinction between coal and oil furnished to one engine of propulsion and hay and oats to another, or between food furnished to a crew and food furnished to the horses.

Replying to the suggestion that, if jurisdiction were sustained of repairs upon a canal boat drawn by horses, it would apply

with equal propriety to a blacksmith's bill for shoeing the horses, it is only necessary to say that, for incidental repairs made on land to articles of a ship's furniture or machinery, it has never been supposed that a court of admiralty had jurisdiction. Indeed, it would seem extremely doubtful if liens for these trivial bills were intended to be created by the state law. Articles removed from a vessel and repaired or renovated upon land at the shop of the artisan, stand upon quite a different footing from repairs made upon the vessel herself, and are the subject of a possessory lien at common law.

The truth is, the present employment of horses is a mere accident, and likely to be changed at any time by an enlargement of the canal, now in contemplation, when steam or electricity will probably supplant the present methods of locomotion. The modern law of England and America rules [33] out *of the admiralty jurisdiction all vessels propelled by oars, simply because they are the smallest class and beneath the dignity of a court of admiralty; but long within the historic period, and for at least seven hundred years, the triremes and quadriremes of the Greek and Roman navies were the largest and most powerful vessels afloat.

It is true, the amount involved in this case is a small one, but the jurisdiction of the admiralty court has never been determined by the amount, though appeals from the district court to the supreme court were first limited to cases involving \$300, subsequently reduced to \$50, and finally, by the court of appeals act, allowed, apparently, in all cases, regardless of amount. [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550.] So, also, cases may be brought under the patent and copyright laws, quite irrespective of the amount involved.

3. As heretofore observed, the exclusive jurisdiction of the admiralty court in this case was attacked upon the grounds, already discussed, that artificial canals and the vessels plying thereon are not within its jurisdiction. A further suggestion, however, is made, that the contract in this case was not only made on land, but was to be performed on land, and was, in fact, performed on land. This argument must necessarily rest upon the assumption that repairs put upon a vessel while in dry dock are made upon land. We are unwilling to admit this proposition. A dock is an artificial basin in connection with a harbor, used for the reception of vessels in the taking on or discharging of their cargoes, and provided with gates for preventing the rise and fall of the waters occasioned by the tides, and keeping a uni-

form level within the docks. A dry dock differs from an ordinary dock only in the fact that it is smaller, and, provided with machinery for pumping out the water in order that the vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock, to prevent the inflow of water, but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. Had the vessel been *hailed up by ways upon the [34] land and there repaired, a different question might have been presented, as to which we express no opinion; but, as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited to this proposition, and it is believed none such exist.

Suppose, for instance, it were believed that the repairs could be made upon this vessel without going into dry dock, but it was afterwards discovered that the injuries were more extensive and that a dry dock were necessary; would a court of admiralty thereby be deprived of jurisdiction? Or, suppose such repairs were made in a floating dry dock, as sometimes happens, would they be considered as made upon land or water? Or, suppose they were made in dry dock upon a seagoing vessel?

There is no doubt of the proposition that a dry dock itself is not a subject of salvage service or of admiralty jurisdiction, because it is not used for the purpose of navigation. That was settled in *Cope v. Vallette Dry Dock Co.* 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336. But the case was put upon the express ground that a dry dock was like a ferry bridge or sailors' floating meeting house, and was no more used for the purposes of navigation than a wharf or a warehouse projecting into or upon the water.

4. Suggestion is also made that the admiralty jurisdiction of the Federal courts does not extend to contracts for the repair of vessels engaged wholly in commerce within a state. It is true that, as late as 1853, in *The Fashion* (*Allen v. Newberry*, 21 How. 244, 16 L. ed. 110), it was held that, under the act of Congress of 1845, extending jurisdiction of the Federal courts to vessels employed in navigation upon the Great Lakes, between ports and places in different states, it did not extend to the case of a shipment of goods from a port in one state to another port in the same state; and that, in the case of *The Goliath* (*Maguire v. Card*, 21 How.

[35]248, 16 L. ed. 118), the same doctrine *was extended to a contract for supplies furnished to a vessel engaged in trade between different ports in the state of California. These cases, however, were practically overruled by that of *The Belfast*, 7 Wall. 624, 19 L. ed. 266, in which a state statute, similar to the statute of New York involved in this case, for a breach of contract of affreightment between ports in the same state (Alabama), was held to be unconstitutional and void, although the shipment was between ports of the same state. The contention was distinctly made (p. 635, L. ed. p. 269), that the state court had jurisdiction because the contract of affreightment was between ports and places in the same state, but it was as distinctly disclaimed by the court, and the prior cases practically overruled. So, also, in *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434, the doctrine of *The Belfast* was reiterated and applied to a collision between canal boats, Mr. Justice Blatchford saying that "it makes no difference, as to the jurisdiction of the district court, that one or the other of the vessels was, at the time of the collision, on a voyage from one place in the state of Illinois to another place in that state." To the same effect are *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *The Montello*, 20 Wall. 430, 22 L. ed. 391; *The Commerce*, 1 Black, 574, *sub nom. Commercial Transp. Co. v. Fitzhugh*, 17 L. ed. 107, and *Lord v. Goodall, N. & P. S. S. Co.* 102 U. S. 541, 26 L. ed. 224.

So, too, in *Re Garnett*, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840, the limited liability act was held to be a part of the law of the United States, enforceable upon navigable rivers above tide waters, and applicable to vessels engaged in commerce between ports in the same states. [9 Stat. at L. 635, chap. 43, U. S. Comp. Stat. 1901, p. 2943.] In delivering the opinion Mr. Justice Bradley said (p. 15, L. ed. p. 634, Sup. Ct. Rep. p. 843): "In some of the cases it was held, distinctly, that this jurisdiction does not depend on the question of foreign or interstate commerce, but also exists where the voyage or contract, if maritime in character, is made and to be performed wholly within a single state,"—citing all the cases noticed in this opinion.

In *The E. M. McChesney*, 8 Ben. 150, Fed. Cas. No. 4,463, Judge Blatchford, more recently of this court, sustained a libel against a canal boat for nondelivery of a cargo ship-
[36]ped on a canal boat in *Buffalo to be carried to New York. In that case, as in this, it was contended that neither the canal, nor the canal boat, were subjects of the admiralty jurisdiction. The case is directly in point.

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It is believed that, since the case of *The Belfast*, the distinction has never been admitted between contracts concerning vessels engaged in trade between ports of the same, and between ports of different, states. Of course, nothing herein said is intended to trench upon the common-law jurisdiction of the state courts, which is, and always has been, expressly saved to suitors "where the common law is competent to give it." Rev. Stat. § 563, sub. 8 (U. S. Comp. Stat. 1901, p. 457). By that law, an action will always lie against the master or owner of the vessel, and, if the laws of the state permit it, the vessel may be attached as the property of the defendant in the case. But, as remarked by Mr. Justice Miller in *The Pine v. Trevor*, 4 Wall. 555, 571, 18 L. ed. 451, 456: A statute providing that a vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names, partakes of all the essential features of an admiralty proceeding *in rem*, of which exclusive jurisdiction is given to the district courts of the United States. See also *The Moses Taylor*, 4 Wall. 411, 427, 18 L. ed. 397, 400, wherein it is said: "The action against the boat by name, authorized by the statute of California, is a proceeding in the nature, and with the incidents, of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly."

In *The Belfast*, 7 Wall. 624, 19 L. ed. 266, a proceeding was taken in a state court in Alabama for the enforcement of a lien for the loss of certain cotton. The statute was, in its essentials, a reproduction of the New York statute under consideration. Plaintiffs contended that, admitting the admiralty courts had jurisdiction, the state courts had concurrent jurisdiction to afford the parties the same remedies. It was held that state *legislatures had no authority to [37] create a maritime lien, or to enforce such a lien by a suit or proceeding *in rem*, as practised in the admiralty courts.

In all these cases the distinction is sharply drawn between a common-law action *in personam*, with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, and a proceeding *in rem* against the vessel as the debtor or "offending thing," which is the characteristic of a suit in admiralty. The same distinction is carefully preserved in the general admiralty rules prescribed by this court; rule 2d declaring that, in suits *in personam*, the mesne process may be "by a warrant of arrest of the person of the defendant, with a clause therein that, if he

cannot be found, to attach his goods and chattels to the amount sued for;" and rule 9, that in suits and proceedings *in rem* the process shall be by warrant of arrest of the ship, goods, or other things to be arrested, with public notice to be given in the newspapers. The former is in strict analogy to a common-law proceeding, and is a concurrent remedy. The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts.

That the New York statute belongs to the latter class is evident from the Code, by which, upon written application to a justice of the supreme court, a warrant is issued for the seizure of the vessel, and for an order to show cause why it should not be sold to satisfy the lien. The warrant in this case recites "that an application had been made to me . . . for a warrant to enforce a lien against the canal boat or vessel called Rob't W. Parsons," and commands the sheriff "to seize and safely keep said canal boat to satisfy said claim . . . as above set forth, to be a lien upon said vessel according to law." The proceeding authorized by the New York statute in question was held to be in the nature of a suit in admiralty in *Bird v. The Josephine*, 39 N. Y. 19, and *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731. The proceeding is also similar to that provided by the laws of Massachusetts, which, in the case of *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. [38] Rep. 930, *was held to be, as to repairs and supplies in the home port, exclusively within the admiralty jurisdiction of the Federal courts.

As § 30 of the New York statute excludes a debt which is not a lien by the maritime law, and § 3419, providing for their enforcement, also excludes liens founded upon a maritime contract, we think the state courts were in error in enforcing this lien, thereby holding that a contract for the repair of a canal boat while lying in the Erie canal was not a maritime contract, and that the statute so construed is *pro tanto* unconstitutional.

The judgment of the court below must, therefore, be reversed, and the case remanded to the Supreme Court of the State of New York for further proceedings not inconsistent with this opinion.

Mr. Justice **Brewer**, dissenting:

I am unable to concur in the opinion and judgment in this case, and deem the matter of sufficient importance to justify an expression of my reasons therefor.

It is well to understand exactly the facts of the case. Sections 30 and 35 of the Laws of New York, 1897, chap. 418, are quoted in the opinion of the court. By the first, a

lien is given on a seagoing or ocean-bound vessel, if the amount of the debt is \$50 or upwards, and on any other vessel if \$15 or upwards. And, among other things, the lien is for work done, or material or other articles furnished, for the building or repairing of such vessel. By the second, the lien, if founded upon a maritime contract, can be enforced only in the United States courts; if not founded upon such a contract, by proceedings in the state courts, in the manner provided by the Code of Civil Procedure.

The canal boat, upon which the lien was claimed, was not a seagoing or ocean-bound vessel, but engaged in carrying merchandise between Buffalo and other ports within the limits of the state of New York. The statements in two affidavits, *one of the plaintiff [39] and the other the defendant (the plaintiff being the owner of the claim, and the defendant the owner of the boat), were, by stipulation between the parties, agreed upon as the facts in the case. No question was made of the justice of the claim or the liability of the owner of the boat therefor. The work consisted in "permanent repairs upon the boat," in this, that "a part of one side of said boat was taken out and her cheek plank removed, and the side of the boat and the cheek plank were rebuilt into said boat." The work was done upon dry docks belonging to the plaintiff in the village of Middleport, a village located on the Erie canal. The boat, at the time, was on a trip from New York to Buffalo. The value of these permanent repairs was \$154.40, and the boat, when thus repaired, sold for only \$155. Further, according to the bill of particulars, 727 feet of lumber, 47 bolts, 165 pounds of spikes, and 265 pounds of iron, as well as three hundred and thirty-four hours of labor, which, at ten hours a day, amounted to over thirty-three days, were used in the work. The size of the canal boat is not given, but, from this statement as to the amount and value of the work, it is evident that the repairs might well be considered a rebuilding of the boat. Be that as it may, the contract was made on land, to be performed on land, and was, in fact, performed on land. The plaintiff was a canal-boat builder, having dry docks and yards at the village of Middleport, and on these dry docks the work was done.

Was this a maritime contract? A contract for building a ship or supplying materials for her construction is not a maritime contract. *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. ed. 961; *Roach v. Chapman*, 22 How. 129, 16 L. ed. 294. In the former of these cases the court said (p. 402, L. ed. p. 965): "So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on

the ocean or elsewhere), it was a contract made on land, to be performed on land."

So, in *Sheppard v. Steele*, 43 N. Y. 52, 56, 3 Am. Rep. 660, 662:

"The claim here is for labor upon the hull of a vessel, while in the process of construction, before launching, while yet on *the land. This is not a maritime contract. It is one relating to a subject on the land, and it is to be performed on the land. The admiralty courts have no jurisdiction for its enforcement. *Foster v. The Richard Busteed*, 100 Mass. 409, 1 Am. Rep. 125."

That a dry dock is to be considered as land in the maritime law seems to be clear from the decision of this court in *Cope v. Vallette Dry Dock Co.* 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336, in which it was held that a dry dock was not a subject of salvage service, Mr. Justice Bradley, speaking for the court, saying (p. 627, L. ed. p. 502, Sup. Ct. Rep. p. 337): "A fixed structure, such as this dry dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water." The dry dock referred to in this case was a floating dock fastened by chains to the bank of the Mississippi river. Whether the dock in this case was likewise fastened by chains, or a structure permanently attached to the land, does not appear. Certainly, it cannot be presumed, for the purpose of reversing the judgments of the state courts, that it was not permanently attached to, and as much a part of, the land, as a bridge or a wharf.

In this connection, reference may be had to *Bradley v. Bolles*, Abb. Adm. 569, Fed. Cas. No. 1,773, in which it was held by Judge Betts that work done upon a vessel in a dry dock in scraping her bottom, preparatory to coppering her, is not of a maritime character, and that compensation for such labor cannot be recovered in a court of admiralty. Judge Betts says, in his opinion, that the court had repeatedly held that contracts of that description do not constitute a lien upon vessels which can be enforced in admiralty. In *Boon v. The Hornet*, Crabbe, 426, Fed. Cas. No. 1,640, a canal boat was hauled on shore on the bank of a river where the tide ebbed and flowed, and there repaired. It was held that, although the law of the state gave a lien, the admiralty court would not take cognizance of such a claim.

So, also, where damage is done wholly upon the land, admiralty will not take jurisdiction, although the cause of the *damage originated on waters subject to its jurisdiction. *The Plymouth*, 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125; *Ex parte Phenix Ins. Co.* 118 U. S. 610, 191 U. S.

30 L. ed. 274, 7 Sup. St. Rep. 25; *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254. Two of these were cases in which fire originating on a vessel communicated to property on land, and the owner of the property attempted to recover in the admiralty courts, but their jurisdiction was denied. The other was where a vessel, while being towed in the Chicago river, struck and damaged a building on the land. For this damage, an action was maintained in the state court, and the jurisdiction of that court upheld. It would seem to follow from these cases that a contract made on land, to be performed on land, and, in fact, performed on land, is not subject to admiralty jurisdiction; and, likewise, that a tort resulting in injury to something on the land is, also, not subject to admiralty jurisdiction, although the tort was on waters subject to such jurisdiction. It is true, many cases may be found in which it is stated, generally, that admiralty has jurisdiction of claims for repairs upon vessels, but, evidently, that contemplates repairs made while the vessel is in the water.

In this connection, I notice a statement in the opinion of the court, that "for incidental repairs made on land to articles of a ship's furniture or machinery, it has never been supposed that a court of admiralty had jurisdiction." But if an engine be taken out of a steam tug and repaired on land, and a court of admiralty has no jurisdiction of the claim for such repairs, has it any more claim when the hull of a canal boat is brought on the land and the side of it replaced? In each case the contract is one performed on the land, and, although having ultimate relation to navigation on the water, it is not, of itself, directly connected with navigation.

Further, no objection can, of course, be made to the New York statutes. Section 30 gives a lien, and no one questions the power of a state to provide for such a lien to be enforced in some court. Section 35 provides that, if the lien is founded on a maritime contract, it is enforceable only in the courts of the *United States. Surely, that is as far [42] as the most strenuous advocates of an extended admiralty jurisdiction can claim, and it is only in those cases, as the section provides, where the lien is not founded upon a maritime contract that the state courts may exercise jurisdiction. The state courts of New York, from the trial through the supreme to the court of appeals, have all held that this lien was not founded upon a maritime contract. Upon what just ground can this court disturb this finding? If it be a pure question of fact, we have often held that we are bound by the action of the state courts. If it is one partly of fact and

partly of law, then, surely, we ought not, except in the clearest case, to reverse those courts.

Still again, it has been repeatedly declared by this court, following the statute, that a claim cognizable in admiralty can be enforced in the state courts by common-law remedies. Now, whatever may be the nature of the contract (the foundation of the lien in this instance), the only provision in § 35 is that it can be enforced in the manner provided by the Code of Civil Procedure.

Turning to the Code of Civil Procedure, we find, in title 4 of chapter 23, the provisions for the enforcement of liens on vessels. These provisions are, first, the lienor is to make a written application to a justice of the supreme court for a warrant to enforce the lien and to collect the amount thereof, which application must state substantially the same facts as in an ordinary pleading to enforce a mechanic's lien on buildings. § 3420. Upon the filing of such application, the justice is directed to issue a warrant for the seizure of the vessel, and, at the same time, to grant an order to show cause why the vessel should not be sold to satisfy the lien. A copy of the order and the application for the warrant must be served personally upon the master or other person in charge of the vessel, "and personally upon the owner and consignee of such vessel if a resident of the state, or, if not a resident of the state, by mail addressed to such owner or consignee at his last known place [43] of residence, within ten days after the *execution of such warrant." §§ 3422 and 3423. By § 3424, the applicant is also required to give notice, in some paper published in the county where the vessel was seized, "stating the issuance of the warrant, the date thereof, the amount of the claim specified therein, the name of the applicant, and the time and place of the return of the order to show cause." By § 3425, the owner or consignee, or any other person interested, may appear and contest the claim of the lienor. Subsequent provisions authorize an appeal, as in other civil cases. The record shows that the proceedings had were substantially in accordance with these provisions. The application, called a petition, was filed, setting forth all the facts required, including the name of the owner. An order of sale and an order to show cause were both issued, and the owner appeared in response to such notice. It is true, there is in the record no proof of service upon the owner, but the fact of her appearance to contest the application is shown. It is also true that she did not, after her appearance, contest the amount of the claim, but contented herself with challenging the jurisdiction of the court. But such action on her part does not

obviate the fact that the proceedings on behalf of the petitioner were substantially those to collect a civil debt by attachment against the property of the defendant. In this connection, reference may be had to *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451, in which an Iowa statute was held unconstitutional, but, as said by Mr. Justice Miller, speaking for the court on page 571, L. ed. p. 456, describing the remedy provided for by that statute:

"The remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar, in substance, to a libel. That, after a notice in the nature of a monition, *the vessel may be [44] condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the western states."

But in the very same case it was also said by the learned justice:

"While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the west called suits by attachment, and, in some of the older states, foreign attachments. In these cases there is a suit against a personal defendant by name, and, because of inability to serve process on him on account of nonresidence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common-law court of the state.

"Such actions may also be maintained *in personam* against a defendant in the common-law courts, as the common law gives; all in consistence with the grant of admiralty powers in the 9th section of the judiciary act."

So, in the case at bar, we have a proceeding authorized by the statute in which the owner is named, and notice required to be served on him, and notice in fact served, an appearance of the defendant, and an opportunity to try the merits of the claim, as in any other civil action.

That a state has full control over the practice and procedure to be pursued in its courts has been often adjudged. Thus, in *Missouri v. Lewis*, 101 U. S. 22, 31, *sub*

nom. Bowman v. Lewis, 25 L. ed. 989, 992, it was said by Mr. Justice Bradley, speaking for the court:

"We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory."

[45] *Again, in *Ex parte Reggel*, 114 U. S. 642, 651, 29 L. ed. 250, 253, 5 Sup. Ct. Rep. 1148, 1153, Mr. Justice Harlan used these words:

"That commonwealth [Pennsylvania] has the right to establish the forms of pleadings and process to be observed in her own courts, in both civil and criminal cases, subject only to those provisions of the Constitution of the United States involving the protection of life, liberty, and property in all the states of the Union."

So Mr. Justice White, speaking for the court, in *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344, 345, declared:

"But it is clear that the 14th Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided."

See also *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 570, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *League v. Texas*, 184 U. S. 156, 158, 46 L. ed. 478, 480, 22 Sup. Ct. Rep. 475.

But it is said that, while this is generally true, there is this limitation, that the state cannot, as to claims against vessels, adopt the procedure now obtaining in admiralty cases, or, without actual notice to the owner, seize and sell a vessel in satisfaction of a lien. Of course, it is not necessary to determine that question, because, as I have stated, there was notice to the owner and an appearance by her, and such proceeding was authorized by the statute. But, even if it was not so authorized, and was simply a direct proceeding to enforce a lien upon the vessel and sell it in satisfaction thereof, I insist that the state courts may entertain jurisdiction. It was held in *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, that a state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is only brought into court by publication. The question was discussed at length, the author-

[46] ities *reviewed, and the conclusion reached
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that the state had such jurisdiction over real estate within its limits that it could determine the title without the personal presence of the owner. But has the state any less jurisdiction over personalty situated within its borders than it has over real estate? Upon what theory of state power can it be held that a state may divest a nonresident of his title to real estate, and not a nonresident of his title to personal property? There seems to be a contention that there is a peculiar sanctity in the form of admiralty proceedings which excludes the state from resort to them, but the jurisdiction of the admiralty courts does not depend on the form of the procedure. Congress may, if it see fit, change entirely that procedure. As said by Chief Justice Taney in *The Genesee Chief v. Fitzhugh*, 12 How. 460, 13 L. ed. 1065:

"The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power, as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases, there is no such limitation as to the mode of proceeding, and Congress may, therefore, in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

Suppose Congress should exercise this power, and substitute for the procedure in admiralty courts the common-law practice, and make it the only method of procedure therein. What would become of the argument that the state cannot resort to the procedure obtaining in admiralty courts for enforcing *the rights of claimants? Must it, [47] then, desist from common-law remedies because they have been adopted in admiralty and go back to that form of procedure now obtaining in the admiralty courts? Can it be that the power of a state to vest jurisdiction in one of its courts depends upon the form of procedure which it adopts?

Why should we be so anxious to drive parties having small claims away from their local courts to courts not infrequently held at a great distance? Why should we be so anxious to force litigants into a court where there is no constitutional right to a trial

by jury? I, for one, believe that the right of trial by jury is not to be taken away from a claimant unless it be a case coming clearly within the well-established limits of equity and admiralty cases. I do not like to see these provisions, which have so long been the boast of our Anglo-Saxon system of procedure, frittered away by either legislative or judicial action.

Further, it seems a great hardship that a party who has been brought into a court of general jurisdiction, with full opportunity to litigate the claim of the plaintiff, and has carried the case through all the courts of the state without ever disputing its validity, should now obtain a reversal of the entire proceedings when such reversal may operate to prevent the collection of the debt. By § 33 of chapter 418, heretofore referred to, the lien expires at the expiration of twelve months from the time the debt was contracted. Of course, the lien is now gone. The canal boat has very likely disappeared, and the owner may be entirely irresponsible.

Even if these objections to the opinion and judgment of the court are wholly without foundation, there is still another, broader and deeper. I do not believe that, under the true interpretation of the Constitution, the admiralty jurisdiction of the Federal courts extends to contracts for the repairs of vessels engaged wholly in commerce within a state. I recognize the fact that this court has decided in a series of cases, commencing with *The Genesee Chief v. Fitzhugh*, 12 How. [48] 443, 13 L. ed. 1058, that *the admiralty jurisdiction of the Federal courts is not limited by tide waters, as admiralty jurisdiction was understood to be limited, both in Great Britain and in this country, at the time the Constitution was framed, but extends to all navigable waters of the United States; and I have no disposition to question the correctness of those decisions, or in any way limit their scope. But what is admiralty? It is the law, not of the water, but of the seas.

As said in *Edwards, Admiralty Jurisdiction*, p. 29:

"But its jurisdiction may be said to rest generally on the following considerations: First, the nature of the property to be adjudicated upon; secondly, the question to be decided; thirdly, the origin of the cause; and fourthly, the locality; and these must be of the sea to give the admiralty a jurisdiction."

So, also, in *Edwards v. Elliott*, 21 Wall. 532, 553, 22 L. ed. 487, 491, is this declaration of this court:

"Maritime contracts are such as relate to commerce and navigation, and, unless a contract to build a ship is to be regarded as a maritime contract, it will hardly be contended that a contract to furnish the mate-

rials to be used in accomplishing that object can fall within that category, as the latter is more strictly a contract made on land, and to be performed on land, than the former, and is certainly one stage further removed from any immediate and direct relation to commerce and navigation."

It grew up out of the fact that the ocean is not the territorial property of any nation, but the common property of all; that vessels engaged in commerce between the different nations ought, so far as possible, to be subject to a uniform law, and not annoyed by the conflicting local laws and customs of the several nations which they visit. I do not mean that the several maritime nations did not establish different rules, or that there is not some dissimilarity in their maritime laws, for, as long as each nation is the master of its own territory, it may legislate as it sees fit in reference to maritime matters coming within its jurisdiction, and yet this does not abridge the fact *that admiralty [49] grew up out of the thought of having a common law of the seas. It was well said by Mr. Justice Bradley in *The Lottawanna*, 21 Wall. 558, 572, *sub nom. Rodd v. Heartt*, 22 L. ed. 654, 661:

"Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet in each country peculiarities exist, either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into, the local or municipal law of the particular country, and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed,—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one, England another, the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein these relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commer-

cial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations.

[50] . . . Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted, and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption *it would not be law. And thus it happens that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common comes to be the common maritime law of the world."

In the opinion of Chief Justice Taney, in *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058, in which this court for the first time held that the jurisdiction of the admiralty courts extended above tide water, the argument is thus stated (p. 454, L. ed. p. 1063):

"In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; *nor any place where a port could be established to carry on trade with a foreign nation*, and where vessels could enter or depart with cargoes. In England, therefore, 'tide water' and 'navigable water' are synonymous terms, and 'tide water,' with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence, the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.

"At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen states, the far greater part of the navigable waters are tide waters. And in the states which were, at that period, in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the [51] discovery of steamboats, *there could be nothing like foreign commerce upon waters with

an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and, consequently, the boundary of admiralty jurisdiction. It measured it by tide water. And that definition, having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England."

Again, as said by this court, in *The Commerce*, 1 Black, 574, 579, *sub nom. Commercial Transp. Co. v. Fitzhugh*, 17 L. ed. 107, 109:

"All such waters are, in truth, but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself."

Such being the general nature of admiralty, and the jurisdiction of its courts being understood, at the time of the adoption of our Constitution, to relate to the ocean and the arms thereof, with the view of uniformity in respect to international commerce, what was granted to the general government when to its courts was given exclusive jurisdiction over "all cases of admiralty and maritime jurisdiction?" Did it mean that the judicial power of the United States should extend to controversies respecting contracts and torts concerning every vessel upon all the waters of the several states? It is not pretended that it did. Take an inland lake, wholly within the limits of the territory of a state and having no connection with the ocean. The admiralty jurisdiction of the Federal courts does not extend to contracts or collisions in respect to, or upon, such waters. *The Montello*, 11 Wall. 411, 20 L. ed. 191. But why should the admiralty jurisdiction of the United States courts not extend to landlocked waters wholly within the limits of a state, when it does extend to waters having connection with the ocean? Clearly, as shown by the quotation from Chief Justice Taney's opinion in *The Genesee Chief v. Fitzhugh*, because, since the use of steam, foreign commerce may extend into such *waters, and, [52] therefore, the full exercise of the admiralty jurisdiction which concerns the law of the sea requires that that jurisdiction should be coextensive with waters which may be traversed by ocean-going vessels. It matters not whether such waters are natural or artificial highways, canals or rivers. If they open to the ocean, or are connected with the ocean, they become, or may become, the highways of ocean commerce, and, therefore, in order that the admiralty jurisdiction may be fully exer-

cised, it was held, and rightfully, in *The Genesee Chief v. Fitzhugh*, that it extends to all navigable waters of the United States. Take the case of a landlocked lake within the limits of New York. Unquestionably, the state has full jurisdiction over its waters and the vessels traversing them. The admiralty courts of the United States would not assume any jurisdiction. Can it be that, if the state of New York constructs a canal, by which the waters of that lake are connected with the ocean, it is deprived of its full jurisdiction over those waters and the vessels traversing them? Doubtless, to a certain extent, and for the purpose of fully effectuating the admiralty jurisdiction of the nation, the Federal courts in admiralty would have a certain jurisdiction. Take the case of *The Diana*, Lush. 539, in which Dr. Lushington assumed jurisdiction over a collision between two British vessels in the Great North Holland canal. Can it for a moment be supposed that the English admiralty courts would take jurisdiction of a claim for repairs made on a Dutch canal boat in such canal? Or, to bring the case nearer home, would the British admiralty courts take jurisdiction of the claim of this plaintiff for the work done upon the defendant's canal boat? Or, would the admiralty courts of the United States take jurisdiction of a like action brought for repairs done to a canal boat on the canal between Liverpool and Manchester? Clearly, these matters are of local significance, and of local significance alone.

If it be said that the state of New York, in the case cited, would, notwithstanding [53] the construction of a canal between *the thitherto landlocked lake and the ocean, still retain jurisdiction to enforce claims for repairs, but only by proceedings according to the course of the common law, I reply that, while it remained still a landlocked lake with no connection with the ocean, the state of New York having full jurisdiction, could, as we have seen, resort to any proceeding it saw fit for the enforcement of claims for repairs. It has full control over its own procedure, and may change and alter it as it sees fit.

Can it be that, having such power before the waters are connected with the ocean, it loses that power by the act of connecting the waters of the ocean, and is deprived of its thitherto unquestioned control over the remedies it chooses to provide?

But it is said that, given the fact that the admiralty jurisdiction of the Federal courts extends to all navigable waters of the United States, and that such jurisdiction is exclusive, it follows that, the moment any navigable waters are connected with the ocean, the jurisdiction of the Federal courts over

those waters becomes exclusive. In this case we touch upon the difference between contracts and torts. As said in *The Belfast*, 7 Wall. 624, 637, 19 L. ed. 266, 270:

"Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures.

"(1) Contracts, claims, or service, purely maritime and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty.

"(2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts.

"Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon locality."

We have here no matter of torts, but simply one of contract. The question, therefore, is not one of locality, but one of the nature of the contract. The contract was for work done, not on an ocean-going vessel or one capable of engaging in foreign *commerce, or, [54] like a tug, *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930, one which can be used directly in assisting foreign commerce, but a canal boat necessarily used only on inland waters, and in fact only so used. Can this fairly be adjudged a maritime contract? I think not. *Wilson v. Lawrence*, 82 N. Y. 409; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487. In addition to the fact that this boat was designed primarily for use upon a canal, to be drawn by animals moving on the land, the place at which the work was done is also worthy of consideration. While the admiralty jurisdiction may extend to canals, yet the United States have no such exclusive control over canals as over natural navigable waters. The canal was built by the state, is owned by the state, and it cannot for one moment be assumed that the national government can interfere to restrict the state as to the size of the canal, the depth of water, the construction of bridges, or other things in respect to which it has full control over the natural navigable waters. It seems an anomaly that, when the state builds a waterway and owns a waterway, and has a general control over that waterway, it cannot provide as it sees fit for enforcing claims for work done on vessels navigating such highway when the vessels are of a character which prevents them being used for any foreign commerce.

Recapitulating: I dissent from the opinion and judgment of the court, because, first, I think the contract, being made on land, for work to be done on land, and in fact done upon the land, is not a maritime contract, and therefore cannot be a subject of admiralty jurisdiction. Second, the pro-

ceeding which was instituted was authorized by the statutes of the state, and in its essential features an ordinary proceeding according to the course of the common law, which may always be resorted to even in respect to contracts which are of a strictly maritime nature. Third, because the grant to the national government over admiralty and maritime matters was in furtherance of commerce between this nation and others, and designed to secure uniformity in respect thereto, and does not extend to contracts made in respect to vessels which are incapable of being used for foreign commerce, designed and used exclusively for mere local traffic within a state.

[55] I am authorized to say that the **Chief Justice** and Mr. Justice **Peckham** concur in this dissent.

Mr. Justice **Harlan** also dissents.

ROBERT R. WRIGHT, Jr., as Mayor of the City of Denver, *Plff. in Err.*,
v.

ELLEN TERESA MORGAN *et al.*

(See S. C. Reporter's ed. 55-59.)

Public lands—patent to municipality—alienable title—municipal power to sell burial ground—informality in executing sale—conformity of deed to common council resolution.

1. An absolute, alienable title was acquired by the city of Denver, Colorado, under a patent purporting to convey to the "mayor in trust for said city and to his successors" land which had been purchased pursuant to the act of May 21, 1872, authorizing the mayor of that city to enter at the minimum price certain lands "to be held and used for a burial place for said city and vicinity."
2. A general power of alienation conferred upon a city by its charter extends to the alienation of property owned by it and devoted to burial purposes.
3. The informality in a sale of real property by a municipality, arising from the execution of the deed by the mayor rather than by a special commissioner, will not sustain ejectment by the municipality to recover back the land after the purchase price has been received by the city, and the land occupied by the purchaser for nearly twenty years.
4. A deed from a municipality to a person incorrectly described as the bishop of Colorado, habendum to him, his heirs, and assigns, is within the authority conferred by a resolution of the common council, granting the petition of the grantee, who was the Roman Catholic bishop of Denver, for a conveyance to him and his successors in office.

[No. 13.]

Argued October 13, 14, 1903. Decided October 26, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment ordered for defendants on exceptions to a judgment of the Circuit Court for the District of Colorado in favor of plaintiff in an action of ejectment. *Affirmed.*

See same case below, 45 C. C. A. 421, 106 Fed. 452.

The facts are stated in the opinion.

Messrs. Frederick A. Williams and *Halsted L. Ritter* argued the cause, and, with *Messrs. Clay B. Whitford, Greeley W. Whitford, and Henry E. May*, filed a brief for plaintiff in error:

The act of 1872 and the patent should be construed together.

Johnson v. Moore, 28 Mich. 3; *Torrence v. Shedd*, 112 Ill. 466; *Watson v. Boylston*, 5 Mass. 411; *Stuyvesant v. Western Mortg. & Invest. Co.* 22 Colo. 28, 43 Pac. 144; *Clough v. Bowman*, 15 N. H. 504.

The rules applicable to conditions precedent and subsequent, in ordinary conveyancing between individuals, have no application here.

Mahoning County v. Young, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 100; *Campbell v. Kansas City*, 102 Mo. 326, 10 L. R. A. 593, 13 S. W. 997.

An act of Congress granting land should neither be enlarged by ingenious reasoning, nor diminished by strained construction. The construction must be reasonable, and such as will give effect to the intention of Congress.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634.

A limitation is implied from the declaration of Congress that it was granted for the given purpose.

Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 354, 39 L. ed. 183, 15 Sup. Ct. Rep. 103.

The lands, being held for a public trust, were inalienable for any purpose.

Rousseau v. Troy, 49 How. Pr. 492; *Stockton v. Newark*, 42 N. J. Eq. 531, 9 Atl. 203; *La Société Italiana v. San Francisco*, 131 Cal. 169, 53 L. R. A. 382, 63 Pac. 174; *Columbus v. Columbus*, 82 Wis. 374, 16 L. R. A. 695, 52 N. W. 425; *Mahoning County v. Young*, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 97; *Com. v. Rush*, 14 Pa. 186; *Weekes v. Galveston*, 21 Tex. Civ. App. 102, 51 S. W. 544; *Oakland v. Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277; *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; *Hoadley v. San Francisco*, 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659; *San Francisco v. Itsell*, 80 Cal. 57, 22 Pac. 74; *Alton v.*

Illinois Transp. Co. 12 Ill. 38, 52 Am. Dec. 479; *Augusta v. Perkins*, 3 B. Mon. 437; *Giltner v. Carrollton*, 7 B. Mon. 680; *Mathews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *Tiedeman, Mun. Corp.* §§ 202, 262; *Story v. New York Elev. R. Co.* 90 N. Y. 124, 43 Am. Rep. 146; *Warren v. Lyons*, 22 Iowa, 351; *Brown v. Manning*, 6 Ohio, 304, 27 Am. Dec. 255; *North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530; *Dill, Mun. Corp.* 4th ed. § 575.

There is no particular form or ceremony necessary in the dedication of land to the public use. All that is required is the assent of the owner of the land and the fact of its being used for public purposes intended by the appropriation.

Cincinnati v. White, 6 Pet. 431, 8 L. ed. 452; *Davidson v. Reed*, 111 Ill. 167, 53 Am. Rep. 613; *Redwood Cemetery Asso. v. Bandy*, 93 Ind. 246; *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246; *Hunter v. Sandy Hill*, 6 Hill, 407; *People v. Holladay* (Cal.) 5 Pac. 798; *Hagaman v. Dittmar*, 24 Kan. 42; *Hayes v. Houke*, 45 Kan. 466, 25 Pac. 860.

If the legal title did pass to the city of Denver, then the land was held by the corporation for a purely public purpose, and not in its private or individual capacity. If it was held for a public purpose it was inalienable, and not subject to the payment of the debts of the city.

Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197.

Messrs. Halsted L. Ritter and Frederick L. Williams also filed a separate brief for plaintiff in error:

Congress has plenary power to prescribe the nature of the title that may be acquired in any public lands, and to prescribe the procedure by which such title may be acquired.

Fee v. Brown, 17 Colo. 510, 30 Pac. 340.

The grant of the sovereign confers upon the donee capacity to take according to the purpose and extent intended, no more and no less.

Goodell v. Jackson, 20 Johns. 693, 11 Am. Dec. 351.

And the legislative will is not to be frustrated by the application of technical rules which apply to and govern private grants.

Rutherford v. Greene, 2 Wheat. 196, 4 L. ed. 218.

The title was intended to be vested in the office perpetually, not in the man.

Smith v. Pipe, 3 Colo. 196.

Mr. Clayton C. Dorsey argued the cause, and, with **Mr. Willard Teller**, filed a brief for defendants in error:

Plaintiff seeking to recover possession of land occupied by another must recover upon the strength of his own title, rather than upon the weakness of his adversary's; and the

burden rests upon the plaintiff to prove the title he asserts.

Cleveland v. Bigelow, 39 C. C. A. 47, 98 Fed. 242; *Watts v. Lindsey*, 7 Wheat. 161, 5 L. ed. 424.

Plaintiff in an action in ejectment must be clothed with a legal title to the lands.

Sheirburn v. Cordova, 24 How. 425, 16 L. ed. 741; *Fenn v. Holme*, 21 How. 481, 16 L. ed. 198; *Foster v. Mora*, 98 U. S. 427, 25 L. ed. 191; *Bagnell v. Broderick*, 13 Pet. 436, 10 L. ed. 235; *Miller v. Courtney*, 152 U. S. 172, 38 L. ed. 401, 14 Sup. Ct. Rep. 517; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. ed. 344, 8 Sup. Ct. Rep. 429; *Johnson v. Christian*, 128 U. S. 374, 32 L. ed. 412, 9 Sup. Ct. Rep. 87; *Carter v. Ruddy*, 166 U. S. 493, 41 L. ed. 1090, 17 Sup. Ct. Rep. 640.

A judgment, however erroneous, will not be reversed at the instance of one having neither the title, nor the right to the possession.

Chittenden v. Brewster, 2 Wall. 196, 17 L. ed. 841; *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. Rep. 216; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875.

The statute of uses (27 Hen. VIII. chap. 10) is in force in the state of Colorado.

2 Mills's Anno. Stat. (Colo.) § 4184; *Teller v. Hill* (Colo. App.) 72 Pac. 811.

The presumption is in favor of a use and against a trust, and the use is executed unless the application of the statute is repugnant to the manifest intent of the grantor.

Newhall v. Wheeler, 7 Mass. 189; *Webster v. Cooper*, 14 How. 488, 14 L. ed. 510.

Where a trust consists of realty, a charge upon it of legacies or debts, or of any other nature, will not vest the legal estate in the trustees, unless the instrument creating the trust contains some direction to them to raise money for the payment of the charge, or unless it contains some requirement to execute an active trust.

2 Beach, Tr. & Trustees, p. 926, § 398.

In many cases where the trust instrument was much more definite in respect to the active duties to be performed by the trustee than in the case at bar it has been held that the statute applied, and the legal title with the right to the possession vested in the *cestui que trust*.

O'Melia v. Mullarky, 124 Ill. 506, 17 N. E. 36; *Burke v. Valentine*, 52 Barb. 412; *Ramsay v. De Remer*, 65 Hun, 212, 20 N. Y. Supp. 143; *Reeves v. Brayton*, 36 S. C. 38, 15 S. E. 658; *Robinson v. Ostendorff*, 38 S. C. 66, 16 S. E. 371; *Hannig v. Mueller*, 82 Wis. 235, 52 N. W. 98; *Everts v. Everts*, 80 Mich. 222, 45 N. W. 88.

Whatever legal title passed by the patent likewise vested in the city; for, without the possession, or right to the possession, the

mayor could in no wise control the use to which the property was put.

Wainwright v. Low, 132 N. Y. 313, 30 N. E. 747.

If the trust is a simple or passive one, to allow the beneficiary to keep and enjoy the estate, the trustee has no power or duty to perform.

2 Perry, Tr. 3d ed. § 475.

A patent carries the fee, and is the best title known to a court of law.

Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *Hooper v. Scheimer*, 23 How. 235, 16 L. ed. 452; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534.

A municipal corporation may take and administer a trust for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects; and this is true, although the trust property may be situated beyond the corporate limits, and the *cestuis que trust* may be other than the inhabitants of said city.

Dill. Mun. Corp. 4th ed. § 557; *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205; *McDonogh v. Murdoch*, 15 How. 367, 14 L. ed. 732; *Perin v. Carey*, 24 How. 465, 16 L. ed. 701; *Chambers v. St. Louis*, 29 Mo. 543.

And this interpretation has been placed upon the present charter of the city of Denver, which in this respect is practically the same as it was in 1873, by the supreme court of the state of Colorado.

Clayton v. Hallett, 30 Colo. 231, 59 L. R. A. 407, 70 Pac. 429.

A patent is to be construed and interpreted by the same rules governing other written instruments conveying title.

Brown v. Huger, 21 How. 305, 16 L. ed. 125; *Gazzan v. Phillips*, 20 How. 372, 15 L. ed. 958.

When a consideration is paid for the grant the instrument of conveyance, whether it be a patent or a deed, is to be construed most strongly against the grantor, even though the grant be of the public domain and by the sovereign.

Charles River Bridge v. Warren Bridge, 7 Pick. 344, 11 Pet. 420, 9 L. ed. 773; 3 Washb. Real. Prop. 3d ed. 173.

If, by inadvertence or mistake of the officials of the land department, a conveyance was made to the wrong person, or of different property, or of a different estate or title, than was intended to be, or ought to have been, conveyed, the question is one which cannot be raised in an action of ejectment,
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wherein the strict legal title prevails, and equitable considerations are inadmissible.

Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; *Brown v. Huger*, 21 How. 305, 16 L. ed. 125; *Gazzan v. Phillips*, 20 How. 372, 15 L. ed. 958.

The dignity, importance, and practical unassailability, even in an action in equity, of a patent of the United States is demonstrated by frequent decisions of this court.

Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *United States v. Northern P. R. Co.* 37 C. C. A. 290, 95 Fed. 864, 177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. Rep. 706.

After a patent is issued and accepted by the grantee, all control, even by the Executive Department, ceases, and such patent passes the legal title to the grantee.

Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; *Widdicombe v. Childers*, 124 U. S. 401, 31 L. ed. 428, 8 Sup. Ct. Rep. 517; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875.

The words "in trust," in the patent, do not reserve any right to the government, or give it any control over the property.

Cowell v. Colorado Springs, 100 U. S. 55, 25 L. ed. 547.

Such being the law, it is clear that the rights of the defendants herein are not in any measure diminished by the act of Congress of January, 1890.

Mead v. Ballard, 7 Wall. 290, 19 L. ed. 190; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Berkley v. Union P. R. Co.* 33 Fed. 794; *Sharon Iron Co. v. Erie*, 41 Pa. 341.

The fact that the power to alienate is not expressed in the Denver charter in immediate conjunction with the power to acquire lands for cemetery purposes is of no significance. What is implied in a statute is as much a part of it as what is expressed.

Thurber v. Miller, 14 C. C. A. 432, 32 U. S. App. 209, 67 Fed. 371; *United States v. Babbit*, 1 Black, 61, 17 L. ed. 96; *Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. ed. 531; *Wilson County v. Third Nat. Bank*, 103 U. S. 770, 26 L. ed. 488.

Even if the language employed in the act of 1872 had been incorporated into the patent, it is thoroughly well settled that, nevertheless, the patent would have conveyed an unqualified fee, without condition, limitation, covenant, or trust.

Stuart v. Easton, 170 U. S. 383, 42 L. ed. 1078, 18 Sup. Ct. Rep. 650; *Kerlin v. Campbell*, 15 Pa. 500; *Seebold v. Shitler*, 34 Pa. 133; *Packard v. Ames*, 16 Gray, 327; *Mahoning County v. Young*, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96; *Rawson v. School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670; *Portland v. Terwilliger*, 16 Or. 465, 19 Pac.

90; *Stone v. Houghton*, 139 Mass. 175, 31 N. E. 719; *Ayer v. Emery*, 14 Allen, 67; *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Farnham v. Thompson*, 34 Minn. 330, 57 Am. Rep. 59, 26 N. W. 9; *Taylor v. Binford*, 37 Ohio St. 262; *Carter v. Branson*, 79 Ind. 14; *Brown v. Caldwell*, 23 W. Va. 187, 48 Am. Rep. 376; *Thornton v. Trammell*, 39 Ga. 202.

It is well settled that a municipal corporation, having acquired title under similar circumstances, is at liberty to alienate the same.

Van Ness v. Washington, 4 Pet. 232, 7 L. ed. 842; *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 672, 27 L. ed. 1070, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15; *Brendle v. German Reformed Congregation*, 33 Pa. 415; *Beach v. Haynes*, 12 Vt. 15; *Warren County v. Patterson*, 56 Ill. 111; *Pettitt v. Macon*, 95 Ga. 645, 23 S. E. 198; *Ogden City v. Bear Lake & River Waterworks & Irrig. Co.* 16 Utah, 440, 41 L. R. A. 305, 52 Pac. 697; *United States v. Case Library*, 98 Fed. 512; *Konrad v. Rogers*, 70 Wis. 492, 36 N. W. 261; *Christy v. Whitmore*, 67 Iowa, 60, 24 N. W. 593; *Bushnell v. Whitlock*, 77 Iowa, 285, 42 N. W. 186; *Prestonsburg v. Floyd County*, 23 Ky. L. Rep. 1157, 64 S. W. 907; *Llano County v. Knowles* (Tex. Civ. App.) 29 S. W. 549; *Atty. Gen. v. Merrimac Mfg. Co.* 14 Gray, 586; *Newark v. Elliott*, 5 Ohio St. 114; *De Varaigne v. Fox*, 2 Blatchf. 95, Fed. Cas. No. 3,836; *Brooklyn Park v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *McGehee v. Woodville*, 59 Miss. 648; *Field v. Providence*, 17 R. I. 803, 24 Atl. 143; *First German Reformed Church v. Summit County*, 23 Ohio C. C. 553.

The doctrine of equitable estoppel is applicable to matters arising in suits at law as well as in equity; and the doctrine has been applied in many cases in the Federal courts.

Dickerson v. Colgrove, 100 U. S. 580, 25 L. ed. 619; *Baker v. Humphrey*, 101 U. S. 494, 25 L. ed. 1065; *Kirk v. Hamilton*, 102 U. S. 78, 26 L. ed. 82; *George v. Tate*, 102 U. S. 570, 26 L. ed. 233; *Drexel v. Berney*, 122 U. S. 253, 30 L. ed. 1222, 7 Sup. Ct. Rep. 1200; *Miller v. Merine*, 43 Fed. 266; *DeGuire v. St. Joseph Lead Co.* 38 Fed. 65.

The mere act of levying taxes and assessing the lots is enough, in and of itself alone, to establish an estoppel as against the city's claim that it was public property.

Dill. Mun. Corp. 3d ed. § 674; *Simplot v. Dubuque*, 49 Iowa, 632; *Quincy v. Chicago, B. & Q. R. Co.* 92 Ill. 21; *Adams County v. Burlington & M. R. Co.* 39 Iowa, 511; *Brandirff v. Harrison County*, 50 Iowa, 164; *Smith v. Osage*, 80 Iowa, 85, 8 L. R. A. 633,

45 N. W. 404; *Audubon County v. American Emigrant Co.* 40 Iowa, 460; *Austin v. Bremer County*, 44 Iowa, 156; *Chicago & N. W. R. Co. v. People*, 91 Ill. 251.

An equitable estoppel is established beyond all question.

Union P. R. Co. v. McAlpine, 129 U. S. 314, 32 L. ed. 676, 9 Sup. Ct. Rep. 286.

An equitable estoppel is as available against, and laches is as well imputed to, a municipal corporation, as an individual.

Boone County v. Burlington & M. River R. Co. 139 U. S. 684, 35 L. ed. 319, 11 Sup. Ct. Rep. 687; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. Rep. 19; 1 Dill. Mun. Corp. 4th ed. § 548; *Clark v. Washington*, 12 Wheat. 40, 6 L. ed. 544; *School Directors v. Goerges*, 50 Mo. 194.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action of ejectment brought in the Colorado state court and removed to the circuit court of the United States. The case was tried in the latter court, and a verdict and judgment were ordered for the plaintiff on the undisputed facts. On exceptions, a judgment was ordered for the defendants by the circuit court of appeals (45 C. C. A. 421, 106 Fed. 452, see 25 C. C. A. 97, 49 U. S. App. 126, 79 Fed. 577), and the case was brought here by writ of error. The defendants claim title under a sale by the city of Denver and a deed executed by the mayor of the city. The plaintiff contends that the act of Congress under which the original patent was granted made the land inalienable; that the patent did not give the city a legal title; that the city had no power to convey; that the alleged authority of the city to the mayor to execute the deed was insufficient; and that the deed did not follow the resolution upon which the defendants rely.

The act of Congress, approved May 21, 1872, chap. 187 (17 Stat. at L. 140), was entitled "An Act to Enable the City of Denver to Purchase Certain Lands in Colorado for a Cemetery;" and it authorized the mayor of the city to enter, at the minimum price, certain lands, including the land in question, "to be held and used for a burial place for said city and vicinity." The price was paid, and a patent was issued purporting to convey to the "mayor, in trust for said city, and to his successors," the said land, not referring to the above act otherwise than by the words "in conformity with the several acts of Congress in such case made and provided." This patent was confirmed by an act of Congress approved January 25, 1890, chap. 3 (26 Stat. at L. 2); and the city of Denver was authorized "to va-

cate the use of the said land, or any portion thereof, as a cemetery, and to appropriate and use the same or any part thereof for a public park or grounds."

[57] *After the passage of the first act, Joseph P. Machebœuf, the Roman Catholic bishop of Denver, made a petition to the mayor and common council of Denver, representing that in 1863 he had purchased a part of the said lands, and that the same had been, and was, used as a burial place, and asking for a conveyance to him and his successors in office. A committee recommended that the petition be granted, and the council voted to adopt the report. On February 6, 1874, for a stipulated price which was received, a deed was executed by the mayor in the name of the city to Machebœuf, described as bishop of Colorado, habendum to him, his heirs and assigns, "for the purposes aforesaid." The land in controversy is a part of the land embraced in this deed, and, never having been used for burial, was conveyed by Machebœuf to the defendants' predecessor in title.

On the foregoing facts, it is sufficiently evident that the plaintiff has no title, and that would be enough to show that the judgment must be affirmed. The action is brought by the present mayor in his own name, not by the city. Furthermore, it also is plain enough that the city did get a title by the patent. The first act of Congress contemplated a purchase by the city, and the patent was to the mayor in trust for the city. This trust was executed by the statute of uses. The second act recites that the city has received and paid for a patent. It is argued that the words in the first act, "to be held and used for a burial place for said city and vicinity," show a trust more extensive than the city, and therefore prevent the execution of the use. But these words are not in the patent, and, if they had any effect, only would impose a trust upon the city; they would not prevent the operation of the habendum in the deed. It is suggested that the answer admits that the title was in the mayor until the conveyance by the city. But this is a mere conclusion of law. The answer sets up the facts in full, and it is apparent that no point was made on the pleadings below. On the contrary, it is said, and is not denied, that after a decision to that effect on de-

[58] murrer * (25 C. C. A. 97, 49 U. S. App. 126, 79 Fed. 577), it was admitted by the plaintiff that the legal title vested in the city by virtue of the patent of the United States.

If the legal title was in the city, it was an absolute title. In view of the extreme unwillingness of courts to admit the existence of a common-law condition, even when the word "condition" is used, it needs no argument to show that there was no condition or

limitation here. *Stuart v. Easton*, 170 U. S. 383, 42 L. ed. 1078, 18 Sup. Ct. Rep. 650. Little more needs to be said to show that the act of Congress did not make the land inalienable at common law. We need not consider whether the act could have that effect upon land within a state, when the conveyance was absolute, and was made to a citizen or instrumentality of the state; we express no opinion upon the point. It is enough that it did not purport so to restrict the ordinary incidents of title. We should require the clearest expression of such an unusual restriction before we should admit that it was imposed,—especially in an ordinary sale for cash. Here, the act probably meant no more than to explain the motive for a sale at a minimum price. *Mahoning County v. Young*, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96. The ratified patent said nothing of any restriction, or even any trust beyond the one executed in the city. Of course, however, no question of trust is before us. If the city had found it more convenient to convey the land to a cemetery corporation, there is nothing in the statutes or patent which would have prevented it. The conveyance to the bishop was essentially similar to the case supposed, except in technical form, and probably was made on grounds of justice that very possibly were considered by Congress. The Catholics had spent money on the land, and had used it for a burial ground long before Congress passed the act.

If the city got a fee simple absolute, as in our opinion it did, we are not called upon to spend time on the question of its power under the laws of the state, or of its action in the premises. These questions were not much argued here. The city had a general power of alienation by charter, and we are not *prepared to say that the power did [59] not extend to burying grounds. The vote to adopt the report was a sufficient vote to sell, and the question is not open whether there was any informality in the execution of the sale by the mayor rather than by a special commissioner. The supposed error would be corrected by equity if necessary. After the price had been received by the city, and the land had been occupied by purchasers for nearly twenty years, the city would not now be allowed to profit by a merely technical mistake.

The objection that the deed did not follow the authority is unfounded. Giving Machebœuf a wrong title had no effect on the grant; and the habendum properly was to him and his heirs, notwithstanding the petition, and the intent that the title should follow the office and not the blood of the grantee. Apart from statute, the law does not recognize the bishop as a corporation

sole, and, therefore, the land could not be limited to him and his successors. At all events, it was sufficient to give the bishop a fee by the proper words, and to leave the official succession to the title to be effected by other means than the limitation in the deed. The petition of Machebœuf no doubt contemplated that he would take the land for the benefit of his church, and no doubt he did so in fact. But there was nothing which required this intention to be expressed in the deed. The plaintiff is not concerned with the extent of Machebœuf's power to convey to secular uses.

Judgment of the Circuit Court of Appeals affirmed.

[60] *BURT ROSS, *Appt.*,
v.

MARTIN AGUIRRE, Warden of the State Prison of the State of California, at San Quentin, California.

(See S. C. Reporter's ed. 60-64.)

Statutes—subject expressed in title.

The title of an amendatory state statute, which designates the particular sections of the Code of Civil Procedure which it purports to amend, satisfies a constitutional requirement that every act shall embrace but one subject, which subject shall be expressed in its title.

[No. 19.]

Argued and submitted October 14, 1903. Decided November 2, 1903.

APPEAL from the Circuit Court of the United States for the Northern District of California to review an order denying a writ of habeas corpus. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. C. Van Fleet and *W. B. Treadwell* submitted the cause for appellant.

Mr. U. S. Webb argued the cause, and, with *Messrs. E. B. Power* and *C. N. Post*, filed a brief for appellee.

Mr. Justice McKenna delivered the opinion of the court:

Appeal from an order denying a writ of

NOTE.—On the power of a legislature to enact a code or compilation of laws, or amend many or undesignated sections thereof, by a single statute—see note to *Lewis v. Dunne*, 55 L. R. A. 833.

On the constitutional requirements with reference to the title of statutes—see notes to *Titusville Iron Works v. Keystone Oil Co.* 1 L. R. A. 362; *Evansville v. State*, 4 L. R. A. 93, and *People ex rel. Hart v. McElroy*, 2 L. R. A. 609.

habeas corpus. The respondent is the warden of the state prison of the state of California, at San Quentin, and holds the petitioner in custody under a judgment of the superior court of San Luis Obispo county, state of California, in which court he had been indicted, tried, and found guilty of the crime of murder, and sentenced to be hanged.

The petition under review is the second presented to the circuit court. The first was denied on the ground "that application for relief on behalf of said Burt Ross should first be made to the courts of the state." Thereupon a petition was presented to the supreme court of the state of California, and denied. A writ of error to this court was also denied. The ground of the petition is that the grand jury by which the indictment was found was not selected in accordance with law, and that, therefore, his conviction, sentence, and commitment do not constitute due process of law, and that he is deprived of his liberty in violation of the 14th Amendment of the Constitution of the United States.

By the Constitution of the state of California no person can be held for a crime unless on information, after examination and commitment by a magistrate, or an indictment by a grand jury. Const. 1879, § 8. By §§ 204 to 211, inclusive, of the Code of Civil Procedure of the state (prior to the amendments hereinafter stated), it was made the duty of each of the superior courts of the state to fix, by order, the number of grand jurors and trial jurors required for the transaction of business and the trial of causes during the ensuing year; and it was made the duty of the boards of supervisors of the counties, upon the making of said order, to select from the last preceding assessment roll a list of persons competent and suitable to serve as grand jurors, and also a list of persons to serve as trial jurors, and certify said lists, and place the same with the county clerk, who, upon receiving them, was required to file them in his office, "and write down the names contained thereon, on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon," and "deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box to be called the 'grand jury box,' and those having on them the names of persons selected to serve as trial jurors in a box to be called the 'trial jury box.'" Grand jurors and trial jurors were required to be drawn respectively from these boxes, by lot, by the

clerk, in the presence and by order of the court. Code Civ. Proc. §§ 241, 242.

[62] On March 23, 1893, the legislature passed an act entitled "An Act to Amend Sections 204, 205, 206, and 208 of the Code of Civil Procedure." Cal. Stat. 1893, p. 297. By this act, it was provided that the superior court, after making the order stating the number of grand jurors which in its opinion would be required for the business of the court, "shall select and list the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year." It was left the duty of the board of supervisors to select a list of trial jurors. The grand jury which indicted the petitioner was selected under this act. Illegally selected, it is contended, because "it is the law of the state of California that an act with only such a title" is void under the Constitution of the state, and that, therefore, the sections of the Code of Civil Procedure, the substance of which we have given above, remained the law of the state. For this contention petitioner relies on *Lewis v. Dunne*, 134 Cal. 291, 55 L. R. A. 833, 66 Pac. 478.

The title of the act passed upon in that case is as follows: "An Act to Revise the Code of Civil Procedure of the State of California by Amending Certain Sections, Repealing Others, and Adding Certain New Sections." The act was held void under that section of the Constitution of the state which provides that "every act shall embrace but one subject, which subject shall be expressed in its title. . . . No law shall be revised or amended by reference to its title; but, in such case, the act revised or section amended shall be re-enacted and published at length as revised or amended." The decision was rendered upon a petition for mandamus to a judge of the superior court of the city and county of San Francisco, but what action to command does not appear. The petitioner, however, contended that both the title and body of the act showed that the act was intended to be, and was, a revision of the Code, and therefore invalid, because the law revised was not "re-enacted and published at length as revised." The court said it could see no sufficient answer to the contention. That contention is not made in the case at bar. The act of 1893 re-enacted and published at length the sections amended, and is confined to their amendment. But the act passed upon in

[63] *Lewis v. Dunne* was also held void because its title did not express its subject,—nor, indeed, any subject. "It is apparent," the court said, "that the language of the title of the act in question, in and of itself, ex-

presses no subject whatever." The words "in and of itself" were used to distinguish an expression of the subject by "reference," and the reference, it was said, was really not to the title of any former act; it was merely to "the Code of Civil Procedure of the state of California." It was asked: "Now, what is the Code of Civil Procedure? It is merely a name given to a large part of the general laws of the state. The part of the great body of our laws which is to be found under that name is not confined to any particular subject or subjects, but includes substantive law, criminal law, and legislation that might be properly classed under any category whatever, as well as 'civil procedure.'" The reference, therefore, was not to one subject, but to many; and the revising act dealt, the court said, "with a vast variety of subjects," many of which were "totally distinct from each other;" and many of them had "no relation to civil procedure, while others were partly procedure and partly substantive law,—declaration as to personal and property rights." These observations are certainly not applicable to the act of 1893. That amends §§ 204, 205, 206, and 208 by designating them, and re-enacts and publishes them at length. It has but one purpose and contains but one subject. It amends particular sections; it does not revise a whole code.

In *People ex rel. Atty. Gen. v. Parvin*, 74 Cal. 549, 16 Pac. 490, an act was considered with the following title: "An Act to Amend Section 3481 of the Political Code." The case was not unqualifiedly approved in *Lewis v. Dunne*. It was not, however, overruled, and it seems to be an irresistible conclusion from the action of the supreme court of the state in denying the application of petitioner, that the act of 1893 was not ruled by *Lewis v. Dunne*, and was not void under the Constitution of the state. We accept the conclusion. It has support, if it need any, in *Beach v. Von Detten*, *decided [64] by the supreme court of California, June 26, 1903 (73 Pac. 187), where it was held (we quote from the syllabus) that "the title of an amendatory act which gives the title of the original act in full, and the number of the section in its amended form, is sufficient." *People ex rel. Atty. Gen. v. Parvin*, 74 Cal. 549, 16 Pac. 490, was cited, and it was observed that that case was discussed in *Lewis v. Dunne*, "and distinguished, but not overruled." And it was also observed that the *Parvin Case* had been approved in *Francais v. Soms*, 92 Cal. 503, 28 Pac. 592.

Order affirmed. Mandate forthwith.

CHOCTAW, OKLAHOMA, & GULF RAILROAD COMPANY, *Plff. in Err.*,

v.

LAURA LOUISE McDADE, Lucy W. McDade, and Kinney McDade, *Defts. in Err.*

(See S. C. Reporter's ed. 64-69.)

Railroads—negligence—province of court and jury—overhanging waterspout—assumption of risk—appeal—general exceptions—evidence of changed conditions.

1. The question whether a railroad brakeman was killed as a result of a collision with an overhanging waterspout on a water tank is for the jury, where there was evidence that when last seen he was signaling the engineer from his post on a car of more than average height and width, where he would be likely to be struck by the spout in passing, and that shortly thereafter he was missed from the train, his lantern found on the car, and his body discovered about 675 feet beyond the tank, with injuries which might have been produced by a collision with the obstruction.
2. It is negligence as matter of law for a railroad company to maintain an iron spout so attached to a water tank as to be a constant menace to the lives and limbs of brakemen on its trains, where it might readily have been so constructed and hung as to be safe.
3. An employee assumes the risk of injury from defective appliances furnished by his employer only when the defect is known to, or plainly observable by, the employee.
4. Assignments of error as to the admission of testimony are not reviewable on writ of error from the Supreme Court of the United States when based upon exceptions general in their character.
5. The admission of testimony, in an action to recover damages for the death of a railroad brakeman, alleged to be the result of a collision with an overhanging waterspout, that such spout was so reconstructed after the accident as to be farther removed from passing trains, is not error, where the jury are told that such change had no other bearing upon the issues involved than to test the correctness of the measurements offered in evidence by the railroad company to show that the waterspout did not constitute danger to brakemen on passing trains.

[No. 26.]

Submitted October 14, 1903. Decided November 2, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit

NOTE.—On the province of the court and jury in determining the question of negligence—see notes to *Roux v. Blodgett & D. Lumber Co.* 13 L. R. A. 728, and *Emry v. Raleigh & G. R. Co.* 15 L. R. A. 332.

On a servant's assumption of risk—see *Pidcock v. Union P. R. Co.* 1 L. R. A. 131, and note; *Foley v. Pettie Mach. Works*, 4 L. R. A. 51, and note, and *Hunter v. New York, O. & W. R. Co.* 6 L. R. A. 246, and note, and see notes to *Kehler v. Schwenk*, 13 L. R. A. 374; *Howard v. Dela-*

ware & H. Canal Co. (C. C. D. Vt.) 6 L. R. A. 75; *Southern P. Co. v. Seley*, 38 L. ed. U. S. 391, and *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

See same case below, 50 C. C. A. 591, 112 Fed. 888.

The facts are stated in the opinion.

Mr. J. W. McLoud submitted the cause for plaintiff in error. Messrs. George B. Peters, E. E. Wright, and C. M. Bryan were with him on the brief:

It is the duty of the trial judge to withdraw the case from the jury and direct a verdict, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 32, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266.

In personal-injury cases it is only where all reasonable men would agree that the evidence was insufficient to warrant a verdict that the court is justified in withdrawing the case from the jury.

Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co. 9 C. C. A. 12, 19 U. S. App. 510, 60 Fed. 351.

In an action to recover damages for any injury arising from the defendant's neglect, the burden of showing neglect is upon the plaintiff; and, if the evidence shows that the injury resulted from one of two causes, only one of which was due to the defendant's negligence, and the inference that the injury resulted from the one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case, and it is not competent for the court to leave the question to the jury.

Hughes v. Cincinnati, N. O. & T. P. R. Co. 91 Ky. 526, 16 S. W. 275.

ware & H. Canal Co. (C. C. D. Vt.) 6 L. R. A. 75; *Southern P. Co. v. Seley*, 38 L. ed. U. S. 391, and *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

Respecting *volenti non fit injuria* as a defense to actions by injured servants—see note to *O'Maley v. South Boston Gaslight Co.* 47 L. R. A. 161.

On precautions after accident as proof of negligence—see note to *Shinners v. Locks and Canals*, 12 L. R. A. 559.

There was no negligence in the construction and maintenance of appliances.

Reed v. Stockmeyer, 20 C. C. A. 383, 34 U. S. App. 727, 74 Fed. 186; *Mississippi River Logging Co. v. Schneider*, 20 C. C. A. 393, 34 U. S. App. 743, 74 Fed. 195.

The master may conduct his business in the way that seems to him best, although other ways may be less hazardous.

Mississippi River Logging Co. v. Schneider, 20 C. C. A. 393, 34 U. S. App. 743, 74 Fed. 195; *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; 1 Bailey, *Personal Injuries Relating to Master & Servant*, pp. 21, 22; *Clark v. Richmond & D. R. Co.* 78 Va. 711, 49 Am. Rep. 394; *Baylor v. Delaware, L. & W. R. Co.* 40 N. J. L. 23, 29 Am. Rep. 208; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291; *Hughes v. Cincinnati, N. O. & T. P. R. Co.* 91 Ky. 526, 16 S. W. 275; *Sheeler v. Chesapeake & O. R. Co.* 81 Va. 188, 59 Am. Rep. 654; *Illick v. Flint & P. M. R. Co.* 67 Mich. 632, 35 N. W. 708; *Lee v. Central R. & Bkg. Co.* 86 Ga. 231, 12 S. E. 307; *Sisco v. Lehigh & H. River R. Co.* 145 N. Y. 296, 41 N. E. 90; *Allen v. Burlington, C. R. & N. R. Co.* 64 Iowa, 94, 19 N. W. 807; *McKee v. Chicago, R. I. & P. R. Co.* 83 Iowa, 616, 13 L. R. A. 820, 50 N. W. 209; *Perigo v. Chicago, R. I. & P. R. Co.* 52 Iowa, 276, 3 N. W. 43; *Wells v. Burlington, C. R. & N. R. Co.* 56 Iowa, 524, 9 N. W. 364; *Brossman v. Lehigh Valley R. Co.* 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; *Carbine v. Bennington & R. R. Co.* 61 Vt. 348, 17 Atl. 491; *Hewitt v. Flint & P. M. R. Co.* 67 Mich. 61, 34 N. W. 659; *Delaware River Iron-Ship Bldg. & Engine Works v. Nuttall*, 119 Pa. 149, 13 Atl. 65; *Lehigh & W. B. Coal Co. v. Hayes*, 128 Pa. 294, 5 L. R. A. 441, 18 Atl. 387; *Henry v. Staten Island R. Co.* 81 N. Y. 373; *Muirhead v. Hannibal & St. J. R. Co.* 103 Mo. 251, 15 S. W. 530; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 15 N. E. 576; *Northern P. R. Co. v. Blake*, 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; *Kehler v. Schwenk*, 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910; *Reese v. Hershey*, 163 Pa. 253, 29 Atl. 907; *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872; *Gulf, C. & S. F. R. Co. v. Warner* (Tex. Civ. App.) 36 S. W. 118.

The servant of mature age and experience is charged by the law with knowledge of obvious dangers, and of those things which are within common observation and are according to natural law.

Mississippi River Logging Co. v. Schneider, 20 C. C. A. 393, 34 U. S. App. 743, 74
191 U. S. U. S., Book 48.

Fed. 195; *Reed v. Stockmeyer*, 20 C. C. A. 383, 34 U. S. App. 727, 74 Fed. 186.

Where one knowing the danger temporarily forgets it, and in consequence suffers, his forgetfulness will not avail him as an excuse; but if he knows, he must remember at his peril; and not to remember is contributory negligence if it occasions the injury.

Beach, *Contrib. Neg.* § 37; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627; *Bruker v. Covington*, 69 Ind. 33, 35 Am. Rep. 202; *Bassett v. Fish*, 75 N. Y. 303; *Weed v. Ballston Spa*, 76 N. Y. 329.

If the servant be of mature years and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers.

Reed v. Stockmeyer, 20 C. C. A. 383, 34 U. S. App. 727, 74 Fed. 186.

The case at bar likewise calls for the application of the equal-knowledge rule.

2 Bailey, *Personal Injuries Relating to Master & Servant*, §§ 775-777.

Again, this case calls for the application of the rule that it is the servant's duty to inform himself as to defects and dangers.

Id. § 796, pp. 273-283.

The deceased had assumed the risk.

Myers v. Chicago, St. P. M. & O. R. Co. 37 C. C. A. 137, 95 Fed. 406; *Hunt v. Hurd*, 39 C. C. A. 226, 98 Fed. 683; *Mississippi River Logging Co. v. Schneider*, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195; *Reed v. Stockmeyer*, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Schroeder v. Michigan Car Co.* 56 Mich. 132, 22 N. W. 220; *Walsh v. Whiteley*, L. R. 21 Q. B. 371; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *Hodgkins v. Eastern R. Co.* 119 Mass. 419; *Kohn v. McNulta*, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044.

The servant assumes the risks incident to overhead and projecting structures.

3 Elliott, *Railroads*, § 1269; *Fisk v. Fitchburg R. Co.* 158 Mass. 238, 33 N. E. 510; *Lovejoy v. Boston & L. R. Corp.* 125 Mass. 79, 28 Am. Rep. 206; *Thain v. Old Colony R. Co.* 161 Mass. 353, 37 N. E. 309; *Seidmore v. Milwaukee, L. S. & W. R. Co.* 89 Wis. 188, 61 N. W. 765; *Siscoe v. Lehigh & H. River R. Co.* 145 N. Y. 296, 41 N. E. 90; *Scymour v. Maddox*, 16 Q. B. 326; *Ryan v. Canada Southern R. Co.* 10 Ont. 745; *Jennings v. Tacoma R. & Motor Co.* 7 Wash.

275, 34 Pac. 937; *McKee v. Chicago, R. I. & P. R. Co.* 83 Iowa, 616, 13 L. R. A. 817, 50 N. W. 209; *Clark v. St. Paul & S. C. R. Co.* 28 Minn. 128, 9 N. W. 581; *Raines v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, 36 Am. Rep. 459; *Evansville & R. R. Co. v. Henderson*, 142 Ind. 596, 42 N. E. 216; *Pennsylvania R. Co. v. Finney*, 145 Ind. 551, 42 N. E. 816; *Jolly v. Detroit, L. & N. R. Co.* 93 Mich. 370, 53 N. W. 526; *Missouri P. R. Co. v. Somers*, 71 Tex. 700, 9 S. W. 741; *Platt v. Chicago, St. P. M. & O. R. Co.* 84 Iowa, 694, 51 N. W. 254; *Baylor v. Delaware, L. & W. R. Co.* 40 N. J. L. 23, 29 Am. Rep. 208; *Clark v. Richmond & D. R. Co.* 78 Va. 709, 49 Am. Rep. 394; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291; *Hughes v. Cincinnati, N. O. & T. P. R. Co.* 91 Ky. 526, 16 S. W. 275; *Sheeler v. Chesapeake & O. R. Co.* 81 Va. 188, 59 Am. Rep. 654; *Illick v. Flint & P. M. R. Co.* 67 Mich. 632, 35 N. W. 708; *Lee v. Central R. & Bkg. Co.* 86 Ga. 231, 12 S. E. 307; *Allen v. Burlington, C. R. & N. R. Co.* 64 Iowa, 94, 19 N. W. 807; *Wolf v. East Tennessee, V. & G. R. Co.* 88 Ga. 210, 14 S. E. 199; *Perigo v. Chicago, R. I. & P. R. Co.* 52 Iowa, 276, 3 N. W. 43.

Where the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence or want of care and caution on his part the misfortune would not have happened, he cannot recover.

Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506.

Prior negligence could not be in any case inferred from subsequent changes or improvements.

Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591.

It is inadmissible to show the conditions after the accident, unless it is shown that no change has occurred in the meantime.

Green v. Ashland Water Co. 101 Wis. 258, 43 L. R. A. 117, 77 N. W. 722; *The Edwin*, 87 Fed. 540. See Greenl. Ev. 16th ed. § 14.

Testimony showing repairs after the accident is not allowable, because it is apt to be taken in an improper manner by the jury, and is likely to be construed by them into an admission of negligence.

Greenl. Ev. 16th ed. § 14; *Abbott*, Trial Pr. p. 36; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Payne v. Troy & B. R. Co.* 9 Hun, 526; *Barber Asphalt Pav. Co. v. Odasz*, 8 C. C. A. 473, 20 U. S. App. 326, 60 Fed. 71.

If such is the tendency of this character of evidence, a sense of fairness toward the defendant in certain cases demands the exclusion of all mention of subsequent repairs

for what purpose soever it may be introduced.

Clapper v. Waterford, 131 N. Y. 382, 30 N. E. 240; *Stone v. Poland*, 81 Hun, 132, 30 N. Y. Supp. 748; *Anson v. Evans*, 19 Colo. 274, 35 Pac. 47; *Fulton Iron & Engine Works v. Kimball Turp.* 52 Mich. 146, 17 N. W. 733; *Lombar v. East Tawas*, 86 Mich. 17, 48 N. W. 947; *Alcorn v. Chicago & A. R. Co.* 108 Mo. 91, 18 S. W. 188; *Fordyce v. Chancy*, 2 Tex. Civ. App. 24, 21 S. W. 182; *Hammargren v. St. Paul*, 67 Minn. 6, 69 N. W. 470; *Bell v. Washington Cedar Shingle Co.* 8 Wash. 27, 35 Pac. 405; *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548; *Shimmers v. Locks & Canals*, 154 Mass. 168, 12 L. R. A. 554, 28 N. E. 10; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 423; *Nalley v. Hartford Carpet Co.* 51 Conn. 526, 50 Am. Rep. 47.

Where incompetent evidence has been introduced, and it cannot be told how much it prejudices the defendant, the judgment should be reversed.

Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591.

Mr. G. T. Fitzhugh submitted the cause for defendants in error. *Mr. J. H. Watson* was with him on the brief:

Where the evidence is so conclusive against defendant on the question of its negligence that the jury could not reasonably find to the contrary, the court may so instruct them, leaving them to determine the plaintiff's negligence where the evidence is conflicting.

Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569.

On the question of assumed risk, the circuit court went further in its charge in favor of the plaintiff in error than the law warranted.

Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *Gusman v. Caffery Cent. Refinery & R. Co.* 49 La. Ann. 1264, 22 So. 742; *Chicago & A. R. Co. v. Stevens*, 189 Ill. 226, 59 N. E. 577; *Atlanta & C. A. L. R. Co. v. Woodruff*, 66 Ga. 707; *Brown v. New York C. & H. R. R. Co.* 166 N. Y. 626, 60 N. E. 1107; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Houston & T. R. Co. v. Oram*, 49 Tex. 341; *Boss v. Northern P. R. Co.* 2 N. D. 128, 49 N. W. 655.

The dangers which needlessly imperil human life, and which can be removed at little cost, are not those necessarily incident to the operation of a railroad, but are those which it is the duty of the railroad to remove; and, as long as the needless peril is maintained, the employer is guilty of culpable negligence.

Dorsey v. Phillips & C. Constr. Co. 42 Wis. 583.

Where the injury results in instant death, the law, out of regard to the instinct of self-preservation, presumes that the deceased was at the time in the exercise of due care; and this presumption is not overthrown by the mere fact of injury. The burden rests upon the defendant to rebut this presumption.

Flynn v. Kansas City, St. J. & C. B. R. Co. 78 Mo. 195, 47 Am. Rep. 99.

Even if the deceased had actually known that this spout was hanging in a dangerous position, but forgot this fact while absorbed in the discharge of his duties, it would still be for the jury to say whether, under all the circumstances, he was guilty of contributory negligence.

Mason & O. R. Co. v. Yockey, 43 C. C. A. 228, 103 Fed. 265.

Contributory negligence is never to be assumed or presumed.

Southern R. Co. v. Duvall, 22 Ky. L. Rep. 56, 56 S. W. 988. See also *Mexican C. R. Co. v. Eckmann*, 42 C. C. A. 344, 102 Fed. 274; *Wood v. Louisville & N. R. Co.* 88 Fed. 44, 11 Am. & Eng. R. Cas. N. S. 525.

There are a number of well-recognized exceptions to the general rule, that evidence of subsequent precautions and repairs is not admissible; as, for instance, where it directly tends to show conditions existing at the time of the injuries, or is in rebuttal of the testimony of defendant's witnesses, or properly drawn out in their cross-examination.

Watson, Damages for Personal Injuries, p. 767; *Shimmers v. Locks & Canals*, 154 Mass. 168, 12 L. R. A. 554, 28 N. E. 10; *Christian v. Minneapolis*, 69 Minn. 530, 72 N. W. 815; *Lake Eric & W. R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660; *Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33.

A witness who has testified to the proper condition of machinery at the time of an accident may properly be asked to explain why, if this were true, repairs were made soon thereafter.

Bevier v. Delaware & H. Canal Co. 13 Hun, 254.

So, where it was alleged by the plaintiff, and confirmed by his witnesses, that there was a depression in a railroad track, at a particular point at the juncture of two rails, which was denied by defendant's witnesses; and evidence was offered that, shortly after the injury, the defendant's workmen raised the point in question up to a level,—such evidence was held competent.

Watson, Personal Injuries, p. 770; *Kuhns v. Wisconsin, I. & N. R. Co.* 76 Iowa, 67, 40 N. W. 92.

For the purpose of showing that an ob-

struction in a street was unnecessary, it has been held proper to show its removal after the accident.

Dillon v. Raleigh, 124 N. C. 184, 32 S. E. 548.

*Mr. Justice Day delivered the opinion of [65] the court:

This was an action to recover for the death, by wrongful act, of John I. McDade, an employee of the Choctaw, Oklahoma, & Gulf Railroad Company. The plaintiff recovered a judgment in the circuit court, which was affirmed in the court of appeals. 50 C. C. A. 591, 112 Fed. 888.

There was evidence tending to show that McDade, a brakeman in the employ of the company, was killed on the night of August 19, 1900, while engaged in the discharge of his duties as head brakeman on a car in one of the company's trains. McDade was at his post of duty, and, when last seen, was transmitting a signal from the conductor to the engineer to run past the station of Goodwin, Arkansas, which the train was then approaching. The train passed Goodwin at a rate of from 20 to 25 miles an hour. At Goodwin there was a water tank, having attached thereto an iron spout, which, when not in use, hung at an angle from the side of the tank. Shortly after passing Goodwin, McDade was missed from the train, and, upon search being instituted, his lantern was found near the place on the car where he was at the time of giving the signal. His body was found at a distance of about six hundred and seventy-five feet beyond the Goodwin tank. There was also testimony tending to show, from the location of the waterspout and the injuries upon the head and person of McDade, that he was killed as a result of being struck by the overhanging spout. The car upon which McDade was engaged at the time of the injury was a furniture car, wider and higher than the average car, and of such size as to make it highly dangerous to be on top of it at the place it was necessary to be when giving signals, in view of the fact that the spout cleared the car by less than the height of a man above the car when in position to perform the duties required of him.

There was no eyewitness as to the exact manner of the injury to McDade, and it is urged that the court below should have taken the case from the jury because of the lack of testimony *upon this point. It was [66] left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration, and the court distinctly charged that, unless satisfied of this, there could be no verdict against the railroad company. While the evidence was circumstantial, it was ample,

in our opinion, to warrant the submission of this question to the jury under the instructions given. Furniture cars like the one on which McDade was riding were received and transported over this road. There is testimony tending to show that a proper construction of the tank and appliances required the spout to hang vertically when not in use, and other testimony to the effect that, when hung in this manner, it would be difficult, if not impossible, for the fireman to pull down the spout in taking water, and that to hang it at an angle is, at least, a more convenient method of adjustment. Be this as it may, the testimony makes it clear that in the proper construction of this appliance there is no necessity of bringing it so near to the car as to endanger brakemen working thereon. Whether hung at an angle or not, it can be so constructed as to leave such space between it and the top of the car as to make it entirely safe for brakemen in passing. The testimony makes it equally clear that, when on the furniture car, McDade, sitting at his post, would be likely to be struck by the spout in passing. It is undoubtedly true that many duties required of employees in the transaction of the business to be carried on by a railroad company are necessarily attended with danger, and can only be prosecuted by means which are hazardous and dangerous to those who see fit to enter into such employment. Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employee should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer. *Kelleher v. Milwaukee & N. R. Co.* 80 Wis. 584, 50 N. W. 942; *Georgia P. R. Co. v. Davis*, 92 Ala. 300, 9 So. 252;

[67] 1 Shearm. & *Redf. Neg. 5th ed. § 201, and cases cited.

We agree with the circuit court of appeals in affirming the instructions upon this subject given by Judge Hammond to the jury, in which he said: "It is so simple a task, one so devoid of all exigencies of expense, necessity, or convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence."

It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use ordinary care to provide properly constructed roadbed, structures, and track to be used in the operation of the road. *Union P.*

R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618. The spout might readily have been so constructed and hung as to be safe. As it was maintained, it was a constant menace to the lives and limbs of employees whose duties required them, by night and day, to pass the structure. It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with the judgments in the courts below that its maintenance under the circumstances was negligence upon the part of the railroad company. The court, having left to the jury to find the fact as to whether McDade was killed by the obstruction, did not err in giving instruction that the negligent manner in which the waterspout was maintained was, of itself, a conviction of negligence.

The court left to the jury the question of the assumption of risk upon the part of McDade, with instructions which did not permit of recovery if he either knew of the danger of collision with the waterspout, or, by the observance of ordinary care upon his part, ought to have known of it. The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; **Northern P. R.* [68] *Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978. The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than

the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee. *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777.

There was testimony tending to show that McDade had been over the part of the road where the Goodwin tank was situated only a few times, and that part of the trips were made in the night season, and also, that the furniture cars were of unusual height as compared with those generally used in the transaction of the business of the company. Neither the assumption of risk nor the contributory negligence of the plaintiff below was so plainly evident as to require the jury [69] to be instructed *to find against the plaintiff, but, under the facts disclosed, these matters were properly left to the determination of the jury.

Numerous exceptions were taken to the refusal of the court to charge in certain respects, but, as the charge given was proper and pertinent to the facts and sufficiently comprehensive, it was not error to refuse such requests. The assignments of error as to the admission of testimony were nearly all based upon exceptions, general in their character, and, under the well-settled rule, not reviewable here. *Burton v. Driggs*, 20 Wall. 125, 22 L. ed. 299; *Noonan v. Caldonia Min. Co.* 121 U. S. 400, 30 L. ed. 1063, 7 Sup. Ct. Rep. 911; *District of Columbia v. Woodbury*, 136 U. S. 462, 34 L. ed. 476, 10 Sup. Ct. Rep. 990.

The one of most gravity is as to the admission of testimony to show that after the accident the waterspout at Goodwin was reconstructed so as to be placed at a point farther removed from passing trains. Evidence having been introduced by the railroad company to show by measurements that the waterspout did not constitute danger to brakemen on passing trains, the court permitted plaintiff below to show that changes had been made which might have an effect upon the subsequent measurements offered in evidence. The jury were told that nothing could be inferred against the defendant company by reason of the fact that, after the accident, such reconstruction of the spout was made, and that such change had no other bearing upon the issues of the case than to enable the jury to ascertain the value of the measurements offered in evidence.

We find no error in the judgment of the Circuit Court of Appeals, and it is affirmed.
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*MARC HUBBERT, *Petitioner*,

[70]

v.

CAMPBELLVILLE LUMBER COMPANY.

(See S. C. Reporter's ed. 70-77.)

Bonds—of county—remedies for collection.

The omission from county bonds purporting to be issued under the authority of Ky. act of March 18, 1878, of the stipulation respecting the remedies for collection which was required to appear on their face by the amendatory act of February 27, 1882, coupled with their failure to contain any reference to the later statute, deprives the holder of the extraordinary remedies for collection not provided for by the original, and only granted in the amendatory, act.

[No. 31.]

Argued October 20, 1903. Decided November 9, 1903.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment reversing a judgment of the Circuit Court for the District of Kentucky, awarding to the holder of county bonds the benefit of the extraordinary remedies for collection granted by a statute amending the act under which the bonds purported to be issued. *Affirmed.*

See same case below, 50 C. C. A. 435, 112 Fed. 718.

Statement by Mr. Justice **Brewer**:

On March 18, 1878, the general assembly of Kentucky passed an act authorizing the county of Taylor to compromise its debts and issue new bonds of the county not exceeding in amount \$125,000, and also authorizing the circuit court, in case of a judgment on any of such bonds and a refusal by the county within thirty days to levy a tax sufficient to pay it, to make an order based on the last previous assessment, levying a tax and appointing a collector. On February 27, 1882, an amendatory act was passed increasing the issuable amount to \$150,000, providing that any judgment rendered thereon should constitute a lien on all the real and personal property in the county subject to taxation, and also that, if the court rendering the judgment should be of opinion that such serious obstruction was likely to be offered as would materially delay the enforcement of the judgment, it should refer the matter to a commissioner, with instructions to ascertain and report the amount proportionally necessary for the holders or owners of any such property to pay in order to raise *promptly a sum sufficient to pay the judgment. Personal judgments were authorized against the parties

found to be the owners of property within the limits of the county, to be enforced by executions as other personal judgments. Section 10 reads as follows:

"Sec. 10. The bonds to be issued under the act to which this is an amendment shall, on their face, stipulate that the holders of any of them, or any coupon thereof, shall be entitled to the remedies for the collection of the same herein, and in the act to which this is an amendment, provided for."

Bonds were issued by the county, some of which passed into the possession of the plaintiff, who brought suit and obtained judgment against the county in the circuit court of the United States for the district of Kentucky.

The bonds did not contain the stipulation referred to in § 10, but did contain the following recital:

"This is one of an issue amounting in all to \$125,000, authorized by an act of the general assembly of the commonwealth of Kentucky, approved March 18, 1878."

Each bond also bore the following indorsement:

"Issued by authority of an act of the general assembly of the state of Kentucky, approved March 18, 1878."

On application for further relief the circuit court awarded to the plaintiff the benefit of the special provisions of the amendatory act of 1882, but the circuit court of appeals held that he was not entitled to them. 50 C. C. A. 435, 112 Fed. 718. Thereupon the case was brought here on certiorari. 186 U. S. 485, 46 L. ed. 1260, 23 Sup. Ct. Rep. 856.

Mr. W. O. Harris argued the cause and filed a brief for petitioner:

When the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be, and generally would be, injuriously affected, they are not directory, but mandatory.

French v. Edwards, 13 Wall. 506, 20 L. ed. 702; *Lyon v. Alley*, 130 U. S. 185, 32 L. ed. 902, 9 Sup. Ct. Rep. 480.

A statute is mandatory if its literal observance might afford substantial protection to the party complaining.

Erhardt v. Schroeder, 155 U. S. 129, 39 L. ed. 96, 15 Sup. Ct. Rep. 45.

The Federal reports furnish several precedents for such a statute.

Lee County v. Rogers, 7 Wall. 175, 19 L. ed. 162; *Thompson v. Allen County*, 115 U. S. 559, 29 L. ed. 475, 6 Sup. Ct. Rep. 410; *Stansell v. Levee Board*, 13 Fed. 846.

The remedy afforded by the act was a part of the contract, and was beyond the reach of repeal.

Seibert v. Lewis, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; *Seibert v. United States*, 129 U. S. 192, 32 L. ed. 645, 9 Sup. Ct. Rep. 271.

Mr. Ernest Macpherson argued the cause and filed a brief for respondent:

The purchaser of municipal securities is bound by the statute therein recited, and may not invoke the aid of another statute not referred to in his bond without bringing himself within its terms.

McClure v. Oxford Twp. 94 U. S. 429, 24 L. ed. 129; *Crow v. Oxford Twp.* 119 U. S. 215, 30 L. ed. 388, 7 Sup. Ct. Rep. 180; *Gilson v. Dayton*, 123 U. S. 59, 31 L. ed. 74, 8 Sup. Ct. Rep. 66.

Mr. Justice Brewer delivered the opinion of the court:

Conceding, without deciding, that both acts of the general assembly of Kentucky were in all respects constitutional and valid, and that the proceedings of the circuit court were in strict compliance therewith, we notice only the single question of the effect of the omission from the bonds of the stipulation required by § 10, as well as of any reference to the amendatory act, and are of opinion that the omission is fatal to the special relief provided for in that act.

There is nothing in the nature of things nor in the terms of the two acts which prevents the parties—the county and the recipient of the bonds—from contracting for solely the remedies provided in the original act. The later act provided remedies not in lieu of, but in addition to, those given by the former. There is nothing on the face of the bonds to indicate that either of the parties had in contemplation the provisions of the amendatory act. On the contrary, the bonds in terms state that they are of an issue amounting to \$125,000, authorized by the original act. As the amendatory act authorized the issue of \$150,000, and as no reference is made to that act, the language of the bond plainly excludes it as *the basis of [76] authority, and therefore as plainly implies that the remedies by that act were not contracted for by the county.

We need not stop to inquire what would be the effect of a recital on the face of the bonds that they were issued under the authority of the amendatory act, or whether such recital would obviate the necessity of complying with the provisions of § 10, for there is no reference to such act, and the bonds on their face do not purport to be issued under its authority. So that the question is whether the plaintiff, in the absence of any such stipulation as is required by § 10, without any reference in the bonds to the amendatory act, and when they purport to be issued under the authority of the orig-

inal act, can avail himself of the remedies not provided for by the original, and only granted in the amendatory, act.

Much is said in the opinion of the court of appeals as well as in the briefs of counsel as to the difference between a directory and a mandatory provision,—the plaintiff claiming that § 10 is simply directory, while the defendant insists that it is mandatory. In that opinion these authorities are cited:

“By directory provisions,” says Judge Cooley, “is meant that they are to be considered as giving directions which ought to be followed, but not so limiting the power in respect to which the directions are given that it cannot be effectually exercised without observing them.” Cooley, Const. Lim. *74.

“Lord Penzance, in *Howard v. Bodington*, L. R. 2. P. Div. 211, after commenting on the difficulty of gathering any rule from the cases, said: ‘I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the enactment is what is called “imperative” or “directory.”’”

Without attempting to state any general [77] rule, if indeed one *such exists, for distinguishing between a directory and a mandatory provision, it is sufficient to say that when a statute provides an extraordinary remedy to the holder of bonds containing an express stipulation that he “shall be entitled” to that remedy, it should not be adjudged that he is also entitled to it in the absence of such stipulation, for it is a reasonable presumption that if the county, in issuing the bonds, intended to contract for such extraordinary remedy, it would have complied with the express provision of the statute, and incorporated the stipulation into the bonds. That the authority in this amendatory act to proceed directly against the several owners of property in the county is not an ordinary remedy for the collection of bonds is true of the state of Kentucky and generally of the states of the Union. Indeed, the original act gave something more than the ordinary remedy, and when the amendatory act provides for what must be conceded is, under the circumstances, an extraordinary remedy, it would seem reasonable to hold that all of the provisions of the statute which grant such remedy should be complied with before it can be considered as contracted for.

We are of opinion that the Court of Ap-

peals did not err, and *its judgment is affirmed.*

Mr. Justice **White** and Mr. Justice **McKenna** concur in the result.

Mr. Justice **Harlan**, Mr. Justice **Brown**, and Mr. Justice **Peckham** dissent.

*ANTOINETTE B. KINNEY and Clesson S. [78]
Kinney, *Appts.*,
v.

COLUMBIA SAVINGS & LOAN ASSOCIATION.

(See S. C. Reporter's ed. 78-84.)

*Removal of causes—diverse citizenship—
amendment of petition.*

Leave to amend a petition for removal to a Federal court for diverse citizenship so as to show the citizenship of the plaintiffs may, in the exercise of the general power of Federal courts, under U. S. Rev. Stat. §§ 948, 954 (U. S. Comp. Stat. 1901, pp. 695, 696), to allow amendments of process, be granted after the filing of the removal papers, but before any action taken in the Federal court on the merits, where there was a general averment of diverse citizenship, and the citizenship of defendant had been clearly stated, and it appeared from the face of the trust deed, which was the subject-matter in controversy, that the plaintiffs were, at the time of its execution, residents of another state.

[No. 102.]

Submitted October 13, 1903. Decided November 9, 1903.

APPEAL from the Circuit Court of the United States for the District of Utah to review a decree for defendant in a suit which had been removed to that court from the District Court of Salt Lake County. *Affirmed.*

See same case below, 113 Fed. 359.

Statement by Mr. Justice **Brewer**:

On August 25, 1899, appellants commenced this suit in the district court of Salt Lake county, Utah. By it plaintiffs sought an accounting and the cancelation of a deed of trust executed by them to a trustee for the benefit of the defendant. The complaint

NOTE.—On removal of cause generally—see notes to *Whelan v. New York*, L. E. & W. R. Co. 1 L. R. A. 65; *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 346; and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

On removal of causes for diverse citizenship—see notes to *Seddon v. Virginia*, T. & C. Steel & I. Co. 1 L. R. A. 108; and *Meyer v. Delaware R. Constr. Co.* 25 L. ed. U. S. 593.

As to amendments to supply jurisdictional defects—see note to *Carnegie v. Hulbert*, 16 C. C. A. 508.

alleged that "the defendant was and now is a corporation organized and existing under the laws of the state of Colorado." The deed of trust (copied in the complaint) was executed November 22, 1890, and purports to be "between Antoinette B. Kinney and Clesson S. Kinney, her husband, of the county of Salt Lake and territory of Utah, parties of the first part; and Clyde J. Eastman" named as trustee. It was executed before a notary public in Salt Lake county.

On September 2, 1899, the defendant filed a petition and bond for removal to the circuit court of the United States for the district of Utah. That petition alleged:

"Your petitioner, The Columbia Savings & Loan Association, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of \$2000.

[79] *"That the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above-entitled suit, was, at the time of the commencement of the suit, and still is, a resident and a citizen of the city of Denver and state of Colorado."

On November 28, 1899, the plaintiffs filed a motion to remand the cause to the state court on the ground, that "the amount or matter in dispute therein does not, and at the time said cause was removed from the state court, did not, exceed the sum or value of \$2,000, exclusive of interest and cost." On the same day the defendant filed in the circuit court an answer and cross complaint, by the latter seeking a foreclosure of the trust deed. In the cross complaint it alleged "that it is a corporation, organized and existing under the laws of the state of Colorado, and is a citizen of said state, and that complainants herein are citizens and residents of Salt Lake City, state of Utah."

On December 30, 1899, the plaintiffs gave notice of a motion to amend their motion to remand, by adding as a further ground "that the diverse citizenship of the parties at the time of the commencement of the suit, and at the time of the removal of said cause from the state court, does not appear upon the record."

On January 2, 1900, the defendant gave notice of a motion to amend the paragraph heretofore quoted from its cross complaint to read as follows:

"First. That your orator, at the time of the commencement of this suit, was and ever since then, and now is, a corporation organized and existing under and by virtue of the laws of the state of Colorado, and a citizen and resident of the city of Denver and state of Colorado, and that the said plaintiffs, Antoinette B. Kinney and Clesson S. Kin-

ney, at the time of the commencement of this suit, were, and ever since have been, and still are, citizens of the state of Utah, and residents thereof, residing at the city of Salt Lake in the said state of Utah."

*And also notice of a motion to amend [80] the petition for removal by adding this allegation:

"That the plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, and each of them, were at the time of the commencement of this suit, and still are, citizens and residents of the city of Salt Lake and state of Utah."

On January 6, 1900, the motion to remand was denied, and leave given to amend the petition for removal and the cross complaint. Subsequently the case went to trial in the circuit court, and a decree was rendered in favor of the defendant for the recovery of \$4,003.45, and the foreclosure of the trust deed. From such decree an appeal was allowed to this court upon the single question of jurisdiction.

Messrs. Charles S. Varian and Franklin S. Richards submitted the cause for appellants:

Amendments may be allowed by the circuit court when, and when only, the petition for removal, as presented to the state court, upon its face, in connection with the remainder of the record made at that time, shows sufficient ground for removal.

Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Jackson v. Allen*, 132 U. S. 27, 33 L. ed. 249, 10 Sup. Ct. Rep. 9; *Martin v. Baltimore & O. R. Co.* 151 U. S. 691, 38 L. ed. 318, 14 Sup. Ct. Rep. 533; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 101, 42 L. ed. 676, 18 Sup. Ct. Rep. 264.

Mr. J. Norman submitted the cause for appellee:

The petition having been founded upon the diversity of the citizenship of plaintiffs and defendant, and that fact being stated, sufficient was averred to give the Federal court jurisdiction, and to authorize an amendment to supply the formal and particular averments as to the citizenship of the plaintiffs.

Stadleman v. White Line Towing Co. 92 Fed. 209; *Johnson v. F. C. Austin Mfg. Co.* 76 Fed. 616.

If, upon the face of the petition and the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the circuit court of the United States by leave of that court by stating more fully and distinctly the facts which support those grounds.

Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, 38 L. ed.

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311, 14 Sup. Ct. Rep. 533; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

And where the removal is upon a single ground, *e. g.*, diverse citizenship, the right of amendment goes for nothing, unless a necessary and material fact not appearing in the record may be supplied.

Mr. Justice **Brewer** delivered the opinion of the court:

Had the Federal court the power to permit the amendment of the petition for removal? The suit was removable. Diverse citizenship in fact existed and the amount in controversy was over \$2,000. The right to remove existed, but the petition for removal was defective. If it had been sufficient there would have been no need of amendment. The question is whether it was so defective as to be incurable. In other words, was the case one in which the court had power to permit the facts to be stated in order to secure to the defendant the removal to which it had a right? By § 1 of chap. 866 (25 Stat. at L. 434, U. S. Comp. Stat. 1901, pp. 508, 582), jurisdiction is given to the circuit courts of all suits of a civil nature "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000," and "in which there shall be a controversy between citizens of different states." By § 2 of the same act any such suit pending in a state court may be removed into the circuit court of the United

[81] States by the defendant or defendants "if nonresidents. The petition for removal, which was duly verified, alleged the existence of just such a suit. True, this court, construing the statute, has held that the difference of citizenship must exist both at the commencement of the suit and at the filing of the petition for removal. *Gibson v. Bruce*, 108 U. S. 561, 27 L. ed. 825, 2 Sup. Ct. Rep. 873; *Akers v. Akers*, 117 U. S. 197, 29 L. ed. 888, 6 Sup. Ct. Rep. 669; *Stevens v. Nichols*, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518. But this does not change the fact that the language of the petition follows that of the statute in stating the existence of that which the statute makes the basis of a right of removal.

It is also true that when a record presented to this court fails to show a diversity of citizenship, both when the suit was commenced and when the petition for removal was filed, a reversal has been ordered and the case sent back to the circuit court, with directions to remand to the state court. *Stevens v. Nichols*, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518; *Orchore v. Ohio & M. R. Co.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Jackson v. Allen*, 132 U. S. 27, 33 L. ed. 249, 10 Sup. Ct. Rep. 9; *La* 191 U. S.

Confiance Compagnie d'Assurance Contre l'Incendie v. Hall, 137 U. S. 61, 34 L. ed. 573, 11 Sup. Ct. Rep. 5; *Kellam v. Keith*, 144 U. S. 568, 36 L. ed. 544, 12 Sup. Ct. Rep. 922; *Mattingly v. Northwestern Virginia R. Co.* 158 U. S. 53, 39 L. ed. 894, 15 Sup. Ct. Rep. 725. In none of these cases does it appear that the defect was noticed in the circuit court, and in some not noticed by the parties after the case had reached this court, but action was taken here by virtue of the duty resting on all Federal courts not to entertain jurisdiction if it does not affirmatively appear. It is also true that in *Orchore v. Ohio & M. R. Co.* 33 L. ed. 144, 9 Sup. Ct. Rep. 692, this court was asked to grant leave to the circuit court to permit an amendment of the defective removal proceedings, and the application was denied, but that was after the case had been finally disposed of in the circuit court, and the insufficiency of the removal papers had been declared by this. Here the application was made shortly after the filing of the removal papers, and before any action had been taken in the circuit court. The amendment was allowed by the circuit court, and the question now to determine is whether that court had power to permit such amendment. It is frequently stated that amendments are within the discretion of the trial court, and that, unless it appears that the discretion has been abused, no error is shown.

*A petition and bond for removal are in [82] the nature of process. They constitute the process by which the case is transferred from the state to the Federal court. Congress has made ample provision for the amendment of process. Section 948 (U. S. Comp. Stat. 1901, p. 695), reads:

"Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues."

And by § 954 (U. S. Comp. Stat. 1901, p. 695), it is provided that—

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form, . . . and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The question of the power of amendment has been decided by this court in several cases. In *Parker v. Overman*, 18 How. 137, 15 L. ed. 318, a petition for removal was de-

fective in that it simply alleged residence, and not citizenship, but was corrected, over objection, by amendment in the Federal court, and, as said by Mr. Justice Grier, (p. 141, L. ed. p. 319):

"In the petition to remove this case from the state court there was not a proper averment as to the citizenship of the plaintiff in error. It alleged that Parker 'resided' in Tennessee and White in Maryland. 'Citizenship' and 'residence' are not synonymous terms; but as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the case."

In *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030, the application for removal was based on two grounds: One, diverse citizenship, and the other, the existence of a Federal question. The allegation in respect to the Federal question was general, and did not state the facts. After the case had been entered in the Federal court, an answer was filed, stating more [83] fully the facts "upon which the existence of a Federal question was based. Mr. Chief Justice Waite, speaking for the court, said, in reference to this answer:

"The answer was filed, which, for the purposes of jurisdiction, may fairly be treated as an amendment to the petition for removal, setting forth the facts from which the conclusions there stated were drawn. As an amendment, the answer was germane to the petition, and did no more than set forth in proper form what had been imperfectly stated."

It is true that this court, on examination of the record, found that no Federal question was even then disclosed, but that does not alter the ruling that an amendment was proper showing the facts upon which the general averment of a Federal question was based. *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 285, 27 L. ed. 932, 935, 3 Sup. Ct. Rep. 207, seems to recognize the right of amendment. The same may be said of *Thayer v. Life Asso. of America*, 112 U. S. 717, 720, 28 L. ed. 864, 866, 5 Sup. Ct. Rep. 355. *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057, was a suit originally commenced in the United States circuit court. It failed to allege diverse citizenship, but no objection was made in the court below on that ground, and while this court reversed the judgment, it sent the case back with leave to amend the petition in respect to the allegation of citizenship. The case relied upon in the opinion was *Morgan v. Gay*, 19 Wall. 81, 22 L. ed. 100, in which the same ruling had been made. These cases recognize the power of the circuit court to permit amendment of pleadings to show diverse citizen-

ship, and of removal proceedings where there is a technical defect and there are averments sufficient to show jurisdiction.

The facts here disclosed clearly show a case in which an amendment was rightfully made. The citizenship of the defendant, both at the time the suit was commenced and when the petition for removal was filed, was clearly and positively stated. There was a general averment that it was a case of diverse citizenship, and, therefore, one in which, by the statute, the party was entitled to a removal. The trust deed, which was the subject-matter of the controversy, showed upon its face that the plaintiffs were of Salt Lake county, and was executed before a notary public in that county. The continuance *of that situation is to be presumed. [84] The first action taken by the plaintiffs after the removal was a motion to remand, based not on account of any defect in the averments of citizenship, but simply in respect to the amount in controversy. A month after filing this motion they sought to amend it by including an objection on account of a defect in the allegations of diverse citizenship, and immediately thereafter the defendant moved to amend the petition for removal so as to make it sufficient in that respect. All these things took place before any action had been had in the Federal court on the merits of the case. It may also be noticed that the state court apparently recognized the removal proceedings as sufficient, for it took no further steps in the case, and hence we need not inquire what would have been the effect of any action taken by it in disregard of the removal. Clearly, the plaintiffs were not prejudiced. The case was one which the appellee had a right to remove, and nothing had been done to prejudice the rights of the plaintiffs before the petition for removal was perfected. It seems to us, therefore, that this is a case in which the amendment was properly allowed.

The decree of the Circuit Court will be affirmed.

UNITED STATES, Plff. in Err.,
v.

DENVER & RIO GRANDE RAILROAD
COMPANY.

(See S. C. Reporter's ed. 84-93.)

Evidence—trover—prima facie case—burden of proof—error to territorial supreme court—extent of review.

1. A prima facie case on the part of the

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

United States in an action of trover against a railroad company for the value of timber cut upon the public domain is made out by proof of the government ownership of the lands, the cutting and asportation of the timber, its value, and subsequent possession by the railroad company, although special acts of Congress exist, conferring authority on such company to take timber from the public domain for certain specified purposes.

2. The burden of proving the purpose for which timber was taken from the public domain by a lumber company acting as the agent of a railroad company rests in the first instance on the railroad company, in an action of trover brought by the United States against that company for the value of the timber, where such company relies upon the authority conferred by the acts of Congress of June 8, 1872 (17 Stat. at L. 339, chap. 354), and March 3, 1877 (19 Stat. at L. 405, chap. 126), to take from the public lands the timber required for the construction and repair of its railway and telegraph line.
3. The action of a territorial supreme court on both the first and second writs of error in a case may be revised by the Supreme Court of the United States on writ of error, although the lower court considered itself bound by its decision on the first writ of error as the law of the case, where its judgment upon such writ lacked the requisite finality to warrant a review in the higher court.

[No. 20.]

Argued October 14, 1903. Decided November 9, 1903.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court in favor of defendant in an action of trover brought by the United States against a railroad company for the value of timber taken from the public domain. *Reversed* and remanded for a new trial.

See same case below, 9 N. M. 382, 54 Pac. 241, and 66 Pac. 550.

Statement by Mr. Justice **Brown**:

This was an action of trover brought by the United States against the railroad company for the value of certain logs cut upon the plaintiff's lands. The declaration averred simply that the "defendant converted to its own use plaintiff's goods; that is to say, logs, lumber, and timbers, . . . manufactured out of trees theretofore standing and growing upon certain lands of the plaintiff," therein described.

The defendant pleaded not guilty, issue was joined, the case tried before a jury, which was instructed to return a verdict for the defendant.

The case was submitted upon an agreed statement of facts, which showed that the New Mexico Lumber Company cut from the **191 U. S.**

lands described in the declaration 2,100,000 feet of lumber, which was furnished to and received by the railroad company for its use.

Upon these facts, and proof of the ownership of the lands, and of the value of the lumber cut, the plaintiff rested.

The defendant also offered an agreed statement of facts, in which it appeared that it was the successor of the Denver and Rio Grande Railway Company, and that by act of Congress of June 8, 1872 (17 Stat. at L. 339, chap. 354) and amendatory act of March 3, 1877 (19 Stat. at L. 405, chap. 126), "the right of way over the public domain . . . and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line," was granted to the Rio Grande Railway Company, of which the defendant was entitled to the benefit. The amendatory act of 1897 merely extended the time for the completion of the railway from five to ten years, and is not material to this controversy. Defendant also offered testimony showing the appointment of the New Mexico Lumber Company as its agent for the cutting of such timber for the purposes mentioned, and that the lumber delivered to the railroad company was furnished upon specific orders given to *the lumber company as its agents. There[86] were other facts included in the statement which are immaterial upon this writ of error.

No testimony was offered by either party tending to show whether the timber cut from the lands and received by the defendant was required for the construction and repair of its railway and telegraph line.

The jury, under instructions of the court, returned a verdict of not guilty, and judgment was entered for the defendant, which was affirmed by the supreme court. 66 Pac. 550.

The case was first tried in 1897, a verdict for plaintiffs returned, the case carried to the supreme court, which reversed the judgment of the court below upon the ground of erroneous instructions with respect to the burden of proof. 9 N. M. 382, 54 Pac. 241.

Mr. Marsden C. Burch argued the cause and filed a brief for plaintiff in error:

The court erred in refusing to instruct the jury to return a verdict for plaintiff.

E. E. Bolles Wooden-ware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398.

The court erred in holding defendant's

plea sufficient to admit of a special statutory defense.

1 Chitty, Pl. p. 655; Stephen, Pl. ¶ 347; 1 Enc. Pl. & Pr. 845, 848; *Young v. Cooper*, 6 Exch. 259; *Mack v. Lancashire Ins. Co.* 1 McCrary, 20, 1 Fed. 193; *Walker v. Flint*, 3 McCrary, 507, 11 Fed. 31; *Kellogg v. New Britain*, 62 Conn. 233, 24 Atl. 996; *Lentz v. Victor*, 17 Cal. 272; *Pico v. Colimas*, 32 Cal. 578; *Alford v. Barnum*, 45 Cal. 482; *Carter v. Wallace*, 2 Tex. 206; *Klais v. Pulford*, 36 Wis. 587; *Snowden v. Wilas*, 19 Ind. 11, 81 Am. Dec. 370; *Chase v. Long*, 44 Ind. 427; *Clifford v. Dam*, 81 N. Y. 53.

The court erred in holding that the burden of proof was upon the plaintiff to show that the timber was used for purposes not contemplated by the act.

Starkie, Ev. ¶ 509; *Com. v. Towle*, 138 Mass. 490; *Stone v. United States*, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 667; *Sclma, R. & D. R. Co. v. United States*, 139 U. S. 560, 35 L. ed. 267, 11 Sup. Ct. Rep. 638; *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210; *Northern P. R. Co. v. Lewis*, 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831.

Mr. Joel F. Vaile argued the cause, and, with Messrs. Edward O. Wolcott, Charles W. Waterman, Edward L. Bartlett, and William W. Field, filed a brief for defendant:

The plea or answer of the defendant herein was at common law appropriate, regular, and sufficient to entitle defendant to raise all the issues and introduce all the evidence which were presented by it in the case at bar.

2 Greenl. Ev. 16th ed. 96; *Nichols & S. Co. v. Minnesota Thresher Mfg. Co.* 70 Minn. 528, 73 N. W. 415; *Johnson v. Williams*, 48 Vt. 565; *Wallace v. Robb*, 37 Iowa, 192.

The burden was on the plaintiff below to establish affirmatively a wrongful conversion by the defendant.

Denver & R. G. R. Co. v. United States, 9 N. M. 382, 54 Pac. 241; *Cooper v. Chitty*, 1 Burr. 20; *Keyworth v. Hill*, 3 Barn. & Ald. 687; *Burroughes v. Bayne*, 5 Hurlst. & N. 296; *Pillot v. Wilkinson*, 2 Hurlst. & C. 72; 1 Greenl. Ev. 16th ed. p. 148, §§ 74, 78, 80; 6 Wail, Act. & Def. ed. 1879, pp. 44, 70, 129, 142, 163, 221; *Burnham v. Noges*, 125 Mass. 85; *Rush v. Dillon* (Tex. Civ. App.) 27 S. W. 497; *Waring v. Pennsylvania R. Co.* 76 Pa. 491; 1 Chitty, Pl. 16th Am. ed. pp. 165, 172; 1 Addison, Torts, Wood's ed. 1878, pp. 554, 556.

When the right or license is established by the evidence, then the presumption of law is that the right has been properly and legitimately exercised, and the burden of proof is on the party asserting the contrary.

United States v. Reder, 69 Fed. 965;

United States v. Denver & R. G. R. Co. 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11.

Mr. Justice **Brown** delivered the opinion of the court:

As plaintiffs alleged simply a conversion of logs, and defendant pleaded the general issue of not guilty, plaintiffs made a prima facie case by proving their ownership of the lands, the cutting and asportation of the timber, its value, and its subsequent possession by the defendant. Here they were entitled to rest, and did rest. They were under no obligation to put in the special acts of Congress, nor could defendant compel their introduction by them.

By the laws of New Mexico of 1889, certain forms of pleadings are prescribed, including forms of pleas in actions for wrongs, one of which is that the defendant "is not guilty of the wrong alleged," and another "that he did what is complained of by the defendant's" (mistake for plaintiff's) "leave."

Whether it was competent, under the plea of not guilty, to introduce the special acts of Congress in question we do not *find it [90] necessary to decide; but assuming that the defense could be made, it is clear that upon the introduction of the statute of 1872 it became necessary for the defendant to assume the burden of producing evidence tending to show that the public lands were adjacent to the right of way, and that the timbers cut were required for the construction or repair of its railway or telegraph line. This is not a question of pleading, but of the order of proof. There was a question of adjacency made in the court below which is not pressed here, and the case was argued substantially upon the question as to which party had the burden of showing the purpose for which the timber was cut.

Except in a single particular, hereinafter noticed, we think this case is practically controlled, with respect to the burden of proof, by that of the *Northern P. R. Co. v. Lewis*, 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831, decided in 1896. That was an action against the railroad company for negligence in burning certain cordwood belonging to the plaintiffs. To prove ownership, plaintiffs showed that they had entered upon a portion of the unsurveyed lands of the United States, chopped about 10,000 cords from the timber thereon standing, and that after it was cut it was piled up near the railroad. For authority to cut the wood plaintiffs relied upon an act of Congress of June 3, 1878 (20 Stat. at L. 88, chap. 150, U. S. Comp. Stat. 1901, p. 1528), the first section of which authorized bona fide residents of the state to fell and remove, for building, agricultural, mining, or other

domestic purposes, timber growing on the public lands, "said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, . . . subject to such rules and regulations as the Secretary of the Interior may prescribe." Plaintiffs insisted that, in the absence of any evidence to the contrary, the presumption was that when they cut the timber they complied with and came under the conditions provided for in this act, and that the burden rested upon the defendant to show that the conditions mentioned in the act had not been complied with by them. The court held that if plaintiffs had acquired the right, by reason of a compliance with the statute, the facts should have been shown by them; that the presumption [91] was that the cutting was illegal, and that the burden of proof was upon the plaintiffs to show the facts which brought them within the statute of 1878.

In *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210, which was an action of replevin to recover possession of certain logs cut by Indians upon a reservation, and sold to Cook, it was held that the Indians, having only the right of occupancy, could not cut the timber for the purposes of sale, and that it was incumbent on the purchaser to show that the timber was rightfully severed from the lands.

The only feature distinguishing the case under consideration from that of Lewis is that the timber was cut, not by the defendant corporation, but by the New Mexico Lumber Company, acting as its agent, and was subsequently furnished and delivered to the defendant. It is insisted that there is a presumption that the agent, having authority to cut, acted within the scope of his authority, and that this would of itself throw upon the plaintiffs the burden of showing that it had not. Although a presumption of this kind may attach to the acts of public officers, we know of no case holding that a party sued for a conversion by his agent may shield himself under a presumption that the agent acted within the scope of his authority. If the burden of proof would rest upon the defendant to show the cutting of timber for a proper purpose, evidently it could not shift that burden upon the plaintiffs by employing an agent to do the work.

Upon principle as well as upon authority, a party who has been shown to be prima facie guilty of a trespass, and relies upon a license, must exhibit his license, and prove that his acts were justified by it. The practical injustice of a different rule is manifest. It would require the plaintiffs not only to establish a negative, that is, that the timber was *not* cut for the purpose of construction and repair, but to establish it

by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant, it would impose upon the plaintiffs a difficult, if not an impossible, task, to require them to show that the timber was not cut for the construction or repair of the railway, though *evidence that it [92] was so cut could be readily produced by the defendant. It is a general rule of evidence, noticed by the elementary writers upon that subject (1 Greenl. Ev. § 79) that "where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party." When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative. *Great Western R. Co. v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199; *King v. Turner*, 5 Maule & S. 206. Familiar instances of this are where persons are prosecuted for doing a business, such, for instance, as selling liquor without a license. It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of. *Com. v. Rafferty*, 133 Mass. 574; *Com. v. Tourle*, 133 Mass. 490. As the license (the statute in this case) authorized the timber to be cut only for a specific purpose, and the means of proof as to the purpose for which the timber was cut were peculiarly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it.

This burden, however, which was simply to meet the prima facie case of the government, must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff. *Heinemann v. Heard*, 62 N. Y. 448; **Willett* [93] *v. Rich*, 142 Mass. 360, 56 Am. Rep. 684, 7 N. E. 776; *Wilder v. Cowles*, 100 Mass. 487; *Central Bridge Corp. v. Butler*, 2 Gray, 130.

If this were a criminal case it would undoubtedly rest on the government upon the whole evidence to satisfy the jury beyond a reasonable doubt that the timber was not cut for the construction or repair of the railway.

While the supreme court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below, and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances.

There was error in requiring plaintiffs to assume the burden of showing that the timber was not cut for purposes of construction or repair, and *the judgment of the Supreme Court is therefore reversed*, and the case remanded to that court with instructions to order a new trial.

Ex parte U. S. JOINS, Petitioner.

(See S. C. Reporter's ed. 93-102.)

Prohibition—will not issue after cause is ended.

Prohibition against the Choctaw and Chickasaw citizenship court to prevent the giving of further effect to a judgment annulling a decree of a Federal court in the Indian territory, admitting persons to citizenship in those nations, or the certifying and delivering of a copy of such judgment to the Dawes commission, on the ground that the provisions of the act of Congress of July 1, 1902 (32 Stat. at L. 641, chap. 1362) § 31, authorizing in a test case the proceedings upon which the judgment rests, are unconstitutional,—will not issue, where the citizenship court, before the application for prohibition was heard, had rendered its judgment, and certified the same to the commission, which was all that it was empowered by the statute in question to do.

[No. 12, Original.]

*Argued and submitted October 19, 1903.
Decided November 9, 1903.*

PETITION for prohibition, and certiorari in aid thereof, to the Choctaw and Chickasaw Citizenship Court, to prevent the giving of further effect to a decree annulling a decree of a Federal court in the Indian territory, admitting certain persons to citizenship in those nations, or the certifying and

delivering of a copy of such decree to the Dawes commission. *Dismissed.*

The facts are stated in the opinion.

Mr. Calvin L. Herbert argued the cause, and, with **Mr. William I. Cruce**, filed a brief for petitioner.

Mr. George A. Mansfield argued the cause, and, with **Messrs. John F. McMurray** and **Melven Cornish**, filed a brief for the Choctaw and Chickasaw nations.

Solicitor General Hoyt submitted the cause for the United States.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for a writ of prohibition, and for a writ of certiorari in aid of the same, to the members of the Choctaw and Chickasaw citizenship court, established by an agreement between the United States and the Choctaw and Chickasaw Nations, made on March 21, 1902, and ratified by an act of Congress of July 1, 1902 (32 Stat. at L. 641, chap. 1362). By § 31 of the act the two nations were authorized to file a bill in equity in the said court to annul, on certain grounds of law, decrees of United States courts in the Indian territory, whereby certain persons were admitted to citizenship in those nations. The bill was filed and a decree was made purporting to annul the former decrees. The prohibition sought is against giving further effect to this decree, or certifying and delivering a copy of the same to the Dawes commission, established under an earlier act, it being alleged that the provisions of § 31 are contrary to the Constitution of the United States.

The facts alleged and not denied may be summed up as follows: *By the act of June [100] 10, 1896, chap. 398 (29 Stat. at L. 321, 339), Congress authorized a commission to the five civilized tribes of Indians, commonly called the Dawes commission, to hear and determine the rights of persons claiming citizenship in any of those nations, with an appeal to the United States courts in the territory. The petitioner applied to the commission, and, his application being rejected, appealed to the United States court, and there, on March 8, 1898, got a decree in his favor, declaring him to be a member of the Chickasaw Nation. A bill of review brought by the Chickasaw Nation is pending in the United States court of appeals for the Indian territory. After the decree, and before the act of 1902, and, for anything to the contrary in the petition, before the decision of this court next to be mentioned, the petitioner entered a tract of Chickasaw land, and made improvements costing \$15,000. For this he invokes the act of June 28, 1898, chap. 517, § 29 (30 Stat. at L. 495, 505, 507), and he contends that that

act, as well as the act of 1902, § 11, gave him a right of property in common with the other members of the tribe. *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

On July 1, 1898, an act of Congress granted an appeal from such decrees to this court, chap. 545 (30 Stat. at L. 591) and an appeal was taken by the Chickasaw Nation. In May, 1899, it was held by this court that the act was intended to open only the question of the constitutionality of the previous legislation, which was sustained, and that the act of July 1, 1898, was not made invalid by the provision in the earlier statute of 1896, that the judgment of the United States courts, on appeal to them, should be final. *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

The Indian nations still being dissatisfied, there followed the agreement and the act of 1902 first mentioned in this statement. By § 33 the Choctaw and Chickasaw citizenship court was created. By § 32 it was given appellate jurisdiction over all judgments of the courts in the Indian territory rendered under the above-mentioned act of 1896, admitting persons to citizenship or to enrolment as citizens in any of the said nations. It is admitted that these sections are valid, [101] but it is *contended that § 31, upon which the decree rests, is void. By that section it is provided that the Choctaw and Chickasaw Nations may file a bill in the new court to annul all the said judgments or decrees of the United States courts, on the ground that notice should have been given to both nations, whereas it was given only to one, or on the ground that the proceedings should have been confined to a review of the action of the Dawes commission on the evidence submitted to that commission, and should not have extended to a trial *de novo* of the question of citizenship. The suit was to be confined to a determination of these questions of law. In case the judgment or decrees should be annulled, parties deprived of citizenship were empowered to transfer the proceedings in their cases to the citizenship court for such proceedings as ought to have been had in the United States courts. Several thousand persons being concerned, ten persons admitted to citizenship were to be made defendants and served with process, and there was to be a general notice, also, by publication, with liberty to any person so situated to become a party. A bill was filed, and after proceedings in conformity to the statute, a decree was rendered, annulling all the said judgments or decrees on both the above grounds.

The answer set up that the test case provided for had been decided, and judgment entered and certified to the Dawes commis-

sion, on January 15, 1903, before the present petition was filed, and that nothing remained to be done by the citizenship court. It also alleged as an estoppel that, since filing this petition, this petitioner has instituted a suit by way of appeal, as provided in the act of 1902, to have his rights tried by the court on their merits, and further, that if the petitioner is an Indian, he is bound by the vote of his tribe ratifying the agreement sanctioned by said act of 1902. To this answer the petitioner demurred, so that, whether a demurrer was necessary or not, the allegations of the answer are not denied.

On these facts the petitioner contends that § 31 is void because it provides for a personal judgment, the annulling of *the decree [102] obtained by him, without personal service, because Congress has no power to annul or to provide for the annulling of a judgment of a court of competent jurisdiction, not alleged to have been obtained by fraud, and because the annulling of the judgment deprives the petitioner of property rights without due process of law.

It is unnecessary to state the objections to the law more in detail, because we are of opinion that the writ must be denied irrespective of these questions. We need not consider whether the jurisdiction of this court to grant a writ of prohibition to the district courts is confined to cases where those courts are "proceeding as courts of admiralty and maritime jurisdiction," Rev. Stat. § 688 (U. S. Comp. Stat. 1901, p. 565). *Ex parte City Bank*, 3 How. 292, 322, 11 L. ed. 603, 617; *Ex parte Gordon*, 1 Black, 503, 17 L. ed. 134; *Ex parte Graham*, 10 Wall. 541, 19 L. ed. 981; *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373. As to the jurisdiction in other cases, whether inherent or under Rev. Stat. § 716 (U. S. Comp. Stat. 1901, p. 580), see *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *Re Huguley Mfg. Co.* 184 U. S. 297, 46 L. ed. 549, 22 Sup. Ct. Rep. 455; *Re Chetwood*, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385. Again, we need not consider whether the citizenship court is a court in such a sense as to be subject to prohibition. See *Re Vidal*, 179 U. S. 126, 45 L. ed. 118, 21 Sup. Ct. Rep. 48; *Gordon v. United States*, 2 Wall. 561, 17 L. ed. 921, 117 U. S. 697, 702. However these things may be, it is clear that the writ will not issue after the cause is ended, and that the cause in the citizenship court was ended before the present application was heard.

It is stated correctly by the answer that the act does not empower the citizenship court to do anything in the test case beyond rendering its judgment and certifying the same, as it has done. This being so, there is

nothing which this court could prohibit, even if it were of opinion that the petitioner made out a good case on the merits, which we do not intimate. Therefore the writ must be denied. *United States v. Hoffman*, 4 Wall. 158, 18 L. ed. 354; *Denton v. Marshall*, 1 Hurlst. & C. 654, 660; *State ex rel. Hamer v. Stackhouse*, 14 S. C. 417, 427, 428; *Brooks v. Warren*, 5 Utah, 89, 12 Pac. 659.

Petition dismissed.

Ex parte L. L. BLAKE *et al.*

[No. , Original.]

This is a petition like that in *Ex parte Joins*, 191 U. S. 93, *ante*, 110, 24 Sup. Ct. Rep. 27, and is governed by the decision in that case.

Motion for leave to file petition denied.

[103]*ECKINGTON & SOLDIERS' HOME RAILWAY COMPANY of the District of Columbia, *Plff. in Err.*,

v.

FLORENCE McDEVITT.

(See S. C. Reporter's ed. 103-115.)

Damages—breach of contract—prevented gains.

The difference between the market value of land with street-car service and the expectation that cars will continue always to run, and such value without the operation of the cars, and with no expectation that they will run in the future, is too uncertain to be made the measure of damages for the breach by a street railway company of its covenant to run its cars over an extension, contained in the agreement by which it secured its right of way.

[No. 9.]

Argued January 21, 1903. Ordered submitted to full bench February 2, 1903. Submitted to full bench March 9, 1903. Decided November 16, 1903.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of that District in favor of plaintiff in an action to recover damages for a breach of contract. *Reversed* and remanded for a new trial.

See same case below, 18 App. D. C. 497.

Statement by Mr. Chief Justice **Fuller**:

This was an action brought in the su-

NOTE.—On loss of profits as an element of damages for breach of contract—see note to *Wells v. National Life Asso.* 53 L. R. A. 33.

preme court of the District of Columbia, August 8, 1894, to recover damages for alleged breach of contract. Plaintiff, on April 4, 1889, being the owner of a tract of land in the District of Columbia, containing about 22 acres (with her husband, since deceased), entered into an agreement with the Eckington & Soldiers' Home Railway Company, which recited: "Whereas the said parties of the first part, being desirous of securing an extension of the Eckington & Soldiers' Home Railway from the corner of Third and T streets northeast extended, to the east line of Lincoln avenue in the District of Columbia, through and along*the following streets,[104] to wit: West on T street to Second street east extended, thence north on the line of said Second street extended to V street extended east in a right line, and thence west on the line of said V street so extended to the east line of Lincoln avenue; and whereas the said party of the second part has agreed to extend said railway to said Lincoln avenue by the route aforesaid, upon certain conditions hereinafter mentioned;" therefore the McDevitts agreed in consideration of the premises "and of the covenants hereafter mentioned, to be kept and performed" by the railway company, to sell, grant, and convey to it, its successors and assigns, "a right of way, 60 feet in width, for the use of the said party of the second part, its successors and assigns forever, through and along the following land belonging to the said Florence McDevitt," described as "beginning at the southeast corner of the lands of said Florence McDevitt, adjoining the property of George Truesdell known as Eckington, and in the line of Second street east extended northwardly in a right line, and extending thence with uniform width 30 feet on each side of the center of said Second street extended, to a line 15 feet south of the north line of said V street extended, and thence westerly with the same width on each side of the center of said V street extended, to the east line of Lincoln avenue;" also to pay to the railway company \$500 five years from the date of the agreement, with interest, to be evidenced by a promissory note. But that the grant was subject to certain "conditions" to wit, that work on the extension should be commenced on or before May 1, 1889, and completed on or before October 1, 1889; that the grades should be as described; that the material removed in grading should be delivered on the lands of the McDevitts as directed by them; that the excavation should not exceed 20 feet in width at bottom and 60 feet at top; and that "after said extension is completed and open for traffic, a car shall be run thereon to Lincoln avenue at least once in thirty minutes between 7.30 A. M. and 6 P. M., and at

least once an hour to 9 P. M., and one car at 11 P. M."

[105] *The extension was completed in the manner and within the time prescribed, and opened to traffic, and the \$500 note was given. On December 27, 1889, a deed was executed and delivered to the company by Mr. and Mrs. McDevitt, in form an indenture, but signed and sealed by the McDevitts alone. This conveyed the right of way to the company, "its successors and assigns forever," with covenants of warranty and further assurance, and it also recited a covenant on the company's part that the cars should be run as described in the contract.

The extension was operated from 1889 to May or June, 1893, when the night cars were taken off. Thereupon, and on June 26, 1893, Mrs. McDevitt filed her bill for specific performance, to which the company set up in its answer, among other things, that the extension had always been a source of great loss, especially in operating at night, and that "the present management of the road, having been advised that their right to operate said extension over the line of proposed streets without authority from Congress was very doubtful, deemed it wise to suspend such operation until the question could be definitely settled."

July 9, 1894, the bill was dismissed but "without prejudice to the right of complainant to resort to such remedy at law as she may be advised." About that time and prior to July 25, 1894, the railway company ceased to operate the extension altogether, and it was testified that the attorney of the company, on its behalf, "refused to do anything in the way of carrying out the contract." On the last named day Mrs. McDevitt notified the company in writing, to forthwith remove its tracks from the premises, and that she should bring an action for breach of contract. The tracks were accordingly removed. In the meantime the \$500 note had matured and was not paid.

The evidence tended to show that Mrs. McDevitt had caused a map of a proposed subdivision of the land to be made, but that this had not been recorded, and that nothing had been *done in the way of preparing the tract for subdivision and sale by grading; that no streets had been opened through it except as effected by the action of the railroad company; that the excavations for the railway tracks were what would be Second and V streets, to which extent plaintiff would be relieved from grading. Evidence was introduced of sales by Mrs. McDevitt of four parcels of the land prior to the removal of the tracks, and tending to show the value of the land with and without the railroad in operation through it. Also that the business depression of 1893 caused de-

clines in value, and rendered real estate in the vicinity of this property unsaleable until after 1894.

Among other instructions the court gave the following:

"The jury are instructed that the measure of damages in this case is the excess (if the jury find from the evidence that there was such excess) in the market value of the land at the time that the defendant ceased entirely to run its cars upon that part of its line which extended to and through the plaintiff's land, with the cars running in accordance with the terms of the contract of the parties in evidence, and the expectation of their continuing to so run in the future, over the market value of the same land at the same time without any cars running on said part of said line, and without any expectation that they would ever run thereon."

To the giving of which defendant objected and duly preserved an exception.

The jury found a verdict in favor of plaintiff for \$15,000, and, motions in arrest and for a new trial having been made and overruled, judgment was entered thereon, which was affirmed by the court of appeals of the District (18 App. D. C. 497), and this writ of error thereupon sued out.

The railway company was a corporation created by an act of Congress approved June 19, 1888 (25 Stat. at L. 190, chap. 419), "with authority to construct and lay down a single or double-track railway, with the necessary switches, turnouts, and other mechanical devices and sewer connections necessary to operate the same by horse, cable, or electric power, in the District of *Columbia, through and along the following [107] avenues, streets, and highways" (describing them), and also a branch as described. The railway was to be laid in the center of the avenues and streets as near as might be, and, in the event of a change of grade of any of the streets, avenues, or roads occupied, it was made the duty of the company, at its own expense, to change its railroad so as to conform to such new grade. The company was to run cars as often as the public convenience might require, in accordance with a time-table or schedule which was to be approved by the commissioners of the District; and was to construct such ticket offices, passenger rooms, etc., at such points on its line as the Commissioners might approve. The government and direction of the affairs of the company were vested in a board of nine directors, who were to choose officers as designated. Congress reserved the right to alter, amend, or repeal the act at any time.

By an act approved April 30, 1890 (26 Stat. at L. 77, chap. 172), amending the charter, the company was authorized to ex-

tend its tracks through and along certain streets named, which provided "and also beginning at the present terminus of its cemetery branch on the east side of Lincoln avenue, and thence northerly along Lincoln avenue to a point opposite the entrance to Glenwood cemetery."

By an act approved July 5, 1892 (27 Stat. at L. 65, chap. 143), the charter was further amended by authorizing the extension of tracks, and providing "that the tracks of this company on Lincoln avenue shall be taken up within thirty days from the passage of this act, and the roadway shall be restored to public uses in such manner as the commissioners of the District of Columbia shall direct."

Messrs. John Ridout and Walter L. McDermott argued the cause and filed a brief for plaintiff in error:

Damages recoverable on a breach of contract are measured by the actual loss sustained, provided such loss is what would naturally result as the ordinary consequence of the breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of both parties as the probable result of a breach.

Hadley v. Baxendale, 9 Exch. 341; *Horne v. Midland R. Co.* L. R. 8 C. P. 131; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Gurley v. MacLennan*, 17 App. D. C. 170.

Enhanced damages must have entered into the contract, and mere notice of the purpose of making the contract would not have the effect of enhancing damages beyond such as would arise naturally or according to the usual order of things.

Horne v. Midland R. Co. L. R. 8 C. P. 131; *Harvey v. Connecticut & P. Rivers R. Co.* 124 Mass. 421, 26 Am. Rep. 673; *Ward v. New York C. R. Co.* 47 N. Y. 29, 7 Am. Rep. 405; *Ward's Central & P. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544; *Mather v. American Exp. Co.* 138 Mass. 55, 52 Am. Dec. 258.

There was no actual loss sustained by the plaintiff as required by the rule.

Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577; *Hetzl v. Baltimore & O. R. Co.* 6 Mackey, 1.

The damage claimed was not the natural and probable consequence of the breach of contract.

Howard v. Stillwell & B. Mfg. Co. 139 U. S. 210, 35 L. ed. 151, 11 Sup. Ct. Rep. 500.

The mere fact of a fall in market price, if it exist, not resulting in damage, and that may never result in damage, to the plaintiff, does not entitle the plaintiff to recover.

Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577.

There was no evidence of market value with or without the cars running, in the proper signification of the term "market value." There had been no public sale, and there was no market value in any legal sense. All the transactions were private and special, and the opinions given in evidence were based upon such transactions, and not upon prices established by public sales in the way of ordinary business, of which, so far as appears, there had never been a single instance.

14 Am. & Eng. Enc. Law, pp. 467-469.

Mr. Walter L. McDermott also filed an additional brief for plaintiff in error:

Before damage is shown the question must be answered, Did the impairment of value continue?

Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577.

To permit the jury to consider the enhanced value of the land was to permit them to conjecture what profits plaintiff might have made by selling it.

Hadley v. Baxendale, 9 Exch. 341; *Horne v. Midland R. Co.* L. R. 8 C. P. 131; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 Kan. 470.

Profits which plaintiff might have made in any other transactions if defendant had performed the contract, even though the loss is a natural consequence of the wrong, are frequently disallowed on the ground that they are more or less speculative or contingent.

Rockford, R. I. & St. L. R. Co. v. Beckemeier, 72 Ill. 267.

Mr. A. S. Worthington argued the cause, and, with **Messrs. John C. Heald** and **Charles L. Frailey**, filed a brief for defendant in error:

Where there is a breach of a contract to expend labor on property the measure of damages is the difference between the value of the property as left by the defendant and the value it would have had if the labor had been expended.

2 Sedgw. Damages, § 615; *Kidd v. McCormick*, 83 N. Y. 391.

When a railroad company has contracted with a landowner, in consideration of his allowing the company to construct its line through his land, to build and maintain a station on or near his property, and has failed to carry out its contract, the measure of damages in an action on the contract is the difference between the value of the plaintiff's land with the station and without it.

Mobile & M. R. Co. v. Gilmer, 85 Ala. 422, 5 So. 138; *Louisville, N. A. & C. R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. 404; *Houston & T. O. R. Co. v. Molloy*,

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64 Tex. 607; *Wilson v. Northampton & B. Junction R. Co.* L. R. 9 Ch. 279.

So, when ornamental or fruit-bearing trees, or trees used as a shade for cattle, are destroyed, the measure of damages is not the value of the trees, but the difference between the value of the premises with and without the trees.

3 Sedgw. Damages, § 933, Citing *Chipman v. Hibberd*, 6 Cal. 162; *Wallace v. Goodall*, 18 N. H. 439; *Argotsinger v. Vines*, 82 N. Y. 308; *Van Deusen v. Young*, 29 Barb. 9.

So, where a railroad company laid its tracks on a street in front of the plaintiff's land, but nearer his land than was necessary, the true measure of damage is the difference in the value of plaintiff's property with the road constructed upon its present line in the street and what that value would have been if the road had been constructed upon a line in said street selected with reasonable care and a proper regard for the rights of all interested.

Cadle v. Muscatine Western R. Co. 44 Iowa, 11.

It does not follow that, because it is difficult to ascertain with precision the injury resulting from a breach of contract, the offending party cannot be called to account at all. Where it is uncertain whether any damages would result from a breach of contract, the plaintiff gets only nominal damages; but where the damage is clear, and the amount of it only, uncertain, the rule invoked does not apply.

Simpson v. London & N. W. R. Co. L. R. 1 Q. B. Div. 274; *Wakeman v. Wheeler & W. Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; *Lanahan v. Heaver*, 79 Md. 413, 29 Atl. 1036; *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Assuming that the railway company might have lawfully bound itself to construct and operate this piece of road, the question is presented to what compensation in damages plaintiff below would be entitled if the company found that the traffic did not justify its further maintenance, and ceased to run its cars, or if the public interests required such changes of the lines of the road as rendered the abandonment necessary.

[112] Plaintiff had been reinstated in the possession of her land, freed from the encumbrance of the right of way, and had been discharged from the liability to pay the \$500. And as the record stands, it is doubtful if any direct specific *damage can properly be held to have been made out. At all events, and conceding that she was entitled to substantial damages for any injurious change of condition, any liability incurred,
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and any gains prevented, to secure which action had been taken, in reliance on the contract, the instruction as to the measure of damages embraced none of these matters, and was confined to profits only.

The transaction was not a sale of the land where the difference between the price agreed and the market value would represent the measure of loss or gain. Restitution having been made of what plaintiff had parted with, how far could she demand to be compensated for prevented gains or anticipated profits?

The contract did not purport to bind the company to operate its cars over the extension for any designated period, but, considering its terms in relation to the right of way, the trial court held that it was bound in perpetuity, and thereupon that if it ceased to do this in whole or in part at any time, she could order the tracks off her premises, and recover the difference between the value of her land with the cars running and with the expectation that they would continue always to run, and the value without the operation of the cars and with no expectation that they would run in the future.

The instruction was addressed to differences in market value as affected by the running of the cars, with the element added of expectation of continuance or cessation for all time. As thus put the supposed difference in market values amounted to anticipated profits, and these were not recoverable if dependent on uncertain and changing contingencies, and not in contemplation of both parties as a probable consequence of breach. *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Globe Ref. Co. v. Landa Cotton Oil Co.* 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754. Whether prevented gains or prospective profits are or are not too uncertain and contingent to be regarded as probable and contemplated consequences is always a question of difficulty, and as in such cases juries are permitted to exercise a wide *discretion[113] in the allowance of damages, great care is required in advising them as to the elements proper to be considered in making up their verdicts.

In a case like this, gain prevented is a more accurate term than loss of profits. And it is said in Sedgwick on Damages, 8th ed. vol. 1, p. 250, § 173: "Where an injured party claims compensation for gain prevented, the amount of loss is always to some extent conjectural; for there is no way of proving that what might have been, would have been. Thus, when the claim is made for compensation for a deprivation of property, it may be that if the property had remained in the owner's control it would have brought no gain."

Here the evidence tended to show that a

financial depression prevailed at the time of the breach, and that all real estate in the particular locality was unsaleable. Gains, then, were practically impossible; while, on the other hand, there was evidence that some years after the breach the depression passed away and real estate rose in value.

The books contain many illustrations of the uncertainties which will or may defeat recovery of anticipated profits.

In *Rockford, R. I. & St. L. R. Co. v. Beckemeier*, 72 Ill. 267, it was held, in a suit against a railroad company for the failure to erect a depot building upon plaintiff's farm, as agreed, that any supposed damage to the farm on that account, growing out of anticipated increased value, was too remote.

In *Evans v. Cincinnati, S. & M. R. Co.* 78 Ala. 341, a railroad company agreed to locate houses for its hands near plaintiff's land, and it was held that possible loss of profits at his store and mill was too speculative.

So, in *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 Kan. 435, where a railroad company failed to perform its agreement to make the city of Fort Scott the terminus of one division of its line, and erect machine shops there, it was held that an inquiry into the value of real estate and amount of business, in order to show what profits would have [114] been *made, was improper; but the city might recover for the value of the buildings to it as taxable property.

Scholten v. St. Louis & S. F. R. Co. (Mo.) 73 S. W. 915, is so far in point that it may well be cited, though not decided by a court of last resort. There the St. Louis court of appeals held that where a railroad's agreement to build and maintain a switch for a private property owner did not affect the performance of the railroad's duties to the public, the railroad was not entitled to allege in an action for illegally destroying the switch, that the contract was void as against public policy; and that as the plaintiff had graded the right of way and furnished the ties, and the agreement did not specify any length of time for the maintenance of the switch, plaintiff was entitled, on the destruction of the switch, to recover the value of the ties, and the cost of grading.

Treating the contract as a simple contract, and the refusal to run the cars as a breach which Mrs. McDevitt could accept as finally determining it, we think she could not recover for deprivation of the speculative gains of a remote future. What might have been made by selling the land at a value enhanced by the operation of the tracks in perpetuity was purely problematical and not naturally in contemplation. And the more so in view of the fact that railroad companies, while private corporations,

are quasi-public agencies, engaged in the performance of public duties, and that contracts which prevent them from the discharge of those duties cannot be sustained. It did not follow that the company, because it possessed the power to construct and operate this extension, could contract to operate it forever in so absolute a sense that damages could be awarded for the breach of such a contract, predicated on the expectation of its perpetual operation. *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846. Again, in this aspect, the instruction treated the agreement as equivalent to a covenant running with the land, and we are inclined to think that the bearing Mrs. McDevitt's demand that the tracks be removed, and the accepted and complete surrender of the right of way *by [115] their removal accordingly, might have had, under all the circumstances, on the question of prospective damages, should not have been excluded from the jury.

We are of opinion that the instruction as given was erroneous, and as it was definite and peremptory in its terms, and as it cannot be said that the jury was not influenced, and perhaps controlled, by it, we hold the error fatal to the judgment. As there must be a new trial we refrain from discussing the suggestions in respect of the acceptance of the deed by the company, a subject much considered in *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176, and the discharge of the alleged covenant, made below, but not pressed in argument here.

Reversed and remanded, with directions to reverse the judgment of the Supreme Court of the District, and order a new trial.

Mr. Justice **White** and Mr. Justice **McKenna** dissented.

D. N. HOLDEN and Lizzie Holden, Bankrupts, *Appts.*,
v.

J. A. STRATTON, Trustee.

(See S. C. Reporter's ed. 115-119.)⁴

Appeal in bankruptcy proceedings not proper mode of reviewing decisions of circuit courts of appeal on original petition.

Certiorari, and not appeal, is the proper method of obtaining a review in the Supreme Court of the United States of a decision of the circuit court of appeals, made in the exercise of its jurisdiction, under the act of July 1, 1898 (30 Stat. at L. 544, chap. 541

NOTE.—On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

[U. S. Comp. Stat. 1901, p. 3418]), § 24b, to review, by original petition, proceedings of inferior courts of bankruptcy, which revised an order of the district court allowing an exemption, since the revising order of the circuit court of appeals is not "a final decision allowing or rejecting a claim" within the meaning of § 25b, providing for appeals in bankruptcy proceedings to the Supreme Court of the United States.

[No. 38.]

Submitted October 22, 1903. Decided November 16, 1903.

A PPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decision which revised an order of the District Court for the District of Washington, allowing an exemption in bankruptcy proceedings. *Dismissed.*

See same case below, 51 C. C. A. 97, 113 Fed. 141.

Statement by Mr. Chief Justice **Fuller**:

Two separate proceedings were commenced in the district court of the United States for the district of Washington, on January 19, 1901, against D. N. Holden and Lizzie Holden, to the end that each be adjudicated a bankrupt, which were consolidated, and on the ensuing 25th of February they were, respectively, so adjudicated. The creditors of each of the bankrupts were the same.

[116] Thereupon J. A. Stratton was duly elected trustee in bankruptcy *of the estate of each of the bankrupts, and qualified as such. The bankrupts, and each of them, applied for exemption in their favor of two certain policies of life insurance in the hands of the trustee. D. N. Holden was insured, and Lizzie Holden was the beneficiary, in both, with the provision that if she should not survive him, payment should be made to his executors, administrators, and assigns.

The exemption was disallowed by the referee, who reported his action to the court. The bankrupts filed exceptions to the report, and the court on July 16, 1901, set it aside and adjudged the policies to be exempt. Stratton then filed a petition in the circuit court of appeals for the ninth circuit for a revision of this order. It was therein alleged among other things that the policies had a present cash surrender value combined of about \$2,200. The circuit court of appeals, accepting the ruling of that court in the previous case of *Re Scheld*, 52 L. R. A. 188, 44 C. C. A. 233, 104 Fed. 870, held that the policies were not exempt, and decreed a revision of the order of the district court accordingly. 51 C. C. A. 97, 113 Fed. 141. From this decree an appeal was prayed to this court, and allowed February 12, 1902, and the record was filed here April 14, 1902.

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And subsequently a certificate of a justice of this court was filed herein that in his opinion the determination of the questions involved was essential to a uniform construction of the bankruptcy act throughout the United States.

The appeal was submitted on a motion to dismiss, and also on the merits.

Messrs. George Turner and P. P. Carroll submitted the cause for appellants. *Mr. John E. Carroll* was with them on the brief:

When the lawmakers used "claim" they must have had in mind the common definition of the word.

See, for such definition, *Burrill*, Law Dict. Vol. 1, p. 296.

Whether a decree is final and appealable is to be decided by the appellate court on a consideration of the essence of what is done by the decree.

Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860.

Mr. Frederiek Bausman submitted the cause for appellee:

Section 24b of the bankruptcy act of 1898, allowing an original petition in the intermediate appellate court, was borrowed from the act of 1867.

Re Abraham, 35 C. C. A. 608, 93 Fed. 783; *Re Richards*, 37 C. C. A. 634, 96 Fed. 935; *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.* 41 C. C. A. 614, 101 Fed. 702; *Re Worcester County*, 42 C. C. A. 637, 102 Fed. 808.

The jurisdiction conferred on the several circuit courts of appeals by subd. b of § 24 of the recent bankrupt act is the same as that which was vested in the circuit court by the bankrupt act of March 2, 1867.

Re Jacobs, 39 C. C. A. 647, 99 Fed. 540.

Appeal did not lie to the supreme court, under the old act, from an adverse ruling of the circuit court "in revision and review" of the district.

Morgan v. Thornhill, 11 Wall. 65, 20 L. ed. 60.

Refusal to allow an exemption to a bankrupt is not a decision "allowing or rejecting a claim."

Re Columbia Real Estate Co. 50 C. C. A. 406, 112 Fed. 645; *Re Whitener*, 44 C. C. A. 434, 105 Fed. 180.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It will be perceived that the jurisdiction of the circuit court of appeals was invoked on an original petition under § 24b *of the [117] bankruptcy law, which provides: "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of

law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432.]

This supervisory jurisdiction in matter of law was conferred on the circuit courts by the act of March 2, 1867 (14 Stat. at L. 518, chap. 176, § 2; Rev. Stat. § 4986), and it was settled under that act that appeals to this court did not lie from the decisions of the circuit courts in the exercise of that jurisdiction. *Morgan v. Thornhill*, 11 Wall. 65, 20 L. ed. 60; *Conro v. Crane*, 94 U. S. 441, 24 L. ed. 145. The ruling is decisive here unless the present act elsewhere otherwise provides. But this it does not do, the special and summary character of the revision contemplated being substantially the same as in the prior act, and the provision for appeals not embracing appeals from decrees in revision.

Section 25a provides "that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of \$500 or over."

And § 25b for appeals to this court "from any final decision of a court of appeals, allowing or rejecting a claim under this act," where the amount in controversy exceeds the sum of \$2,000, and the question involved was one which might have been taken from the highest court of a state to the Supreme Court of the United States; or where some justice of the Supreme Court certifies that "in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

118] *This case was not taken to the court of appeals by appeal, as in equity cases, to be re-examined on the facts as well as the law, nor could it have been, for it was not one of the cases enumerated in § 25a. The order of the district court was not "a judgment allowing or rejecting a debt or claim of \$500 or over," or the revising order of the circuit court of appeals, "a final decision, allowing or rejecting a claim," within the intent and meaning of either subdivision a or b. By § 2, sub. 2, courts of bankruptcy are vested with the power to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;" and § 57 comprehensive-

ly covers the subject of the proof and allowance of claims, treating them as moneyed demands.

And while the word "claim" is used in its signification of the demand or assertion of a right in sub. 11 of § 2, in respect of "all claims of bankrupts to their exemptions," it is also used in many parts of the act, and, as we think, in § 25, as referring to debts (which by sub-sect. 11 of § 1 include "any debt, demand, or claim provable in bankruptcy") presented for proof against estates in bankruptcy. *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. ed. 1179, 1180, 23 Sup. Ct. Rep. 778; *Re Whitener*, 44 C. C. A. 434, 105 Fed. 180; *Re Columbia Real Estate Co.* 50 C. C. A. 406, 112 Fed. 645.

The allowance or rejection of a debt or claim is a part of the bankruptcy proceedings, and not an independent suit, and under the act of 1867 it was held that this court had no jurisdiction to review judgments of the circuit courts dealing with the action of the district courts in such allowance or rejection, because they were not final. *Wiswall v. Campbell*, 93 U. S. 347, 23 L. ed. 923; *Leggett v. Allen*, 110 U. S. 741, 28 L. ed. 313, 4 Sup. Ct. Rep. 195. The jurisdiction now given is carefully restricted, and cannot be expanded beyond the letter of the grant. It is an exception to the general rule as to appeals and writs of error obtaining from the foundation of our judicial system. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the *estates of [119] bankrupts is recognized in §§ 23, 24, and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. *First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899; *Elliott v. Toeppner*, 187 U. S. 327, 333, 334, 47 L. ed. 200, 203, 23 Sup. Ct. Rep. 133.

Section 6 of the act of March 3, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550], has no application, as that refers to cases carried to the circuit court of appeals by appeal or writ of error. But in view of the terms of that act and of the nature of the writ, we have held that under a reasonable construction of subdivision d of § 25, certiorari lies to decrees in revision. *Bryan v. Bernheimer*, 175 U. S. 724, 44 L. ed. 338, 20 Sup. Ct. Rep. 1031, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Mueller v. Nugent*, 180 U. S. 640, 45 L. ed. 711, 21 Sup. Ct. Rep. 927, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; *Louisville Trust Co. v. Cominger*, 181 U. S. 620, 45 L. ed. 1031, 22 Sup. Ct. Rep. 946, 184 U.

S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293. In the case first cited it is pointed out that the circuit court of appeals treated the case as if before it on a petition for revision, though it had been carried there by appeal; and we considered the decree as rendered in the exercise of the supervisory power. 181 U. S. 192, 193, 45 L. ed. 815, 816, 21 Sup. Ct. Rep. 557.

Appeal dismissed.

CONTINENTAL NATIONAL BANK OF
MEMPHIS, Tennessee, *Plff. in Err.*,
v.

G. C. BUFORD.

(See S. C. Reporter's ed. 119-125.)

Appeal—review of judgment of circuit court of appeals in action by national bank.

1. The jurisdiction of the United States Supreme Court to review a judgment of the circuit court of appeals must be first considered, where the question in regard thereto arises on the face of the record.
2. The judgment of the circuit court of appeals is final, and not subject to review by the United States Supreme Court, in an action by a national bank against a corporation of another state, where no Federal questions are presented upon which the suit depends, under the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517 [U. S. Comp. Stat. 1901, pp. 488, 547]), making the judgment of the circuit court of appeals final where the jurisdiction of the court below depended entirely on the diverse citizenship of the parties, and the act of August 13, 1888 (25 Stat. at L. 433, chap. 866 [U. S. Comp. Stat. 1901, p. 514]), providing that in an action by or against national banking associations the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.

[No. 60.]

Argued and submitted November 6, 1903.
Decided November 16, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming a judgment of the Circuit Court for the Eastern District of Arkansas in an action by a national bank against a corporation of another state. *Dismissed.*

See same case below, 53 C. C. A. 14, 114 Fed. 290.

The facts are stated in the opinion.

Mr. Rhea P. Cary argued the cause and filed a brief for plaintiff in error.

Mr. W. J. Orr argued the cause and filed a brief for defendant in error.

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Mr. Justice **Harlan** delivered the opinion of the court:

Has this court authority to review the judgment of the circuit court of appeals in this case?

This question arises upon the face of the record, and cannot be ignored; for, the rule is well established that, "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 464, 4 Sup. Ct. Rep. 510; *King Bridge Co. v. Oloee County*, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 522; *Gerling v. Baltimore & O. R. Co.* 151 U. S. 673, 690, 38 L. ed. 311, 317, 14 Sup. Ct. Rep. 533; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 98, 42 L. ed. 673, 675, 18 Sup. Ct. Rep. 264; *Great Southern Fire-Proof Hotel Co. v. Jones*, 177 U. S. 449, 453, 44 L. ed. 842, 844, 20 Sup. Ct. Rep. 690.

The plaintiff in error, plaintiff below,—the Continental National Bank, organized under the acts of Congress, and located for purposes of business at Memphis, Tennessee,—alleged in its complaint that the Bank of Mammoth Springs, an Arkansas corporation, was indebted to it in a named sum, and it sought by this action to hold the defendant liable for the amount of such debt.

The action was based upon certain sections of the statutes of Arkansas (Sandels' & Hill's Digest), as follows:

"§ 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make *a cer-[121] tificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the 1st day of January or of July next preceeding the time of making such certificate, in the following particulars; viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February or of August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"§ 1346. The certificates required by §§ 1334, 1337, 1343, and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts he shall be deemed guilty of perjury, and be punished accordingly.

"§ 1347. If the president or secretary of

any such corporation shall neglect or refuse to comply with the provisions of § 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal."

The complaint alleged that during the entire period of his term of office as president of the Bank of Mammoth Springs, that is, from June 9th, 1891, to June 9th, 1896, the defendant Buford "wholly neglected to comply with the provisions and perform the duties required of him by said §§ 1337 and 1346, by making, swearing to, and causing to be filed, the statement or certificate required thereby."

The defendant demurred to the complaint on various grounds; one being that the plaintiff's action appeared to be barred by the statute of limitations of Arkansas. The circuit court sustained the demurrer, it being of opinion that the complaint did *not show any cause of action; also, that a suit for the debt in question was barred by the statute of limitations of Arkansas. The plaintiff declining to amend, the suit was dismissed. That judgment was affirmed by the circuit court of appeals, 53 C. C. A. 14, 114 Fed. 290, and from that judgment the present writ of error was prosecuted.

By the very terms of the judiciary act of March 3d, 1891, 26 Stat. at L. 826, chap. 517 (U. S. Comp. Stat. 1901, pp. 488, 547), the judgment of a circuit court of appeals of the United States is final where the jurisdiction of the circuit court depended *entirely* upon the diverse citizenship of the parties. No ground whatever of jurisdiction in the circuit court appears in the complaint or elsewhere in the record, other than diversity in the citizenship of the parties, unless it can be said that by reason alone of the plaintiff bank having been organized under an act of Congress the suit is one arising under the laws of the United States. This, however, could not be said of the present suit, if regard be had to the acts of Congress defining and regulating the jurisdiction of the courts of the United States.

The judiciary act of March 3d, 1875, for the first time invested the circuit courts of the United States, without reference to the citizenship of the parties, with original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in dispute exceeded a prescribed sum, and the suit was one "arising under the Constitution or laws of the United States." [18 Stat. at L. 470, chap. 137 (U. S. Comp. Stat. 1901, p. 508).] Referring to that statute, this court, in *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 648, 35 L. ed. 1144,

1145, 12 Sup. Ct. Rep. 325, 326, said: "Suits by or against national banks might therefore be brought or removed upon the ground of diverse citizenship, or of subject-matter, since, as they were created by Congress, and could acquire no right, make no contract, and bring no suit, which was not authorized by a law of the United States, a suit by or against them was necessarily a suit arising under the laws of the United States. *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Leather Mfrs. Nat. Bank v. Cooper*, 120 U. S. 778, 30 L. ed. 816, 7 Sup. Ct. Rep. 777; *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113. And, of course, national banks as *well as state banks and individuals, might bring or remove suits otherwise arising under the Constitution, laws, or treaties of the United States."

But, in respect of national bank associations, a radical change was introduced by subsequent acts of Congress.

By the act of July 12th, 1882, chap. 290, it was provided: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business, where such national banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." 22 Stat. at L. 162 (U. S. Comp. Stat. 1901, p. 3457). Then came the judiciary act of March 3d, 1887, corrected by the act of August 13th, 1888, chap. 866, and providing: "That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." 25 Stat. at L. 433 (U. S. Comp. Stat. 1901, p. 514).

The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in

which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that [124] they were created *by, and exercised their powers under, acts of Congress. No other purpose can be imputed to Congress than to effect that result. Of course, notwithstanding the acts of 1882 and 1888, there remained to a national bank, independently of its Federal origin, and as a citizen of the state in which it was located, the right to invoke the original jurisdiction of the circuit courts in any suit involving the required amount, and which, by reason of its subject-matter, and not by reason simply of the Federal origin of the bank, was a suit arising under the Constitution or laws of the United States. *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 648, 35 L. ed. 1144, 1145, 12 Sup. Ct. Rep. 325. Treating the plaintiff as a citizen of Tennessee, its right to sue the defendant in the Federal court, sitting in Arkansas, was beyond dispute. But, as already suggested, it did not assert any right, privilege, or immunity that was dependent in any degree upon the Constitution or laws of the United States. As jurisdiction could not arise merely from the Federal origin of the plaintiff bank, and as no Federal question was involved in the suit, it must be taken that the only ground of jurisdiction in the circuit court was the diverse citizenship of the parties. If, apart from the fact that the plaintiff bank was a Federal corporation, the suit had been one arising under the Constitution or laws of the United States, it could not have been said that the jurisdiction of the circuit court depended entirely upon diverse citizenship of the parties. But as no Federal questions, upon which the suit depended, are presented by the record, the judgment of the circuit court of appeals in this case was final and, therefore, not subject to review by this court.

What we have said is, we think, required by the decision in *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222. It appeared in that case that a judgment for money was recovered in the circuit court of the United States for the district of Massachusetts. Its amount was paid and subsequently deposited in a national bank. The bank having refused to pay over the money, suit was brought against it. The suit was dismissed by the circuit court and the judgment of dismissal was affirmed by the circuit court of appeals. The latter court having refused to allow an appeal upon the ground that an appeal was not given by the statute, proceedings by mandamus were instituted to compel it to do so. After referring to the clause in the judiciary act of 1888, declaring that national banking asso-

[125]ciations should be deemed citizens of the states in which they were respectively located, and that the circuit and district courts should not have jurisdiction, other than such as they would have in cases between individual citizens of the same states, the court said: "In *Leather Mfrs. Nat. Bank v. Cooper*, 120 U. S. 778, 30 L. ed. 816, 7 Sup. Ct. Rep. 777, it was held by this court that, under the act of 1882, which was similar in its terms [to that of 1888], an action against a national bank could not be removed to the Federal court, 'unless a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank. Consequently, so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. A national bank was, by that statute, placed before the law in this respect the same as a bank not organized under the laws of the United States.' . . . In this case the original bill averred the complainant to be a citizen of Pennsylvania, and the defendant to be a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the state of Massachusetts. As the bill was filed after the act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. . . . The petition for mandamus must be denied." Of course, that suit would not have been so regarded, and the petition would have been granted, if the Federal origin of the bank had been itself ground of jurisdiction, independently of the diverse citizenship of the parties.

For the reasons stated, the writ of error must be dismissed for want of jurisdiction in this court to review the final order of the Circuit Court of Appeals.

Dismissed.

*J. L. HOWARD, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, *Appts.*,
v.
CAPTAIN J. M. FLEMING, Warden of State's Prison of North Carolina. (No. 44.)

J. L. HOWARD, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, *Plffs. in Err.*,
v.
STATE OF NORTH CAROLINA. (No. 45.)
(See S. C. Reporter's ed. 126-138.)
Habeas corpus—conclusiveness of decisions of state courts—cruel and unusual punishment.
NOTE.—On cruel and unusual punishment—

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ishment—equal protection of the laws—due process of law—error to state court—Federal question.

1. A decision of the highest state court that a conspiracy to defraud is a crime under the laws of the state concludes the Supreme Court of the United States on habeas corpus to inquire into a detention under a conviction for that crime in a court of the state.
2. Whether an indictment in a state court sufficiently charged an offense is not open to inquiry on habeas corpus to inquire into a detention under a conviction in the state court.
3. A sentence of the state court of ten years' imprisonment for the offense of a conspiracy to defraud is not so cruel or unusual as requires the interference by the Supreme Court of the United States on habeas corpus.
4. The equal protection of the laws is not denied to two of three persons convicted of conspiracy to defraud, because their sentence was for ten years' imprisonment, while that of their codefendant was for but seven years.
5. The omission on a criminal trial in the state court of any reference to the presumption of innocence cannot be regarded as a denial of due process of law, where the highest court of the state has held that such omission does not invalidate the proceedings.
6. The decision in the opinion of the highest state court, in reviewing a conviction of crime, of questions respecting due process of law, the equal protection of the laws, and cruel and unusual punishment, will not confer jurisdiction on the Supreme Court of the United States of a writ of error to the state court, in the absence of any claim to protection under the Federal Constitution made therein.

[Nos. 44, 45.]

Argued October 27, 1903. Decided November 16, 1903.

A PPEAL from the Circuit Court of the United States for the Eastern District of North Carolina to review the dismissal of a writ of habeas corpus. *Affirmed.* Also **I**N ERROR to the Supreme Court of the State of North Carolina to review a judgment affirming a conviction of crime in the Superior Court of Guilford County, in that state. *Dismissed.*

See same case below (No. 45) 129 N. C. 584, 40 S. E. 71.

see note to *State ex rel. Garvey v. Whitaker*, 35 L. R. A. 561.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

As to what constitutes due process of law—see notes to *Kuntz v. Sumption*, 2 L. R. A. 655; *Re Gannon*, 5 L. R. A. 359; *Ulman v. Baltimore*, 11 L. R. A. 224; and *Gilman v. Tucker*, 13 L.

Statement by Mr. Justice **Brewer**:

At the June term, 1901, of the superior court of Guilford county, North Carolina, the three parties named as appellants in the first of these cases and as plaintiffs in error in the second were indicted, tried, and convicted of the crime of conspiracy. *Daly[127] was sentenced to the penitentiary for seven years, and the other two for ten years each. All appealed to the supreme court of the state, by which court the judgment was affirmed (129 N. C. 584, 40 S. E. 71), and thereupon the writ of error in the last case was issued. A writ of habeas corpus was also sued out from the circuit court of the United States for the eastern district of North Carolina, directed to the warden of the state prison, which, after hearing, was dismissed, and from such dismissal an appeal was taken to this court; and that is the first of the above cases.

Messrs. Frank P. Blair and Leslie A. Gilmore argued the cause and filed a brief for Howard *et al.*:

The sentence is more severe than that inflicted in North Carolina for a like, or graver, offense.

State v. Jackson, 82 N. C. 565, *State v. Mallett*, 125 N. C. 718, 34 S. E. 651.

The 14th Amendment prohibits a different, or greater, punishment to be imposed on one than is imposed on all for like offenses.

Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The sentence is cruel and unusual within the meaning of the state Constitution, and hence, discriminates against defendants below.

State v. Driver, 78 N. C. 423.

By reason of the unequal sentence, Howard and Hawley were denied the equal protection of the laws.

State v. Jackson, 82 N. C. 565.

The trial was not due process, because the judge below refused to charge on the presumption of innocence.

State v. Heaton, 77 N. C. 505; *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394; *Cochran v. United States*, 157 U. S. 286, 39 L. ed. 704, 15 Sup.

R. A. 304. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

Ct. Rep. 628; *Allen v. United States*, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154; *Kirby v. United States*, 174 U. S. 47, 43 L. ed. 890, 19 Sup. Ct. Rep. 574; *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

Regarding mere property rights, this court has refused to follow state adjudications on the rules of equity, on the rules of the law merchant, or on the principles of admiralty law.

Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Boyce v. Tabb*, 18 Wall. 546, 21 L. ed. 757.

Will the court be less solicitous to protect a citizen's liberty than his property?

Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The state is not absolutely omnipotent in criminal matters within its boundaries.

Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

If the sentence is cruel or unusual, under *State v. Driver*, 78 N. C. 423, then defendants below did not have the equal protection of the law.

The inhibition of the 14th Amendment applies to all state instrumentalities of government.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 14 Sup. Ct. Rep. 581; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

If punishment had been awarded by a state court under a statute clearly void, this court would discharge the prisoner, even though the state court had held the statute valid.

Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384; *Re Savage*, 134 U. S. 176, 33 L. ed. 842, 10 Sup. Ct. Rep. 389.

A fortiori, then, should this court overturn a wrong decision on a question of a common-law crime by the state tribunal.

No particular form of words or phrases has ever been declared necessary in which the claim of Federal right must be asserted.

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Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

It is only necessary that the state court's attention be called to the Federal question as one that was relied on.

Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

Mr. Thomas B. Womack argued the cause, and, with Mr. Robert D. Gilmer, filed a brief for appellee and defendant in error:

An erroneous ruling on a defective indictment does not present a Federal question.

Bergemann v. Backer, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Central Land Co. v. Laidley*, 159 U. S. 112, 40 L. ed. 94, 16 Sup. Ct. Rep. 80; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Re Boardman*, 169 U. S. 44, 42 L. ed. 655, 18 Sup. Ct. Rep. 291; *Remington Paper Co. v. Watson*, 173 U. S. 451, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *Kohl v. Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304.

Due process of law does not even require an indictment where information is provided for.

McNulty v. California, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Talton v. Mayes*, 163 U. S. 384, 41 L. ed. 199, 16 Sup. Ct. Rep. 986; *Nordstrom v. Washington*, 164 U. S. 705, 41 L. ed. 1183, 17 Sup. Ct. Rep. 997.

The question as to whether or not an indictment charges a crime under the laws of a state does not present a Federal question.

Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Davis v. Texas*, 139 U. S. 652, 35 L. ed. 301, 11 Sup. Ct. Rep. 675; *Bergemann v. Backer*, 157 U. S. 656, 39 L. ed. 847, 15 Sup. Ct. Rep. 727; *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

This is simply a case of a state court determining the meaning of a state statute and constitution, and contains nothing that is obviously violative of fundamental principles.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *O'Neil v. Vermont*, 144 U. S. 336, 36 L. ed. 457, 12 Sup. Ct. Rep. 693; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Lambert v. Barrett*, 157 U. S. 697, 39 L. ed. 865, 15 Sup. Ct. Rep. 722; *Roesel v. Kirk*, 172 U. S. 646, 43 L. ed. 1183, 19 Sup. Ct. Rep. 879; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Kohl v. Lehlback*, 160 U. S. 296, 40 L. ed. 433, 16 Sup. Ct. Rep. 304.

The question as to whether or not the punishment of a criminal is cruel or unusual under the Constitution and laws of a state is not a Federal one.

O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

The 8th Amendment is inapplicable to the states, and applies only to a Federal action.

Ibid.; *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Pervear v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

The decision of a state court as to the existence of a law is conclusive.

Re Duncan, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.

The place of execution does not present a Federal question.

Davis v. Burke, 179 U. S. 404, 45 L. ed. 252, 21 Sup. Ct. Rep. 210.

The validity of a sentence under a state law will not be reviewed by the Supreme Court.

Storti v. Massachusetts, 183 U. S. 142, 46 L. ed. 124, 22 Sup. Ct. Rep. 72.

It is not the province of this court to interfere with the disposition of state questions by the appropriate state authorities, and there is no basis for the suggestion of any violation of the Constitution of the United States, the denial of due process of law, or deprivation of any right, privilege, or immunity secured to one by the Constitution or laws of the United States.

Lambert v. Barrett, 157 U. S. 697, 39 L. ed. 865, 15 Sup. Ct. Rep. 722; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959.

Mr. Justice **Brewer** delivered the opinion of the court:

Although these are separate cases, coming from different courts, we shall consider them together, for the same proceedings are challenged in each.

[135] *We premise that the trial was had in a state court, and therefore our range of inquiry is not so broad as it would be if it had been in one of the courts of the United States. The highest court of the state has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial.

The first contention demanding notice is

that the indictment charged no crime. As found it contained three counts, but the two latter were abandoned, and therefore the inquiry is limited to the sufficiency of the first. That charged a conspiracy to defraud. There is in North Carolina no statute defining or punishing such a crime, but the supreme court held that it was a common-law offense, and as such cognizable in the courts of the state. In other words, the supreme court decided that a conspiracy to defraud was a crime punishable under the laws of the state, and that the indictment sufficiently charged the offense. Whether there be such an offense is not a Federal question, and the decision of the supreme court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense. *Caldwell v. Texas*, 137 U. S. 692, 698, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; *Davis v. Texas*, 139 U. S. 651, 652, 35 L. ed. 300, 301, 11 Sup. Ct. Rep. 675; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727.

Again, it is contended that the defendants were denied the equal protection of the laws, in that the sentence was more severe than ever before inflicted in North Carolina for a like offense, and was cruel and unusual, in that two were given ten years' and the third only seven years' imprisonment, and also in that they were sentenced to imprisonment in the penitentiary instead of to hard labor on the public roads. No case of a similar offense is cited from the judicial reports of North Carolina, and the supreme court in its opinion refers to the crime as "a fashion of swindling which has doubtless been little practiced in this state." That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted, does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one. Swindling by means of a pretended gold brick is no trifling crime, and a conspiracy to defraud by such means does not commend itself to sympathy or leniency. But it is unnecessary to attempt to lay down any rule for determining exactly what is necessary to render a punishment cruel and unusual, or under what circumstances this court will interfere with the decision of a state court in respect thereto. It is enough to refer to *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930, in which these questions were discussed, and to say that a sentence of ten years for an offense of the nature disclosed by the testimony, especially after it has been sustained by the supreme court of a state, does not seem to us deserving to be called cruel. If

the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned. Doubtless there were sufficient reasons for giving to one of the conspirators a less term than the others. At any rate, there is no such inequality as will justify us in setting aside the judgment against the two.

So far as respects the sentence of the defendants to the penitentiary instead of to work on the public roads, § 4, chap. 355, p. 631, N. C. Laws 1887, in terms warrants it, for that provides that when the judge presiding is satisfied that there is good reason to fear an attempt to release or injure any person convicted of any of the offenses for which sentences to work on the public roads may be imposed, it shall be lawful for him to sentence to imprisonment in the penitentiary. It is true there is no recital of any such reason to fear, but we cannot hold, in the face of the decision of the supreme court of the state, that the omission of such recital invalidates the judgment.

Again, it is said that there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of [137] the accused must *be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is meant by the term "reasonable doubt." The supreme court sustained the charge. Of course, that is a decision of the highest court of the state that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt, and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the state, the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law.

These are the principal matters presented by counsel. Some of them were argued elaborately both in brief and orally; especially that in reference to the absence of any statute providing for the punishment of conspiracy, and the alleged absence of any common-law offense of that nature. We have not deemed it necessary to review the various authorities, or enter upon any discussion of the matter, because we are of opinion that the decision of the supreme court of the state in reference thereto is conclusive upon us.

It does not appear that the Federal character of the questions was presented to the supreme court of the state, although in the opinions of the supreme court the questions themselves were fully discussed. But in the absence of any claim to protection under the Federal Constitution, we are compelled to

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hold that we have no jurisdiction in the case coming from the supreme court of the state, and the writ of error will be dismissed.

The same questions were presented in the habeas corpus case, and as that comes to us from a Federal court, we have jurisdiction, and in that case the judgment will be affirmed.

The motions in respect to change of custody of the defendants *will, in view of the [138] conclusion on the merits of the cases, be denied.

Mr. Justice Harlan concurs in the result.

HARRY B. SMITH, Auditor of Marion County, Indiana, *Plff. in Err.*,
v.

STATE OF INDIANA, on the Relation of
MARTHA and BENJAMIN LEWIS.

(See S. C. Reporter's ed. 138-150.)

Error to state court—personal interest of officer entitling to.

1. A personal, and not an official, interest is necessary to entitle one to a writ of error from the United States Supreme Court to review the judgment of a state court.
2. A county auditor does not have a personal interest entitling him to a writ of error from the United States Supreme Court to review the judgment of a state court requiring him to deduct from the assessed valuation of certain real estate the amount of a mortgage thereon, in accordance with a statute of such state, even though a judgment personal in form has been rendered against him for costs, where he did not move for a modification of the judgment in that particular.

[No. 81.]

Argued October 22, 23, 1903. Decided November 16, 1903.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Marion County on a petition for a writ of mandamus to compel the deduction from the assessed valuation of real estate of the amount of a mortgage thereon. *Dismissed.*

See same case below, 158 Ind. 543, 63 N. E. 25, 214, 64 N. E. 18.

Statement by Mr. Justice Brown:

This was a petition filed in the circuit

NOTE.—On writs of error from United States Supreme Court to state courts—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and Re Buchanan, 39 L. ed. U. S. 884.

court of Marion county by the state, upon the relation of Martha and Benjamin Lewis, against the auditor of Marion county, for a writ of mandamus to compel the defendant, in his official capacity, to allow an exemption of a mortgage of \$500 upon a lot of land in Indianapolis owned by the relators, and that the same be deducted from the value of such lot.

The petition was based upon an act passed by the general assembly March 4, 1899, the first section of which declares: "That any person being the owner of real estate liable for taxation within the state of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding \$700, existing and unpaid upon [139] the first day of *April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year." [Horner's Anno. Stat. (Ind.) § 6272*a*.]

An alternative writ having been issued, defendant interposed a general demurrer, which was sustained by the court, and the relators declining to plead further, judgment was entered against them.

Upon appeal to the supreme court, the action of the court below was reversed, the law held to be constitutional, and the cause remanded. 158 Ind. 543, 63 N. E. 25, 214, 64 N. E. 18. Thereupon the defendant made formal return to the writ, alleging the unconstitutionality of the act, both under the state and Federal Constitutions, to which relators demurred. The demurrer was sustained, and a judgment entered for a peremptory mandamus commanding the defendant to allow the exemption, and to deduct from the assessed valuation of the real estate the amount of the mortgage, \$500, and also that relators recover from the defendant their costs, which, however, appear never to have been taxed. This judgment was subsequently affirmed by the supreme court upon the authority of its opinion upon the previous appeal, and a writ of error sued out from this court.

Mr. Horace E. Smith argued the cause, and, with **Mr. Roscoe O. Hawkins**, filed a brief for plaintiff in error:

The plaintiff in error has such an interest in the cause of action that he not only may, but must, prosecute the action.

Denman v. Broderick, 111 Cal. 97, 43 Pac. 516; *Norman v. Kentucky Bd. of Managers of World's Columbian Exposition*, 93 Ky. 537, 18 L. R. A. 556, 20 S. W. 901; *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac.

682; *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033.

Mr. Cassius C. Hadley argued the cause, and, with *Messrs. Charles W. Miller, L. G. Rothschild, and William C. Geake*, filed a brief for defendant in error:

Plaintiff in error has no right to prosecute his writ of error in this court, since he does not show that he has any just cause for complaint.

Cooley, Const. Lim. 6th ed. p. 196; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; *Jones v. Black*, 48 Ala. 540; *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631; *Gustavel v. State*, 153 Ind. 613, 54 N. E. 123; *Kansas City v. Union P. R. Co.* 59 Kan. 427, 52 L. R. A. 321, 53 Pac. 468.

Mr. Justice Brown delivered the opinion of the court:

The constitutionality of the exemption law of Indiana was apparently the only question raised by the parties. It was argued elaborately, both in the circuit and supreme court of the state, and was finally affirmed by a majority of the latter court. The power of the county auditor, who is charged by law with the duty of making the assessment, to refuse to allow the relators their exemption upon the ground of the unconstitutionality of the act, does not appear to have been raised in the state courts, and is not noticed in either opinion of the supreme court. In fact, the celerity of the proceedings and the admissions of counsel indicate that the suit was begun and carried on for the purpose of testing the constitutionality of the law, and that the litigation was, at least, not an unfriendly one.

We have no doubt of the power of state courts to assume jurisdiction of the case if they chose to do so, although there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that, in his opinion, it is repugnant to the Constitution.

It is but just to say, however, that the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it has often been assumed, and sometimes directly decided, to exist. In any event, it is a purely local question, and seems to have been so treated by this court in *Huntington v. Worthen*, 120

U. S. 97, 101, 30 L. ed. 588, 7 Sup. Ct. Rep. 469.

Different considerations, however, apply to the jurisdiction of this court, which we have recently held can only be invoked by a party having a personal interest in the litigation. It follows that he cannot sue out a writ of error in behalf of third persons. *Tyler v. Registration Court Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Turpin v. Lemon*, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; *Lampases v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. [149] Ct. Rep. 623. These authorities *control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, *viz.*, the taxpayers, and in this particular the case is analogous to that of *Caffrey v. Oklahoma*, 177 U. S. 346, 44 L. ed. 799, 20 Sup. Ct. Rep. 664. We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision.

It is true there seems to have been a personal judgment in form against the defendant for costs, the amount of which, however, has never been taxed, and when taxed and paid would probably be reimbursed to him. It was formerly held, under the practice which disqualified interested witnesses, that a liability for costs was sufficient to render a witness incompetent. 1 Greenl. Ev. §§ 401, 402. But it seems to be well settled that even if the fact that costs are awarded against a party gives him an appealable interest, of which there appears to be considerable doubt (*Travis v. Waters*, 12 Johns. 500; *Reid v. Vanderheyden*, 5 Cow. 719, 736), it does not give him an appealable interest in the judgment upon the merits, but limits him to the mere question of costs. *Studabaker v. Markley*, 7 Ind. App. 368, 34 N. E. 606; *Hone v. Van Schaick*, 7 Paige, 221; *Card v. Bird*, 10 Paige, 426; *Cuyler v. Morland*, 6 Paige, 273. If plaintiff in error objected to this judgment for costs, he might have moved to modify it in that particular. Not having done so, his appeal is presumptively
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from the judgment on the merits (*American Ins. Co. v. Gibson*, 104 Ind. 336, 342, 3 N. E. 892), and as his individual rights were not affected by such judgment, he is not entitled to an appeal.

The fact that the various statutes fixing the jurisdiction of *the circuit court of the [150] United States, and of this court, which, from the original judiciary act of 1789 [1 Stat. at L. 73, chap. 20] have, where the amount involved was made the test of jurisdiction, uniformly used the words "exclusive of costs," would indicate, so far as the Federal courts are concerned, that a mere judgment for costs could not ordinarily be made the basis of an appeal to this court.

For the reasons above given the appellant did not have the requisite interest to maintain this appeal, and it is therefore *dismissed*.

Mr. Justice **Harlan** and Mr. Justice **White** are of opinion that the plaintiff in error was entitled to prosecute the present writ, and that the court should determine the case upon its merits.

CITY OF JOPLIN, *Appt.*,
v.
SOUTHWEST MISSOURI LIGHT COMPANY.

(See S. C. Reporter's ed. 150-158.)

*Electric lighting—implied contract of city
not to enter competition.*

An implied contract that the city will not, for twenty years, enter into the business of commercial electric lighting, does not arise from a municipal grant to certain persons under the authority of Mo. Laws 1891, p. 60, of the right to erect and maintain an electric light plant for that period, where such grant is not exclusive.

[No. 32.]

Argued October 20, 1903. Decided November 16, 1903.

A PPEAL from the Circuit Court of the United States for the Western District of Missouri to review a decree enjoining a municipality from entering into the business of commercial electric lighting. *Reversed* and remanded for the dismissal of the bill. See same case below, 113 Fed. 817.

Statement by Mr. Justice **McKenna**:

Bill in equity to restrain the appellant from supplying its inhabitants with incandescent lights or other electric lighting in competition with the appellee.

The city of Joplin is a municipality of the

state of Missouri; the appellee is a corporation of said state, and the jurisdiction of the circuit court was invoked on the ground that the action of the city impaired the obligation of the contract existing between it and the appellee, in violation of the Constitution of the United States, and hence the appeal directly to this court.

A preliminary injunction was granted. 101 Fed. 23. It was made perpetual upon final hearing, and a decree was entered enjoining the city "from supplying or furnishing to the inhabitants, residents, or any other person, firm, or corporation within said city, or any addition thereto or extension thereof, electric lights, either incandescent or arc, or in any other form or manner, for commercial or private lighting, for and during the full term" of the grant to the predecessors and assignors of appellee, to wit, the term of twenty years from and after October 7, 1891. 113 Fed. 817.

A statute of Missouri (Laws 1891, p. 60) authorizes cities to erect, maintain, and operate electric light works, to light the streets, and supply the inhabitants with light for their own use, and to establish rates therefor. Or they may, the statute provides, "grant the right to any person or persons or corporation to erect such works . . . upon such terms as may be prescribed by ordinance, provided further that such right . . . shall not extend for a longer period than twenty years." Subsequently to, and in pursuance of, this statute, the city, by ordinance, October 7, 1891, [152] granted the right to *erect and maintain an electric light plant to certain persons, naming them, their successors and assigns, for a period of twenty years. The plant was erected at considerable expense, and has ever since been maintained and operated. The appellee is the successor of the original grantees.

The ordinance conferred rights and exacted obligations, and fixed, besides, the rates to be charged. It also provided for its written acceptance within ten days after its passage, and the commencement of the work within sixty days. It was accepted.

Subsequently (March, 1899), the city, acting in pursuance of, and in the manner provided in, certain ordinances, issued bonds to the amount of \$30,000, "for the purpose of erecting an electric light plant, to be owned, controlled, and operated by the city," and by the means obtained thereby constructed electrical works, erected poles and wires, established a schedule of rates, and entered into the business of commercial electrical lighting in competition with appellee. The bill alleged that the appellee was the owner of real and personal property within the city, which is assessed by the city for

municipal taxation, and that appellee is compelled, by reason of such taxation, "to aid and assist in operating and maintaining defendant's (the city's) electric plant and business as a rival and competing one" with appellee's electrical plant and business.

Mr. C. H. Montgomery argued the cause, and, with Mr. Samuel W. Moore, filed a brief for appellant:

As the city of Joplin did not expressly grant an exclusive franchise, or expressly disable itself from erecting and maintaining an electric light plant, no such restrictions will be created by implication.

Bienville Water Supply Co. v. Mobile, 93 Fed. 539; *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Pearsall v. Great Northern R. Co.* 161 U. S. 664, 40 L. ed. 844, 16 Sup. Ct. Rep. 705; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; *Stein v. Bienville Water Supply Co.* 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; *Charles River Bridge v. Warren Bridge*, 11 Pet. 536, 9 L. ed. 819; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Thompson Houston Electric Co. v. Newton*, 42 Fed. 723; *Levis v. Newton*, 75 Fed. 884; *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983; *Austin v. Bartholomew*, 46 C. C. A. 327, 107 Fed. 349; *Newburyport Water Co. v. Newburyport*, 103 Fed. 587.

The power of the city of Joplin to erect and operate its own electric light plant, and the power to grant to some person or corporation a franchise therefor, are concurrent powers.

Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400.

Mr. John A. Eaton argued the cause, and, with Mr. J. McD. Trimble, filed a brief for appellee:

The express provisions of the statute and contract shall be first considered, and then what is necessarily implied from such express provisions. This is the only rule for finding the true and entire contract.

Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Dill. Mun. Corp.* 4th ed. ¶¶ 451-459.

The law implies duties and obligations in a contract from those which are expressed, and the implied duties and obligations are as much a part of the contract as those expressed.

Union Depot Co. v. Chicago, K. & N. R. Co. 113 Mo. 213, 20 S. W. 792; *Bishop, Contr.* 241; 2 *Parsons, Contr.* 6th ed. p. 514; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *United States v. Eabbit*, 1 Black, 55, 17 L. ed. 94; *Whincup v. Hughes*, L. R. 6 C. P. 78; *Donahoe v. Kettell*, 1 Cliff. 144, Fed. Cas. No. 3,980.

Implication is but another term for meaning an intention, apparent in the light of judicial inspection.

Rhode Island v. Massachusetts, 12 Pet. 723, 9 L. ed. 1260.

The purpose of the contract was not to govern the inhabitants of the city, but to obtain a private benefit for the city itself and its denizens.

Illinois Trust & Sav. Bank v. Arkansas City, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

The corporation is estopped from asserting that no contract relations exist.

Zabriskie v. Cleveland, C. & C. R. Co. 23 How. 381, 16 L. ed. 488.

The obligation of a contract is the law which binds the parties to perform their agreement; any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution.

Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357.

Courts may acquaint themselves with the persons and circumstances that are the subjects of the written agreement, and place themselves in the situation of the parties who made the contract,—view the circumstances as they viewed them, so as to judge of the meaning of the words, and of the correct application of the language to the thing described.

Guarantee Co. v. Mechanics' Sav. Bank & T. Co. 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766; *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589.

The following cases fully support the right to an injunction in this suit:

Walla Walla Water Co. v. Walla Walla, 60 Fed. 957; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Westerly Waterworks v. Westerly*, 75 Fed. 181; *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 695.

A legislative act which impairs the obligation of an existing contract is void as violative of the contract clause of the Constitution.

New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Los Angeles v.* 191 U. S. U. S., Book 48.

Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

The foundation of the suit is that the ordinances of March, 1899, and the acts and conduct of the city in entering into competition with the complainant (appellee) impair the obligation of the contract impliedly arising from the ordinance of October 7, 1891, and the acceptance thereof by appellee. In other words, it is contended that under the statute of the state, which we have quoted, the city was given the power to *construct an [156] electrical plant and erect poles, etc., to "supply private lights for the use of the inhabitants of the city," or it could grant that right "to any person or persons or corporation" upon such terms as might be prescribed by ordinance. It chose the latter, and granted to the assignors of appellee the right given by the statute, and expressed it to be "in consideration of the benefits to be derived therefrom." And it is hence contended that thereby the city contracted not to build works of its own, and that by doing so it violated § 10 of article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of a contract, and also violated that clause of the 14th Amendment of that instrument, which provides that no state shall deprive any person of property without due process of law.

It is by implication from the statute and the ordinance passed under it, not from the explicit expression of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant to the appellee is not exclusive. That is, it is conceded the city has not exhausted its power under the statute by the grant held by appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but cannot itself become such competitor. The strength of the argument urged to support the distinction is in the consideration that competition by the city would be more effective than competition by private persons or corporations—indeed, might be destructive. The city, it is further urged, could be indifferent to profits, and could tax its competitor to compensate losses. But this is speculation and it may be opposed by speculation, and there are, besides, counter-vailing considerations. The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city

[157]which might give it (the appellee) *a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government.

Many cases illustrate this principle, and some of them were decided in response to contentions similar to those made in the case at bar. In *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400, the village of Skaneateles, under statutes of the state of New York, granted to the water company the right to construct waterworks, and contracted with it to supply water to the village and its inhabitants for the period of five years. At the expiration of the term of the contract some difference arose about the terms of its continuance, and the village constructed an independent system of waterworks. A suit was brought by the water company to restrain the further construction of the works and their operation, and the company contended that under the statute of the state by which the village granted to the company its franchises, the village had the election to construct works, or confer such power upon a private company like the water company, and having elected the latter, it impliedly contracted not to construct works of its own. In reply to this contention this court said, by Mr. Justice Peckham:

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

It is true there was an element in that case which is not in the case at bar. The village of Skaneateles had entered into a contract with the water company to take [158]water from the *company. This contract had expired before the city constructed its works. It was not that contract, however, which was alleged to have been impaired, but that which the water company claimed to have been implied by reason of its organization and incorporation, and in pursuance of the application made to, and with the consent of, the village authorities. The ultimate reliance, therefore, of the water company was that from the grant to it the vil-

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lage impliedly contracted not to construct works of its own. The similarity of the contention with that in the case at bar is apparent.

In *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40, 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820, it was again decided that the granting of franchises to private persons to construct waterworks in a city does not preclude the city from afterwards erecting such works, and supplying its inhabitants with water.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, is not in opposition to these views. The city of Walla Walla was, by the statute incorporating it, empowered to erect waterworks or to authorize the erection of the same. In pursuance of this power it granted a franchise to the Walla Walla company, and contracted to take water from the company, reserving the right to avoid the contract under certain contingencies. But it was provided that: "Until such contract shall have been so avoided, the city of Walla Walla shall not erect, maintain, or become interested in any waterworks except the ones herein referred to, save as hereinafter specified." The contract was in force at the time the suit was brought, and the water company had substantially complied with all of its terms and conditions. The contract passed upon, therefore, was expressed and explicit. The power to make it was sustained. In the case at bar, restraint upon the power of the appellant city is claimed to be implied by the grant to the appellee. We think, for the reasons stated and upon the authorities cited, such restraint cannot be implied.

Decree reversed and case remanded with directions to dismiss the bill.

*ST. LOUIS HAY & GRAIN COMPANY,[159]

Appt.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 159-164.)

Contracts—right to maintain a quantum valebat of one performing a contract invalid because not in writing—what constitutes a breach of.

1. That a contract for the sale of hay to the United States is invalid, under U. S. Rev. Stat. § 3744, because it had not been reduced to writing and signed by the contracting parties, does not entitle the contractor, after furnishing the hay and receiving the contract price, to maintain a *quantum valebat* on the ground that the value of the hay had increased from the time of the contract to the time of delivery.

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2. A contract for the sale of hay to the United States, under an advertisement providing that awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per cent, and that, if the troops of the United States should be wholly or in part withdrawn, the award shall become inoperative to the extent of such reduction, and that deliveries shall begin in five days from the date of the award, and proceed at daily rates of at least one sixtieth of amount, or in such quantities and at such times afterwards as may be designated by the chief quartermaster,—is not broken by a suspension for some time of orders for hay after the withdrawal of troops, and a continuation of orders for a period of ten months after the award, although the market value of hay is much greater during the later than the earlier part of such period.

[No. 41.]

*Argued October 30 and November 2, 1903.
Decided November 16, 1903.*

APPEAL from the Court of Claims to review a judgment dismissing a petition for damages for the breach by the United States of a contract made with it by the claimant. *Affirmed.*

See same case below, 37 Ct. Cl. 281.

The facts are stated in the opinion.

Messrs. William E. Harvey and George A. King argued the cause, and, with **Mr. William B. King**, filed a brief for appellant:

The claimant is entitled to recover the value of the hay at the time and place of delivery.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518.

The special contract was void for all purposes.

Filor v. United States, 9 Wall. 45, 19 L. ed. 549; *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318.

To sustain the defense of accord and satisfaction there must be both an accord and a satisfaction; that is, there must be an agreement—express or implied—to receive a certain sum in satisfaction of a claim, coupled with payment of that sum.

Memphis v. Brown, 20 Wall. 289, 22 L. ed. 264; *Cumber v. Wayne*, 1 Smith Lead Cas. 7th Am. ed. 595; *Flockton v. Hall*, 14 Q. B. 380, 16 Q. B. 1039.

This case is governed by the principles asserted in the decision in *Piatt v. United States*, 22 Wall. 496, 22 L. ed. 858.

The question is whether the payment was in fact made and accepted in satisfaction.

Baird v. United States, 96 U. S. 430, 24 L. ed. 703; *Fire Ins. Asso. v. Wickham*, 141 U. S. 577, 35 L. ed. 866, 12 Sup. Ct. Rep. 84; *Chicago & N. W. R. Co. v. United States*, 104 U. S. 886, 26 L. ed. 893; *Swift & C. & 191 U. S.*

B. Co. v. United States, 105 U. S. 691, 26 L. ed. 1108, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; *Cape Ann Granite Co. v. United States*, 20 Ct. Cl. 1.

Time was of the essence of the contract.

Hipwell v. Knight, 1 Younge & C. Exch. 401; *Coon v. Spaulding*, 47 Mich. 163, 10 N. W. 183; *Cameron v. Wells*, 30 Vt. 633; *Blydenburgh v. Welsh*, Baldw. 331, Fed. Cas. No. 1,583; *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500.

In the case of a government contract there is a special ground for insisting upon a construction which is in accordance with good faith, and which seeks no unconseionable advantage of the other party.

Scott v. United States, 12 Wall. 443, 20 L. ed. 438; *Hume v. United States*, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. Rep. 134.

Assistant Attorney General **Pradt** argued the cause and filed a brief for appellee:

The agreement not being in writing and signed by the parties, as required by U. S. Rev. Stat. § 3744 (U. S. Comp. Stat. 1901, p. 2510), was not a valid contract upon which an action can be brought for damages caused by the defendant's breach.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518.

It is true that where services have been rendered, or goods delivered, under a contract within the statute of frauds, an action may be maintained on the *quantum meruit* as upon an implied contract, but only where the defendant is in default.

Galvin v. Prentice, 45 N. Y. 164, 6 Am. Rep. 58; *Day v. New York C. R. Co.* 51 N. Y. 583; *King v. Brown*, 2 Hill, 487; *Coughlin v. Knowles*, 7 Met. 61, 39 Am. Dec. 759.

The statute of frauds has no application to an executed agreement.

Stone v. Dennison, 13 Pick. 1, 23 Am. Dec. 654; *King v. Welcome*, 5 Gray, 44; *Gillespie v. Battle*, 15 Ala. 276; *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318; *Remington v. Palmer*, 62 N. Y. 31; *Larsen v. Johnson*, 78 Wis. 306, 47 N. W. 615; *Haussman v. Burnham*, 59 Conn. 133, 22 Atl. 1065; *Mecue v. Smith*, 9 Minn. 258, 86 Am. Dec. 100, Gil. 237; *Webster v. Le Compté*, 74 Md. 258, 22 Atl. 232; *Crane v. Gough*, 4 Md. 333; *Bibb v. Allen*, 149 U. S. 497, 37 L. ed. 825, 13 Sup. Ct. Rep. 950.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a judgment of the court of claims dismissing the appellant's petition. 37 Ct. Cl. 281. The petition alleges a contract by the United States to buy 9,000,000 pounds of hay from the claimant at the rate of \$.61½ per hundred weight, a refusal by the government to take the hay at the rate of one sixtieth daily, as required

by the contract, according to the claimant's interpretation, and a failure to accept 255,291 pounds out of the 9,000,000. The rest, it is admitted, was taken and paid for at contract rates. The claimant seeks compensation for an increased price paid by it, increased cost of transportation, and loss of anticipated profits, caused by the delay, all as damages for the breach of the contract, or, alternatively, the market value of the hay less the amount paid by the United States. The answer is a general denial.

[162] The court of claims finds that during the late war with Spain an advertisement was published by a quartermaster for 9,000,000 pounds of hay, among other things, seemingly for *use in Camp George H. Thomas, Georgia, and that in connection with it the following information was furnished: "The foregoing are the estimated quantities which will be required, but bids will be accepted in whole or in part . . . and awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per centum thereof . . . and further, that if the troops should be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction. . . . Hay and straw. . . . Deliveries of the supplies to begin within five days from date of award, and proceed at daily rates of at least one sixtieth of amount, or in such quantities and at such times afterwards, as may be designated by the chief quartermaster," etc. A bargain was made on these terms on July 12, 1898. Shipments were made, amounting, on August 27, 1898, to 4,685,949 pounds. On August 28 the quartermaster telegraphed to the claimant not to ship any more hay until notified to do so. This suspension of orders was due to the withdrawal of troops. The claimant then had 100 carloads in transit, which it was obliged to sell for what it could get, and protested against the stoppage. At different dates between September 12 and May 18 following the quartermaster telegraphed orders for hay, which were filled. Hay meantime had risen in value, and cost the claimant more than it would have cost in the summer. Accordingly, the claimant asked to be relieved from delivery, but the quartermaster refused, holding back money due to the claimant as security to compel performance. The claimant went on with deliveries, and in December was asking for orders "on our contract;" on April 27 returned a voucher "covering hay on our contract;" on May 27 sent a bill of lading and invoice "ordered upon our contract to-day;" and on June 24, 1899, wrote "We would like to know how soon you expect us to put in the balance of the hay due

upon the contract, as we are anxious to get it all cleaned up." It would seem that no hay was ordered after June 13. The claimant *delivered the hay, and received full pay-[163] ment for it under the contract, without protest or attempt to reserve any rights at that time. The last payment was made on July 24, 1899. On May 11, 1899, however, the claimant wrote to the quartermaster, claiming damages on account of the government not taking the hay at the rate of one sixtieth per day, and on June 28, and later, the quartermaster approved the claim. Although, no doubt, both parties supposed their agreement binding, the court of claims held, and it is not disputed, that the contract was within Rev. Stat. § 3744 (U. S. Comp. Stat. 1901, p. 2510), and not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," could not have been sued upon if it had not been performed. *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518; *South Boston Iron Co. v. United States*, 118 U. S. 37, 30 L. ed. 69, 6 Sup. Ct. Rep. 928. See *Monroe v. United States*, 184 U. S. 524, 46 L. ed. 670, 22 Sup. Ct. Rep. 444. It is argued by the claimant on this ground that it is entitled to maintain a *quantum valebat*.

On the facts stated it is evident that the claimant has no case. The invalidity of the contract is immaterial after it has been performed. When a lawful transfer of property is executed, it does not matter whether the terms of the execution were void or valid while executory; the transfer cannot be revoked or the terms changed. A promise to make a gift does not bind, but a gift cannot be taken back, and a transfer in pursuance of mutual promises is not made less effectual by those promises or by the fact that money was received in exchange. The contract may be void, as such, but it expresses the terms on which the parties respectively paid their money and delivered their goods. See *Savage v. United States*, 92 U. S. 382, 23 L. ed. 660. The proposition does not need to be argued or explained more at length. Of course, different considerations would come in if the claimant had been subjected to a motive from which it had a right to be free, as, for instance, by fraud or duress. But there was nothing which the law could recognize as duress, and the suggestion that it was peculiarly the duty of the officers of the government to see that *the[164] contract was put in binding form is very far from making out an analogy to fraud. The claimant was bound to know the law at its peril. The agent of the United States made no representation, and the claimant in no way purported to submit its judgment to his, if that would have bettered its case.

But it is said that this is not the simple case of mutual performance of a void contract, but that the United States, although it has paid the price, has broken the contract in respect of time. It may be said that if the United States, instead of paying for the hay, had set up the invalidity of the contract, the claimant could have sued on a *quantum valebat*. *Clark v. United States*, 95 U. S. 539, 542, 543, 24 L. ed. 518, 519; *Bacon v. Parker*, 137 Mass. 309, 310, 311. And it might be argued that the same result would follow if the United States, after paying the price, were compelled to rely upon the invalidity of the contract in answer to a claim of damages for a breach. Acceptance of payment by the vendor is not necessarily a waiver of such a claim. *Garfield & P. Coal Co. v. Fitchburg R. Co.* 166 Mass. 119, 123, 44 N. E. 119. But we need not consider the questions suggested, because we agree with the court of claims that there was no breach. The right to diminish the order, and to change the quantities and times, was reserved in the fullest and most express terms, and especially with regard to the event which happened,—the withdrawal of the troops. Therefore, if, in view of the protest and claim made by the claimant, we should assume that the payment of the contract price did not purport to be in full satisfaction of all claims under the contract, which would be going very far and would be against the findings, still there is no valid claim under it, because the United States has done all that it undertook to do. It is true that hay is an article varying greatly in price at different seasons of the year, and that would have been a reason for holding time of the essence, if the contract had fixed a time; but the contract left the time open, as we have said, and the claimant must be held to the bargain which it made, although it has been disappointed in reasonable hopes.

Judgment affirmed.

[165]*STATE OF MISSOURI, at the Relation of
WILLIAM PRESTON HILL, *Plff. in*
Err.,

v.

ALEXANDER M. DOCKERY, Sam. B.
Cook, B. P. Williams, Albert O. Allen,
Edward C. Crow, and The State Board of
Equalization.

(See S. C. Reporter's ed. 165-171.)

Judgments — conclusiveness of decision of

NOTE.—On writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

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state board of equalization—error to state court—Federal question.

1. The judgment of a state board of equalization of Missouri, which has laid a substantial tax upon corporations therein, is final under the Missouri Constitution and statutes.
2. A taxpayer who admits that his own tax is correct cannot, on the ground that he will be deprived of his property without due process of law, and denied the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States, have a writ of error from the United States Supreme Court to review a construction by the supreme court of the state of the statutes thereof, as exempting in whole or in part certain corporations from the payment of taxes.
3. Questions under the state Constitution and laws cannot be considered on a writ of error to a state court, as they might be on error to an inferior Federal court.

[No. 180.]

Argued and submitted October 27, 1903,
Decided November 16, 1903.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment quashing an alternative writ of mandamus to the state board of equalization. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward P. Johnson argued the cause, and, with Mr. William Preston Hill *in propria persona* and Mr. Frank K. Ryan, filed a brief for plaintiff in error.

Mr. Edward C. Crow submitted the cause for defendants in error. Mr. Bruce Barnett was with him on the brief.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to the supreme court of Missouri, upon a judgment quashing an alternative writ of mandamus to the state board of equalization. The petition alleges that the board, instead of assessing the total actual cash value of the taxable property of certain railroad, bridge, telephone, telegraph, and express companies, made pretended, fraudulent, inadequate, and not uniform assessments upon such property, at valuations varying from about a quarter to forty-eight *per cent of the actual [170] value, except that of the express companies, which they did not assess at all. It alleges that in this way the petitioner will be deprived of his property without due process of law and will be denied the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States. The motion to quash denied the jurisdiction of the supreme court of Missouri to issue the writ, and also the sufficiency of the grounds on which the writ was

allowed. The court sustained the motion without an opinion or statement of reasons.

For all that appears, the court may have quashed the writ on grounds of local practice. But if this consideration be laid on one side, it is impossible to say that the board of equalization has not acted with regard to those companies which it has assessed. It has laid a substantial tax upon them. Its judgment is final under the Missouri Constitution and statutes. Mo. Const. art. 10, § 18; Rev. Stat. §§ 9344, 9356, Stat. 1901, p. 232. If, nevertheless, we assume that mandamus would lie upon a clear case of fraud adequately alleged and proved (*State Bd. of Equalization v. People*, 191 Ill. 528, 539, 58 L. R. A. 513, 61 N. E. 339), it would be a strong thing to revise the judgment of the board on the strength of allegations of undervaluations, and the single adjective "fraudulent" without more specific allegations of fact. *State ex rel. Gottlieb v. Western U. Teleg. Co.* 165 Mo. 502, 516, 517, 65 S. W. 775; *State ex rel. Folk v. Talty*, 166 Mo. 529, 560, 66 S. W. 361; *Manchester v. Furnald*, 71 N. H. 153, 158, 51 Atl. 657; *Knight v. Thomas*, 93 Me. 494, 45 Atl. 499; *Maish v. Arizona*, 164 U. S. 599, 611, 41 L. ed. 567, 571, 17 Sup. Ct. Rep. 193; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 434, 438, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114. See *Fogg v. Blair*, 139 U. S. 118, 127, 35 L. ed. 104, 107, 11 Sup. Ct. Rep. 476.

However this may be, the petitioner admitted at the argument that his own tax was correct, and that he would have had no case under the 14th Amendment if the companies had been exempted altogether. *Magon v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293-295, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431. But his rights [171] under that amendment turn on the power of the state, no matter by what organ it acts. *Virginia v. Rives*, 100 U. S. 313, 318, 25 L. ed. 667, 669. Therefore, if the supreme court of the state construed the statutes as exempting express companies from this tax, and substituting another, as it is argued on behalf of the defendants in error that the statutes do, the petitioner cannot complain here. For the legislature could exempt them, and the question whether it has done so or not is for the state courts to decide in their construction of its acts. Furthermore, if the state could grant a total exemption it could grant a partial exemption, and if it has done so, *de facto*, through its officers, the petitioner cannot come here on an allegation that the officers acted as they did without the authority of the state. That, again, is for the

state court to decide. The petitioner has no case under the Constitution of the United States, and nothing else is open. This is a writ of error to a state court, so that questions under the state Constitution and laws cannot be considered, as they might be on error to a subordinate court of the United States.

Judgment affirmed.

J. W. ALLEN, Comptroller of the State of Tennessee, *Plff. in Err.*,

v.

PULLMAN'S PALACE CAR COMPANY.

(Sec S. C. Reporter's ed. 171-183.)

Commerce—privilege tax on sleeping-car companies.

1. Taxes exacted from a sleeping-car company engaged in both interstate and intrastate traffic, under a state statute imposing an annual tax of \$500 per car upon sleeping-car companies doing business in the state, which makes no distinction between cars used in interstate traffic or in traffic wholly within the borders of the state, are void as an attempt by the state to impose a burden upon interstate commerce.
2. The annual tax of \$3,000 imposed by a state statute upon sleeping-car companies which carry one or more local passengers on cars operating within the state is not void as a burden on interstate commerce, where the company is free to decline all local business if it sees fit.

[No. 27.]

Argued October 16, 1903. Decided November 16, 1903.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee to review a judgment for the recovery from the state of Tennessee of moneys paid by a sleeping-car company for license taxes. *Modified* and remanded for further proceedings.

Statement by Mr. Justice **Day**:

This is a writ of error to review the judgment of the circuit court for the middle district of Tennessee in suits brought by the Pullman's Palace Car Company to recover from the state of Tennessee moneys paid under protest for taxes levied and collected by virtue of certain laws of the state requiring the payment of sums for the years 1887 to 1893, inclusive. These statutes are set forth in the opinion. The cases were tried to the court without the intervention of a jury, and separate findings of fact and

NOTE.—On corporate taxation as affected by the commerce clause of the Federal Constitution.—see note to *Sandford v. Poe*, 60 L. R. A. 641.

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law were made. From the findings of fact it appears that the Pullman Company, a sleeping-car company, operated its cars in Tennessee under a contract with railroad companies traversing the state. These contracts required the Pullman Company to furnish the cars, keep the same in order, and to hire the porters and conductors. The railroad companies paid the Pullman Company for the privileges afforded, furnishing light, heat, and water for the cars, and repairing damages due to accident and casualty. The special finding of facts as to the manner of operation in transporting the cars of the Pullman Company sets forth:

[173] During the years 1887 and 1888 the company operated sleeping cars, as follows: A car left Nashville and went to Memphis nightly and on this car tickets were sold to passengers from Nashville to Memphis, and not beyond. This car remained in Memphis during the day, returning to Nashville the following *night, and going no further. The next night, it went from Nashville by way of Chattanooga to Atlanta, Georgia. It remained in Atlanta during the day, and returned the next night from Atlanta to Memphis. On the trip from Memphis tickets were sold from Nashville to Atlanta and to intermediate points in the state of Tennessee. On the nights the cars left Nashville for Memphis and Atlanta for Nashville, a car left Memphis for Nashville and another left Nashville for Atlanta, selling tickets from Memphis to Nashville and intermediate points, and no further, and from Atlanta and intermediate points to Nashville and no further. The car from Memphis to Nashville went on the trip to Atlanta before making a return trip to Memphis, and the car making the trip from Atlanta to Nashville went on the trip the following night to Memphis before making a return trip to Atlanta. The same cars were not used continuously in this service, but were changed from time to time, there being four cars performing the service at all times.

During the year 1887 the East Tennessee, Virginia, & Georgia Railroad Company ran two sleepers of its own, doing a business between Knoxville and Chattanooga, Tennessee. During the years 1889, 1890, 1891, 1892, and 1893 the company has operated sleeping cars between Nashville and Memphis and Atlanta and Nashville, as above set forth. From 1887, continuously, the Pullman Company has operated its cars on the lines of the Nashville, Chattanooga, & St. Louis Railway, the Louisville & Nashville Railroad, East Tennessee, Virginia, & Georgia Railroad, now the Southern Railway, the Newport News & Mississippi Valley Railroad, Illinois Central Railroad, and Cincinnati Southern Railroad, and all other

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railroads within the state of Tennessee whereon sleeping cars are used, and has taken up, carried, and put down passengers within the state.

In 1887 sleeping cars were operated during a portion of the year between Nashville and Memphis, and did not pass beyond the limits of the state. It was agreed that, without either party waiving any rights, the plaintiff's claim would be abated \$1,234.

*The gross receipts of the plaintiff per[174] year from lines running into the state of Tennessee was about \$500,000. The gross receipts per year from passengers carried locally in Tennessee was about \$25,000.

The cars actually used on all these lines during each year would number over one hundred.

Mr. John J. Vertrees argued the cause, and, with Mr. Charles T. Cates, Jr., filed a brief for plaintiff in error:

If the state of Tennessee is possessed of the power to impose this privilege tax the amount of the tax is a question for the legislature of Tennessee alone to decide. The only concern of this court is with the validity of the tax. All else lies beyond the jurisdiction which it has.

Delaware Railroad Tax, 18 Wall. 231, 21 L. ed. 896; *California v. Central P. R. Co.* 127 U. S. 1, 41, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Kirtland v. Hotchkiss*, 100 U. S. 499, 25 L. ed. 562; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 432, 2 L. R. A. 853, 11 S. W. 348; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115; *Jenkins v. Ewin*, 8 Heisk. 477.

The motives of legislatures, and the policy or impolicy of statutes, are things with which courts have nothing to do.

Fletcher v. Peek, 6 Cranch, 87, 3 L. ed. 162; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 17, 38 L. ed. 64, 14 Sup. Ct. Rep. 240; *Lynn v. Polk*, 8 Lea, 218; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 708, 53 L. R. A. 921, 43 S. W. 115.

It is permissible for the states to tax personal property employed in interstate commerce like other property within its jurisdiction.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599.

It is permissible for the states to tax the franchises of a corporation engaged in interstate commerce.

Atty. Gen. v. Western U. Teleg. Co. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889.

A tax upon that part of the business only which is local is not forbidden.

Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *Western U. Teleg. Co. v. Alabama State Board*, 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 215; *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 685, 53 L. R. A. 921, 43 S. W. 115; *Osborne v. State*, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731, 14 So. 588; *State v. French*, 109 N. C. 722, 14 S. E. 383; *Lumberville Delaware Bridge Co. v. State Board*, 55 N. J. L. 529, 25 L. R. A. 134, 26 Atl. 711; *Western U. Teleg. Co. v. Fremont*, 43 Neb. 500, 26 L. R. A. 706, 61 N. W. 724; *York v. Chicago, B. & Q. R. Co.* 56 Neb. 578, 76 N. W. 1065; *Ogden City v. Crossman*, 17 Utah, 76, 53 Pac. 985; *Western U. Teleg. Co. v. Bright*, 90 Va. 778, 20 S. E. 146; *Alabama, G. S. R. Co. v. Bessemer*, 113 Ala. 668, 21 So. 64; *Adams Exp. Co. v. State*, 55 Ohio St. 69, 44 N. E. 506.

General words in an act should not be so construed as to give an effect to it beyond the legislative power, and thereby render the act unconstitutional; but, if it be possible, a construction shall be given to it that will render it free from constitutional objection. And the presumption is that the legislature intended to enact a law within its powers.

Grenada County v. Brogden, 112 U. S. 269, 28 L. ed. 707, 5 Sup. Ct. Rep. 125; *Marshall v. Grimes*, 41 Miss. 27; *United States v. Sanges*, 48 Fed. 78.

If a statute is fairly susceptible of two constructions, that one will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary, for this purpose, to disregard the more usual or apparent import of the language employed.

Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; *Black, Interpretation of Laws*, 94; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 687, 53 L. R. A. 921, 43 S. W. 115; *Sutherland*, Stat. Constr. § 332.

In making the distinction between the power over commerce and municipal power literal adherence to particular nomenclature should not be allowed to control construc-

tion in arriving at the true intention and effect of state legislation.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 700, 39 L. ed. 317, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360.

Tax laws and other laws general in character enacted to further important public interests, should be construed with liberality so as to carry out the intention of the legislature.

Black, Interpretation of Laws, 325; *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138.

The statute which taxes the company for "doing business in this state" taxes it for doing, and taxes it upon, local business only.

Osborne v. State, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731, 14 So. 588, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 215; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co. v. Alabama State Board*, 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 689, 39 L. ed. 312, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Ashley v. Ryan*, 153 U. S. 446, 38 L. ed. 778, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 23, 36 L. ed. 607, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *New York, L. E. & W. Coal & R. Co. v. Pennsylvania*, 158 U. S. 440, 39 L. ed. 1046, 15 Sup. Ct. Rep. 900.

Where the specific items of property—like cars—are constantly changed and shifted according to the exigencies of the business, the number to be taxed may be averaged.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631.

Mr. William Burry argued the cause, and, with *Mr. J. S. Runnells*, filed a brief for defendant in error:

During all of the time covered by these different suits the business of the Pullman company was principally interstate business, and its business and the conduct of the same in Tennessee were exactly the same as that shown in *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635, and *Pullman Southern Car Co. v. Nolan*, 22 Fed. 276, which were there held to constitute interstate commerce.

Even if there had been cars running only between Nashville and Chattanooga, those cars would have run interstate, as the rail-

road passes into both Alabama and Georgia in going to Chattanooga. *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214.

There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company.

Leloup v. Port of Mobile, 127 U. S. 647, 32 L. ed. 314, 2 Inters. Com. Rep. 136, 8 Sup. Ct. Rep. 1383.

No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.

Lyng v. Michigan, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

When the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose.

Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

The Pullman company is bound to afford sleeping-car accommodations to any person who properly applies therefor.

Nevin v. Pullman Palace Car Co. 106 Ill. 222, 46 Am. Rep. 688; *Elliott, Railroads*, § 1617; *Atty. Gen. v. London & N. W. R. Co.* L. R. 6 Q. B. Div. 216.

The statute of Tennessee which abrogates the duties laid upon common carriers, innkeepers, and some others of receiving all proper persons who present themselves for carriage, etc., does not apply to sleeping-car companies.

Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; *Elliott, Railroads*, §§ 1616 *et seq.*; *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53, 21 L. R. A. 298, 23 S. W. 70.

State legislation which may operate as a burden on, or interfere with, interstate commerce is obnoxious to the Federal Constitution, and, inasmuch as this revenue act, joined to the duty imposed by law to accept passengers whenever they offer themselves, would act as such regulation of interstate commerce, it is clear that the act must be unconstitutional.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 220, 41 L. ed. 695, 17 Sup. Ct. Rep. 305; *State Freight Tax Case*, 15 Wall. 277, 21 L. ed. 162; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *West-*
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ern U. Teleg. Co. v. Alabama State Board, 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

There is an important distinction between a tax upon property and a tax upon the privilege of doing business.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268.

If the interstate business and the local business, upon which only the tax could be sustained, are necessarily so mixed as to preclude separation, a tax thereon is invalid.

Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127.

The state may tax its internal commerce, but, if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state.

State Freight Tax Case, 15 Wall. 277, 21 L. ed. 162.

The fact that the legislature sought to make the license tax depend upon the receiving on the cars an intrastate passenger (which is a necessary incident to the interstate business) cannot save the tax, or make it valid.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

But this provision of the license act, seeking to make the business liable to a heavy tax if only a single passenger tenders fare for interstate accommodation, is but a subterfuge to evade the interstate commerce clause of the Constitution.

Ibid.; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 462, 30 L. ed. 241, 6 Sup. Ct. Rep. 1114.

In whatever language a statute may be framed, its purpose and its validity under the interstate commerce clause of the Federal Constitution must be determined by its natural and reasonable effect.

Henderson v. Wickham, 92 U. S. 259, 23 L. ed. 543.

The test in such a case is, Upon what does the burden really rest? The tax is not valid because laid upon local and domestic, as well as interstate, traffic.

State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146.

After making the foregoing statement, Mr. Justice **Day** delivered the opinion of the court:

The taxes in controversy were levied under certain revenue laws of the state of Tennessee. Those for the years 1887 and 1888 pro-

vided: "That the rate of taxation on the
[178]following *privileges shall be as follows: Sleeping cars: Each company doing business in the state, on each car, per annum, \$500." Section eight of the act provided: "That any and all parties, firms, or corporations exercising any of the foregoing privileges must pay this tax, as set forth in this act, for the exercise of such privilege, whether they make a business of it or not."

The Tennessee act of 1877, imposing a tax upon the running of sleeping cars, was before this court for consideration in the case of *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635. That act provided: "That the running or using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege, and the companies shall be required to pay to the comptroller by the first day of July following fifty dollars (\$50) for each and every said cars or coaches used or run over said roads; and if the said privilege tax herein assessed be not paid as aforesaid, the comptroller shall enforce the payment of the same by distress warrant."

It was held that the tax was a burden upon interstate commerce, and void because of the exclusive power of Congress to regulate commerce between the states. Unless the statute now under consideration can be distinguished from the one then construed, the *Pickard Case* is decisive of the present case. Both taxes were imposed under the power granted by the Constitution of Tennessee to lay a privilege tax. This power is held by the supreme court of the state to give a wide range of legislative discretion. Any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115. In the act of 1877 the running and using of sleeping cars on railroads in the state, when the cars are not owned by the railroads upon which they are run, is declared to be a privilege. Under the act of 1887, the tax is specifically imposed upon a privilege. Under the act of 1877, the tax imposed was \$50 for each car or coach used or run over the road. Under the act of 1887, each company doing

[179]business in the state is *required to pay \$500 per annum for the same privilege. The distinction, except in the amount of annual tax exacted, is without substantial difference. Under the earlier act the tax is required for the privilege of running and using sleeping cars on railroads not owning the cars. In the later act it is enacted for the privilege of doing business in the state. This business consists of running sleeping cars

upon railroads not owning the cars, and is precisely the privilege to be paid for under the first act, neither more nor less. In neither act is any distinction attempted between local or through cars or carriers of passengers. The railroads upon which the cars are run are lines traversing the state, but not confined to its limits. The cars of the Pullman Company run into and beyond the state as well as between points within the state. The act in its terms applies to cars running through the state as well as those whose operation is wholly intrastate. It applies to all alike, and requires payment for the privilege of running the cars of the company, regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the state. There is no decision of the supreme court of Tennessee limiting the act in its operation to intrastate traffic. It is true that the comptroller has sought to restrain the operation of the law by imposing the tax for two years upon cars running between Nashville and Memphis and between Nashville and Chattanooga for two years, and fixing one car in each year as the proportion of local business done on interstate cars for two years. But this action does not conclude the state in taxing for other years, and the action taken by the comptroller does not limit the terms of the law affecting interstate commerce.

In *Leloup v. Port of Mobile*, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 136, 8 Sup. Ct. Rep. 1380, 1383, it was sought to recover a penalty imposed upon an agent of the Western Union Telegraph Company for failure to pay an annual license tax as required by an ordinance of Mobile. In the course of the opinion denying the right to exact the license fee, Mr. Justice Bradley said: "But it is urged that a portion of the telegraph *company's [180] business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

In *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 215, a license tax upon express companies was sustained, in view of the decision of the supreme court of that state that it affected only business of the company within the state. The statute now under consideration requires payment of the sum exacted for the privilege of doing any business, when the principal thing to be done is interstate traffic. We are not

at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature, in the terms of the act, impose upon the entire business of the company. We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the state to impose a burden upon interstate commerce.

Other considerations apply in the construction of the act of 1889, under which, or acts identical in terms, taxes were collected from 1889 to 1893, inclusive. It provides: "Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum: . . . Sleeping car companies (in lieu of all other taxes except ad valorem tax) for one or more passengers taken up at one point in this state and delivered at another point in this state, and transported wholly within the state, per annum, \$3,000." Its terms apply strictly to business done in the transportation of passengers taken up at one point in the state and transported wholly within the state to another point therein. It is not necessary to review the numerous cases in this court in which attempts by the states to control or regulate interstate commerce have been the subject of consideration. While they show a zealous care to preserve *the exclusive right of Congress to regulate interstate traffic, the corresponding right of the state to tax and control the internal business of the state, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness. In the late case of *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 215, Mr. Justice Peckham, speaking for the court, said: "It has never been held, however, that when the business of the company, which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to, and is not imposed upon, the business of the company which is interstate, there is no interference with that commerce by the state statute."

Granting that the right exists whereby a state may impose privilege or license fees upon business carried on wholly within the state, it is argued that the tax of \$3,000 per annum, collected for carrying one or more local passengers on cars operating within the state, is assessed upon traffic which bears such small proportion to the entire business of the company within the state that it could not have been levied in good faith up-

on purely local business, and is but a thinly disguised attempt to tax the privilege of interstate traffic. If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the *expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged that under the Constitution of Mississippi the Pullman Company was a common carrier, required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of a decision of the supreme court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the state Constitution. Speaking upon this subject, Mr. Justice Holmes, delivering the opinion of the court, said: "If the clause of the state Constitution referred to were held to impose the obligation supposed, and to be valid, we assume, without discussion, that the tax would be invalid. For then it would seem to be true that the State Constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

There is additional reason for holding that the Pullman Company may transact its business in Tennessee without paying this privilege tax, and continue its interstate

business, declining local business, thereby escaping the attempt to tax it upon business wholly within the state. The statute of Tennessee, enacted in 1875, provides: "The rule of the common law giving a right of action to any person excluded from any hotel or public means of transportation or place of amusement is hereby abrogated; and hereafter no keeper of any hotel or public house, or carrier of passengers for hire, or conductors, drivers, or employees of such [183] carrier or keeper, shall be bound *or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, carriage, or means of transportation, or place of amusement, nor shall any right exist in favor of any such person so refused admission, but the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement, and their employees, to control the access and admission or exclusion of persons to or from public houses, means of transportation, and places of amusement, shall be as perfect and complete as that of any private person over his private house, carriage, or private theatre or places of amusements for his family." Shannon's Code, § 3046.

Under this act, no carrier is required to admit any passenger to his car or means of transportation. While the Pullman Company may not be technically a common carrier, still we think it comes within the scope and meaning of this act. A sleeping car is obviously a public means of transportation. Under this act, the carrier is not obliged to afford its privileges to those making application therefor. Mr. Justice Blatchford, speaking of the character of the service afforded by sleeping cars, in *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635, said: "The car was equally a vehicle of transit as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself."

It follows that a tax imposed upon domestic business, under the circumstances shown, cannot be a burden upon interstate commerce in such sense as will invalidate it.

Under the judgment of the court below, the Pullman Company was permitted to recover for license taxes levied under both acts. In so far as it permitted a recovery for taxes under the act of 1889 and identical laws of other years, the judgment should be modified. For that purpose, and for further proceedings in accordance with this opinion, the case is remanded to the Circuit Court.

*DEFIANCE WATER COMPANY, *Appt.*, [184] v.

CITY OF DEFIANCE and the Council of the City of Defiance.

(See S. C. Reporter's ed. 184-195.)

Federal jurisdiction—case arising under Federal Constitution and laws.

1. The assertion, in a bill filed by a water company against a municipality and its common council, that the obligation of the municipality's rental contract with the company was impaired by an ordinance which, while denying the validity of the contract, allowed a claim for rentals, with a saving clause to prevent estoppel, is too clearly unfounded to present a case arising under the Constitution or laws of the United States, of which a Federal circuit court has jurisdiction without regard to the diversity of citizenship.
2. The averment that if a temporary injunction granted by an inferior state court, restraining the future payment of rentals accruing under the alleged contract of a municipality with a water company because of the invalidity of the contract, should ultimately be made perpetual, such company would thereby be deprived of its property without due process of law, does not justify a Federal circuit court in assuming jurisdiction of a suit by the water company to restrain the municipality from attempting to annul the rental contract, as being a case arising under the Federal Constitution or laws.

[No. 21.]

Argued April 22, 1903. Decided November 30, 1903.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio to review a decree sustaining a plea of *res judicata* to a bill to enjoin the denial of the existence of a municipal contract with a water company or the abrogation or annulment of such contract. *Reversed* and remanded, with instructions to dismiss the bill for want of jurisdiction.

Statement by Mr. Chief Justice **Fuller**:

On the 4th day of January, 1898, the city of Defiance, a municipal corporation of the state of Ohio, by its solicitor, filed a bill in equity against the council of the city of Defiance *and the Defiance Waterworks [185] Company, in the court of common pleas of Defiance county, Ohio, praying that future payments under an alleged contract of August 17, 1887, between the council of the city and Bullock & Company, who had subsequently assigned it to the water company,

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308; and *Re Buchanan*, 39 L. ed. U. S. 884.

for the furnishing of water to the city for the term of thirty years from the date of the contract, be enjoined because of the invalidity of said contract, on grounds set forth. A preliminary injunction was granted. The defiance Water Company thereupon presented its petition and bond for the removal of the case to the circuit court of the United States for the northern district of Ohio, the petition alleging: "That this is a suit of a civil nature in which there is a controversy arising under the Constitution of the United States, in this especially, that by means of it the said plaintiff seeks to abrogate the contract alleged in its suit, and to deprive this defendant of its property, the amount alleged in said plaintiff's petition to be due this defendant, under said contract, without due process of law and without trial by jury; to which end and for which purpose the said council of the said city of Defiance have colluded and conspired with the said plaintiff, and it is by their said council's procurement that the said plaintiff has brought the said suit."

The case was removed, but on January 24, 1898, was remanded by the circuit court of the United States to the court of common pleas. On the same day the water company filed its bill in the circuit court of the United States against the city of Defiance and the council of the city of Defiance, and complained that complainant was a corporation organized under the laws of the state of Ohio for the purpose of operating waterworks in the city of Defiance, and thereby furnishing water to the city and to its citizens; that on January 4 the city brought the suit hereinbefore mentioned, and had obtained a preliminary injunction therein; that on August 17, 1887, the city of Defiance duly passed an ordinance entitled "An Ordinance to Authorize and Provide for the Construction and Maintenance [186] of a System of Waterworks in the *City of Defiance, Defiance County, Ohio," a copy of which ordinance was annexed. The provisions of the ordinance were then set forth, to the effect that by its terms the right and privilege for the period of thirty years thereafter was granted to Bullock & Company, their associates, successors, and assigns, to locate and operate a system of waterworks in that city, and to use the streets of the city for the purposes thereof; that the city contracted to rent of Bullock & Company a certain number of hydrants, and to pay a certain rental therefor; that the city, at the expiration of ten years, was given the right to purchase the system, or, if that was not then done, then at the expiration of five years thereafter.

It was averred that the ordinance was accepted by Bullock & Company, and the
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works were constructed, in the course of which Bullock & Company became indebted, and certain mortgage bonds were issued, which were outstanding and held by certain persons named; that Bullock & Company assigned all their rights and interests to the Defiance Water Company, and the water company completed the construction of the works to the entire satisfaction of the city, and the same were accepted March 5, 1889, by resolution.

The bill further averred that the city had used the hydrants and was still using them, and that it had paid all of the rentals claimed under the contract down to January 1, 1898, except the sum of \$500 due in 1895, to recover which suit had been commenced. It was then alleged that the city council "at its regular meeting, January 7th, 1896, passed an ordinance or resolution in substance rescinding and annulling said contract of the city with the Defiance Water Company, your orator, so far as it had power so to do; and providing by the terms of said ordinance or resolution, by which it should allow the bill of said water company for the rents that had accrued to them from the said city for the last half of the year 1895, that the payment of the said bill should not be 'construed or taken to be any acknowledgment of any contract between them and the said city for said water rentals, or in any manner implying *any ae-[187]tual performance of any alleged contract, and that no further payment at the present rate be made to the said company.'"

The bill then stated that there was due to the water company for the last half of the year 1897 the sum of \$3,142.50, less \$756, which, it was subsequently said, had been paid. And it was charged, on information and belief, that the council and the several members of it had, ever since the passage of the resolution or ordinance of January 7, A. D. 1896, claimed, and repeatedly stated and given out to the public generally, that the city had no such contract as aforesaid for furnishing water to it by the water company; and that they had also passed resolutions and ordinances looking toward the construction of waterworks by the city, but nevertheless the city had given no notice of its intention to purchase, and had not offered to purchase, complainant's waterworks. And, furthermore, that many, if not all, of the members of the council combined, colluded, and confederated together and with the city solicitor, to procure him to institute the suit before mentioned, and to procure an order of injunction against themselves, the city council, prohibiting them from paying complainant the amounts due and owing. The bill then averred "that if said order of injune-

tion shall stand and be made perpetual the said city and council of Defiance, said defendants, will thereby deprive your orator of its property without due process of law, and by means of said order of injunction they will confiscate your orator's property and convert it to their own use, without payment therefor and without trial by jury, contrary to the provisions of the Constitution of the United States." And it was further averred "that the passage of said ordinance or resolution, and the attempt thereby to abrogate and annul said contract, contravenes the provisions of § 10 of article 1 of the Constitution of the United States, in this, that they are laws impairing the obligation of their said contract with your orator."

[188] The prayer was that an account might be taken of the amount *due complainant from the city of Defiance for water rents that may have accrued to it, and that the city and the city council be decreed and ordered to allow and pay the same; that a provisional or preliminary injunction be issued to restrain defendants from appropriating and diverting the moneys in the water fund to the payment of any other indebtedness than that due complainant; and that on final hearing the council and the city be perpetually enjoined from thereafter denying the existence of the contract, and abrogating or attempting to abrogate or annul the same; and for general relief.

The bill was subsequently amended, and a supplemental bill filed.

To the bill as amended defendants demurred for want of jurisdiction, among other grounds specially assigned, and the demurrers were overruled. Complainant then filed a supplemental bill, and to the amended and supplemental bills defendants filed a joint plea, with an answer in support thereof, insisting, among other things, that the court of common pleas of Defiance county had jurisdiction in the premises, and that the circuit court had not. The plea was overruled, and defendants answered, May 1, 1899, reserving their rights under their demurrers and plea; asserting the illegality of the alleged contract; insisting that complainant's bill was an attempt to secure a removal of the case from the state court to the circuit court, which had already been determined against complainant; denying the passage of any resolution or ordinance by the city council impairing or intended to impair the obligation of any contract with complainant or its assignors; and the performance of any act, or the intention to perform any act, toward the erection or construction of waterworks by the city; and submitting that the circuit court had no jurisdiction of the sub-

ject-matter, and that it ought to refuse to further hear or consider the cause.

Defendants attached to their answer, as they did to their plea, a copy of the resolution of January 7, 1896, referred to in the bill, and also copies of sundry other ordinances or resolutions, *and denied that [189] that of January 7, 1896, or any other, had the effect, or was intended to have the effect, of impairing the obligation of the alleged contract with complainant; and insisted that if that, or any other resolution or ordinance, had the scope attributed to it, it was not lawfully passed under the statutes of Ohio; and, further, that such resolution or ordinance had been repealed by various subsequent resolutions or ordinances for the payment of rentals to complainant, copies of which were attached. Defendants disclaimed any reliance on or benefit from any or all said resolutions and ordinances as releasing or intending to release the city from the obligation of the alleged contract, or that they served any other purpose than as notice that defendants claimed the ordinance of 1887 was void and illegal from the beginning. Defendants denied combination or collusion in the institution of the suit in the state court, and averred that the city solicitor acted on his own volition.

Replication was filed, and evidence taken, and on June 17, 1901, defendants, by leave of court, filed a plea setting up the final decree of the circuit court of Defiance county, entered March 15, 1901, in the suit commenced in the court of common pleas, adjudging the alleged contract to be null and void, and perpetually enjoining the city of Defiance and the Defiance Water Company from carrying it out. Replication was filed to this plea, and a transcript of the record in the state courts was put in evidence. This showed that, after the case commenced in the court of common pleas was remanded to that court, a demurrer was filed to the petition, was sustained, and the petition dismissed, whereupon the case was carried to the circuit court of Defiance county by appeal. In that court the demurrer was overruled, the water company answered, the city replied, the case was heard on pleadings and evidence, and a final decree was rendered in favor of the city and against the water company and the city council to the effect above stated. The circuit court of the United States on hearing sustained defendants' plea and dismissed the bill. From that decree complainant prosecuted this appeal, which was *argued in this court April 22, [190] 1903. Thereafter, and on October 13, counsel for all the parties called the attention of the court to the fact that the case in the circuit court of Defiance county had been

carried to the supreme court of Ohio by the water company, and that that court on June 16, 1903, had reversed the decree of said circuit court, sustained the demurrer to the petition, and directed it to be dismissed. 48 Ohio L. J. 687, 67 N. E. 1052. The supreme court held that, even if the alleged contract between the city and Bullock & Company were invalid, the cause of action to restrain its performance was barred by statute.

Messrs. Henry Newbegin and Robert Newbegin argued the cause, and, with *Mr. Robert W. Bingham*, filed a brief for appellant.

Messrs. Henry B. Harris and Fred L. Hay argued the cause, and, with *Mr. John P. Cameron*, filed a brief for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The decree of the circuit court was based on the decree of the state circuit court, which has been reversed by the state supreme court, and various suggestions have been made by counsel in respect of the judgment which they think should be rendered here in view of the termination of the litigation in the state courts.

But the question of the jurisdiction of the circuit court meets us on the threshold, and the disposal of that question disposes of this appeal.

Diverse citizenship did not exist, and, unless the case was one arising under the Constitution or laws of the United States, the jurisdiction of the circuit court was not properly invoked, and should not have been maintained.

[191] We have repeatedly held that "when a suit does not really and substantially involve a dispute or controversy as to the *effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground." *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *New Orleans v.* 191 U. S.

Benjamin, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905, 909.

In the case last cited we said:

"The judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require (*Chicago & A. R. Co. v. Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617); and if there be ground for complaint of their decision, the remedy is by writ of error under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). Congress gave its construction to that part of the Constitution by the 25th section of the judiciary act of 1789 [1 Stat. at L. 85, chap. 20], and has adhered to it in subsequent legislation."

Complainant rested its assertion of jurisdiction on two grounds:

1. That the resolution or ordinance of January 7, 1896, impaired the obligation of the contract created by the ordinance of August 17, 1887.

*2. That if complainant were perpetually [192] enjoined, as prayed in the suit in the state courts, the state would thereby have deprived it of its property without due process of law.

1. The bill did not set forth the resolution or ordinance of January 7, 1896, *in extenso*, but stated that by its passage the city council "in substance" rescinded and annulled the contract "so far as it had power so to do," in that in allowing a bill of the water company for accrued rentals it provided that the payment should not be "construed or taken to be any acknowledgment of any contract between them and the said city for said water rentals," . . .

The record shows the resolution, which was as follows:

"January 7th, 1896.

"A resolution to draw warrant in favor of water company for \$3,160.

"Whereas, the Defiance Water Company have submitted a bill to the city council for \$3,160, alleged to be due them from said city for water rental for the past six months; and

"Whereas, said council are of the opinion

that no valid contract exists or is between said city and said company for the payment of the same; and, furthermore, that said bill is, in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity; and

"Whereas, the best interests of the city, in their opinion, demand that the present service be discontinued and immediate steps be taken for the purpose of supplying water to said city upon fair and equitable terms: therefore;

"Be it resolved, That the city clerk is hereby directed to forthwith draw his warrant on the city treasurer against the water fund of said city for the said sum of \$3,160, in favor of said Defiance Water Company, in full payment of said bill; provided, however, that if said warrant be accepted by said company it be taken and accepted by them without thereby in any manner being construed or taken to be any acknowledgment of any contract between them and [193] said city for said water *rental, or in any manner implying any actual performance of any alleged contract, and that no further payments at the present rate be made to said company.

"Passed Jan. 7th, 1896."

Clearly, this resolution was not a law impairing the obligation of the contract. It was merely the allowance of a claim for rentals, with a saving clause to prevent estoppel; and the semiannual payments for 1896, and the first for 1897, were directed by subsequent ordinances to be made without any reservation.

And the city not only denies that the resolution (or any other) had or was intended to have the effect now attributed to it, but says that if this had been otherwise the resolution would have been invalid because not passed in accordance with the statutes of Ohio in that behalf.

The position of the city as disclosed by the record was, indeed, that no valid contract existed, and it was to test that question that the suit was instituted by the city solicitor in the court of common pleas; but there was no definitive legislative action taken by the city for the erection of its own waterworks, or otherwise, which was obnoxious to the prohibition of the Federal Constitution.

2. Nor does the contention that if the temporary injunction granted by the court of common pleas should ultimately be made perpetual justify the assumption of jurisdiction because of violation of the 14th Amendment.

Litigation in the state courts cannot be dragged into the Federal courts at such a stage and in such a way. The proposition

is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional.

Moreover, the state courts are perfectly competent to decide Federal questions arising before them, and it is their duty to *do [194] so. *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 583, 40 L. ed. 536, 543, 16 Sup. Ct. Rep. 389.

And, we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. *Chicago & A. R. Co. v. Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *Neal v. Delaware*, 103 U. S. 370, 389, 26 L. ed. 567, 571; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905.

If error supervenes, the remedy is found in § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575).

The present case strikingly illustrates the applicability of these well-settled principles. The preliminary injunction was dissolved by the court by which it was granted, and the city's suit was dismissed by the highest judicial tribunal of the state.

We regard this bill as an attempt to evade the discrimination between suits between citizens of the same state, and suits between citizens of different states, established by the Constitution and laws of the United States, by bringing into the circuit court controversies between citizens of the same state,—an evasion which it has been the constant effort of Congress and of this court to prevent (*Bernards Twp. v. Stebbins*, 109 U. S. 341, 353, 27 L. ed. 956, 960, 3 Sup. Ct. Rep. 252; *Shreveport v. Cole*, 129 U. S. 36, 44, 32 L. ed. 589, 592, 9 Sup. Ct. Rep. 210); and are of opinion that it should have been dismissed for want of jurisdiction.

The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 464, 4 Sup. Ct. Rep. 510; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Continental Nat. Bank v. Buford*, 191 U. S. 119, ante, 119, 24 Sup. Ct. Rep. 54.

The circuit court having maintained jurisdiction on the ground that the case arose under the Constitution of the United States, and having proceeded to decree, the appeal was properly brought directly to this court, and it at once became our duty to inquire whether the circuit court should have retained the case. Having reached the result that the court erred in so doing, we are vested with the power to direct that conclusion to be carried into effect, and in its exercise we discharge one of our essential functions,—the determination of the jurisdiction of the courts below. *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; *Aztec Min. Co. v. Ripley*, 151 U. S. 79, 38 L. ed. 80, 14 Sup. Ct. Rep. 236.

The bill was dismissed by the circuit court, but not for want of jurisdiction, and the decree will be reversed in order that the case may be disposed of on that ground, at the costs of appellant, which takes nothing by its appeal.

The decree is reversed at appellant's costs, and the cause remanded, with instructions to dismiss the bill for want of jurisdiction.

WILLIAM R. WARNER, Jr., Executor of the Estate of William R. Warner, Deceased, *Appt.*,

v.

SEARLE & HERETH COMPANY, Gideon D. Searle, Frank S. Hereth, and O. T. Eastman.

(See S. C. Reporter's ed. 195-206.)

Registered trade-marks—remedies for infringement—appeal—finality of decision of circuit court of appeals.

1. The remedies afforded by the act of March 3, 1881 (21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401) § 7, in case of the "wrongful use" of a trade-mark registered under that act as used in commerce with foreign nations or with the Indian tribes, are only available when the infringement of such trade-mark consists in the use of a counterfeit or imitation on goods intended for such commerce.
2. Averments in a bill which charge the infringement of a trade-mark registered under the act of March 3, 1881 (21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401) sufficiently invoked the jurisdiction of a Federal circuit court on the ground that the case arose under a law of the United States to deprive the judgment of the circuit court of appeals in the suit of that finality which would exist had jurisdiction depended entirely on diverse citizenship.

[No. 42.]

191 U. S. U. S., Book 48.

Argued November 2, 3, 1903. Decided November 30, 1903

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed a decree of the Circuit Court for the Northern District of Illinois enjoining the infringement of a registered trade-mark, and remanded the cause, with directions to dissolve the injunction and dismiss the bill. *Affirmed.*

See same case below, 50 C. C. A. 321, 112 Fed. 674.

Statement by Mr. Chief Justice **Fuller**:

William R. Warner, a citizen of Pennsylvania, filed this bill against The Searle & Hereth Company, a corporation of Illinois, and Gideon D. Searle and others, citizens of Illinois, in the circuit court of the United States for the northern district of Illinois, alleging:

*That complainant "was the sole and exclusive owner and proprietor of, and had used in his business in Philadelphia and in commerce between the United States and foreign countries, and particularly with New South Wales and Victoria, a certain arbitrary and fanciful mark, termed Pancreopepsine, upon bottles and packages containing a certain medicinal preparation," and had sold large quantities thereof "throughout the United States and in commerce with foreign countries, and particularly in the cities of Philadelphia and Chicago;" and that the public generally had come to recognize packages and bottles so marked as containing the preparation manufactured by complainant.

That on December 26, 1882, complainant registered said trade-mark in the Patent Office, and obtained a certificate of registration according to law, a copy of which certificate and accompanying statement and declaration was attached. That defendants had, in violation of complainant's rights, "counterfeited, copied, and colorably imitated the trade-mark registered," and affixed the mark or symbol "to a medicinal preparation of the same general nature as that manufactured" by complainant, and had so closely imitated complainant's mark or symbol, and the manner of placing it on bottles and wrappers, that the public had been deceived into believing that the goods of defendants were those of complainant; "and that the said defendants, together and individually, have sold in the northern district of Illinois, and elsewhere, large quantities of the medicinal preparation intended for the cure of indigestion similar to that manufactured by your orator and contained in packages or bottles marked with the trade-mark or symbol heretofore referred to as belong-

ing solely to your orator, or in such close imitation of your orator's trade-mark or symbol as has deceived the public, and led such public to believe the said mark or symbol designated the goods manufactured by your orator;" so that complainant's sales have been lessened, and profits lost.

[197] It was further averred that "the public in general, and particularly *the citizens of the northern district of Illinois, identify the article by the name, mark, or symbol; and that the spurious article manufactured and sold by the defendants associated with the same mark or symbol, or a mark or symbol in close imitation thereof, is a fraud and deception upon such of the citizens of the northern district of Illinois, and elsewhere, as purchase the same, believing it to be the genuine article manufactured by your orator, and thereby the public generally, and particularly the citizens of the northern district of Illinois, are damaged and misled."

Complainant prayed for an accounting; for damages; and for injunction.

Defendants in their answer denied that the word "Paneropepsine" was a proper subject for registration as a trade-mark; and charged that "if not deceptive it is purely descriptive, being a mere compound of the ordinary names of the ingredients, or the principal ingredients, contained in the medicinal compound, with the name of one slightly modified, and they deny, on information and belief, that the public have associated the said name with the goods manufactured by the complainant."

They averred that they were engaged in business in Chicago as general manufacturing chemists, and that they had, among other things, "put upon the market a medicinal compound having special merit as an aid of digestion, consisting, aside from the diluent, of nearly 40 per cent of pure pancreatin, about 50 per cent of pure pepsin, and a few other ingredients in relatively small proportions; that pancreatin and pepsin are well-known medicinal agents of recognized efficacy in promoting digestion, and have been mixed together for medicinal purposes for nearly or quite thirty years past; that they have designated their compound upon the labels of their bottles and packages 'Panero-Pepsin' in order that the nature of the compound may be expressed and its purpose as a digestive implied by the name; that they have put the said preparation in bottles and sold it upon the market both as [198] a powder and *in liquid form, the latter being designated 'Elixir Panero-Pepsin.'"

Defendants said that in adopting the name they had only followed common usage where it was desired that the name should be generally descriptive of the compound to which it was applied, and that their com-

pound could not be more appropriately designated; and they denied that they had in any manner or way whatsoever copied or colorably imitated complainant's alleged trade-mark, or that they had at any time misled the public or any member thereof, into supposing that the panero-pepsin manufactured and sold by them was of complainant's manufacture, or that any person could have been so misled. And they averred that even if the name "Paneropepsine" could be the subject of a lawful trade-mark, which they denied, it had not been infringed by them.

Replication was filed, evidence taken, and hearing had. The circuit court held that complainant's contention touching unfair competition was not established, but that the trade-mark was valid and had been infringed, and granted an injunction.

The case was carried to the circuit court of appeals, and William R. Warner, Jr., executor, was made party in place of William R. Warner, deceased. The circuit court of appeals agreed that there was no proof establishing unfair competition; held that the monopoly claimed could not be sustained; and reversed the decree of the circuit court, and remanded the cause with directions to dissolve the injunction and dismiss the bill. 50 C. C. A. 321, 112 Fed. 674. From that decree this appeal was prosecuted, and argued on a motion to dismiss as well as on the merits.

Mr. Frank T. Brown argued the cause, and, with *Mr. Samuel E. Darby*, filed a brief for appellant.

Mr. Philip C. Dyrenforth argued the cause and filed a brief for appellees.

Mr. Chief Justice Fuller delivered the opinion of the court:

In the *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550, it was ruled that the act of July 8, 1870 [16 Stat. at L. 210, chap. 230], carried forward into §§ 4937 to 4947 of the Revised Statutes, was invalid for want of constitutional authority, inasmuch as it was so framed that its provisions were applicable to all commerce, and could not be confined to that which was subject to the control of Congress. But **Mr. Justice Miller**, speaking for the court, said that the question "whether the trade-mark bears such a relation to commerce in general terms as to bring it within Congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided."

That decision was announced at October term, A. D. 1879, and on March 3, 1881, an act was approved entitled "An Act to Authorize the Registration of Trade-Marks, and

Protect the Same." 21 Stat. at L. 502, chap. 138 (U. S. Comp. Stat. 1901, p. 3401).

By its 1st section it was provided that "owners of trade-marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribes which by treaty, convention, or law, affords similar privileges to citizens of the United States, may obtain registration of such trade-marks by complying with" certain specified requirements.

[203] By the 2d section, the application prescribed by the first "must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration" "that *such party has at the time a right to the use of the trade-mark sought to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated; . . ."

The 3d section provided that "no alleged trade-mark shall be registered unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes as above mentioned, or is within the provision of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark owned by another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers."

By the 4th section certificates of registration of trade-marks were to be issued, copies of which, and of trade-marks and declarations filed therewith, should be evidence "in any suit in which such trade-marks shall be brought in controversy;" and by § 5 it was provided that the certificate of registry should remain in force for thirty years from its date, and might be renewed for a like period.

Sections 7, 10, 11, and 13 are as follows:

"Sec. 7. That registration of a trade-mark shall be prima facie evidence of ownership. Any person who shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of

equity to enjoin the wrongful use of such trade-mark used in foreign commerce or *commerce with Indian tribes, as aforesaid,[204] and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy."

"Sec. 10. That nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this act had not been passed.

"Sec. 11. That nothing in this act shall be construed as unfavorably affecting a claim to a trade-mark after the term of registration shall have expired; nor to give cognizance to any court of the United States in an action or suit between citizens of the same state, unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe."

"Sec. 13. That citizens and residents of this country wishing the protection of trade-marks in any foreign country, the laws of which require registration here as a condition precedent to getting such protection there, may register their trade-marks for that purpose as is above allowed to foreigners, and have certificate thereof from the Patent Office."

Obviously the act was passed in view of the decision that the prior act was unconstitutional, and it is, therefore, strictly limited to lawful commerce with foreign nations and with Indian tribes. It is only the trade-mark used in such commerce that is admitted to registry, and it can only be infringed when used in that commerce, without right, by another than its owner.

Reading the 7th, 10th, and 11th sections together, we find that the registration is prima facie evidence of ownership; that any person counterfeiting or colorably imitating any trade-mark registered under the act is liable, in the Federal courts, to an action on the case for damages for, and to injunction to restrain, its wrongful use; that is, the use of the *simulated mark in foreign com-[205] merce or with the Indian tribes; that the provisions of the act cannot operate to circumscribe any remedy which a party aggrieved by any wrongful use of any trade-mark might otherwise have had; and that the courts of the United States cannot take cognizance of an action on the case or a suit in equity between citizens of the same state, "unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe."

Where diverse citizenship exists, and the statutory amount is in controversy, the courts of the United States have jurisdiction; but where those conditions do not exist, jurisdiction can only be maintained when there is interference with commerce with foreign nations or Indian tribes, and it is in such cases that the amount is declared by § 7 to be immaterial. The registered trade-mark must be used in that commerce, and is put in controversy by the use of the counterfeit or imitation on goods intended for such commerce, as prescribed by § 11.

We cannot concur in the view that the mere counterfeiting or imitating a registered trade-mark, and affixing the same, is the ground of the action on the case, in the Federal courts, given by § 7, for it is the wrongful use of the counterfeit or imitation that creates the liability at law, and justifies the remedy in equity. And the intent and object of the act forbid a construction that would bring local commerce within its scope.

In the present case, diverse citizenship, and requisite amount existed, and the circuit court, therefore, had jurisdiction; but it is argued that the jurisdiction depended entirely on diversity of citizenship, and hence that the decision of the circuit court of appeals was final. We think, however, that as infringement of a trade-mark registered under the act was charged, the averments of the bill, though quite defective, were sufficient to invoke the jurisdiction also [206] on the ground that the *case arose under a law of the United States, and will not, therefore, dismiss the appeal.

The bill was filed in February, 1898, and must be treated as alleging that the trade-mark was then in use in foreign or Indian commerce, although the proofs do not make out that fact after December 26, 1882.

The certificate of registry was good for thirty years as matter of evidence, but when it was sought to enjoin the wrongful use it should have been made to appear that the trade-mark was then being used in that commerce, and that that use was interfered with, without right, by defendant. And if the presumption of continuing use in such commerce flows from the registry, nevertheless, to make out infringement, it must appear that the alleged counterfeit or imitation was being used on merchandise intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe.

We so held, in effect, in *Ryder v. Holt*, 128 U. S. 525, 32 L. ed. 529, 9 Sup. Ct. Rep. 145, and we see no reason to depart from that ruling.

But the evidence in this record does not show that defendant used the name of its preparation on merchandise intended to be

so transported, while the sales proved were sales in the city of Chicago and northern district of Illinois, and there is nothing to indicate that the preparation was intended to be used in foreign or Indian trade.

In short, even if it were assumed that there could be a trade-mark in the use of the word "Pancreopepsine," which would be invaded by the use of the word "Pancro-Pepsin," the circuit court could not, by virtue of the act, enjoin such use because it was not used in the commerce to which the act related.

Our conclusion does not require us to consider the question of the constitutionality of the act, which, it may be added, does not seem to have been raised in the courts below.

Decree affirmed.

*W. W. ATKIN, *Plff. in Err.*,
v.

[207]

STATE OF KANSAS.

(See S. C. Reporter's ed. 207-224.)

Constitutional law — eight-hour law—freedom of contract — equal protection of the laws.

1. The freedom to contract guaranteed by U. S. Const. 14th Amend. is not infringed by the provisions of Kan. Gen. Stat. 1901, §§ 3827-

NOTE.—Respecting the constitutionality of statutes restricting contracts and business—see note to State v. Loomis, 21 L. R. A. 789.

As to the validity of class legislation—see State v. Goodwill, 6 L. R. A. 621, and note; State v. Loomis, 21 L. R. A. 789, and note.

Respecting the constitutional equality of privileges, immunities, and protection—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L. R. A. 579, and note.

On the validity and effect of statutes requiring wages to be paid in lawful money—see note to Avent-Beattyville Coal Co. v. Com. 28 L. R. A. 273.

As to the validity and effect of statutes regulating the time of payment of wages—see note to Re House Bill No. 1,230, 28 L. R. A. 344.

On statutory restrictions of contracts between master and servant—see notes to Com. v. Perry, 14 L. R. A. 325, and Ramsey v. People, 17 L. R. A. 853.

Validity of legislation regulating hours of labor.

I. *Introduction*, 148.

II. *General regulations*, 149.

III. *Specific employments.*

a. *Mining and smelting*, 149.

b. *Laundries*, 150.

c. *Railroads*, 150.

d. *Bakeries*, 150.

e. *Public work*, 150.

IV. *Women and children*, 152.

V. *Sunday laws*, 153.

I. *Introduction.*

Whenever the attention of the courts has been directed to the question of the validity of

3829, making it a criminal offense for a contractor for a public work to permit or require an employee to perform labor upon that work in excess of eight hours each day.

2. The equal protection of the laws is not denied to a contractor for a public work or his employees by the provisions of Kan. Gen. Stat. 1901, §§ 3827-3829, making it a criminal offense for such contractor to permit or require an employee to perform labor upon the work in excess of eight hours each day.

[No. 30.]

Submitted May 1, 1903. Decided November 30, 1903.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a conviction for a violation of the eight-hour law. *Affirmed.*

statutes regulating for all employments the hours of labor, they have denied the existence of legislative power, either absolutely to restrict the right to labor or employ labor to a prescribed time, or to compel extra compensation for overtime. On the other hand, regulations applicable only to specific employments are frequently, though not at all uniformly, sustained as a valid exercise of the police power to conserve the public health, and the courts are almost unanimous in sustaining the validity of such enactments as are designed to shorten the working hours of women and children. The right of freedom to contract is usually relied upon to defeat such statutes of this character as are not otherwise invalid as discriminative or class legislation. While it must be conceded that the right to contract is included in the constitutional guaranties designed to secure liberty and to protect property, it must also be admitted that such right, like the other rights protected by these guaranties, is not absolute, but is subject to regulation and limitation in the legitimate exercise of the police power. From an economic standpoint such measures may be objectionable, but the doctrine of *laissez faire* has not yet found its way into our Constitutions and it seems difficult to distinguish legislative regulation of hours of labor from the many undoubtedly valid restrictions upon the right to contract which have been made, either by statute, or by judicial application of the rules of public policy.

II. General regulations.

The constitutional right to contract is regarded as sufficient, in *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362, to invalidate a statute limiting to eight hours a legal day's work for all classes of mechanics, servants, and laborers except those engaged in farm or domestic labor, and requiring for every hour's work in excess of that number double the pay of the preceding hour.

So, where a proposed legislative measure which provided that "eight hours shall constitute a legal day's work for all classes of mechanics, workmen, and laborers employed in any occupation in the state of Colorado" was submitted to the Colorado supreme court for an expression of opinion respecting its constitutionality, that court replied that such a law would violate the right of parties to make their own contracts guaranteed by the Colorado Bill 191 U. S.

See same case below, 64 Kan. 174, 67 Pac. 519.

The facts are stated in the opinion.

Mr. Thomas A. Pollock submitted the cause for plaintiff in error:

The term "liberty," as used in the 2d clause of the 14th Amendment to the Constitution of the United States, guarantees the right to pursue any lawful calling or avocation, and to enter into all contracts which may be proper, necessary, or essential to the carrying on of such calling or avocation.

Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct.

of Rights, and protected by U. S. Const. 14th Amend. *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328.

"Any statute," says Magruder, J., in *Fiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985, "providing that the employer and laborer may not agree with each other as to what time shall constitute a day's work, is an invalid act."

So, in *State v. McNally*, 48 La. Ann. 1450, 36 L. R. A. 533, 21 So. 27, the court said that a municipal ordinance regulating the hours of labor generally within the city limits would undoubtedly be invalid.

Even if otherwise valid, an exception of persons engaged in farm and domestic labor from a statute limiting a legal day's work for mechanics, servants, and laborers to eight hours, and making the pay for every additional hour double that of the hour preceding, makes such statute unconstitutional as class legislation. *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362.

III. Specific employments.

a. Mining and smelting.

A statute limiting the period of employment of laborers in underground mines to eight hours a day, except in cases of emergency where life or property is in imminent danger, is a valid exercise of the police power, under Utah Const. art. 16, § 6, requiring the legislature to pass laws to provide for the health and safety of employees in factories, smelters, and mines, and does not deny the equal protection of the laws, or deprive anyone of liberty without due process of law. *State v. Holden*, 14 Utah, 71, *sub nom.* *Holden v. Hardy*, 37 L. R. A. 103, 46 Pac. 756, *Affirmed* in 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The same is true of a statute limiting the period of employment of laborers in smelters and other institutions for the reduction or refining of ores or metals to eight hours a day, except in cases of emergency where life or property is in imminent danger. *State v. Holden*, 14 Utah, 96, *sub nom.* *Holden v. Hardy*, 37 L. R. A. 108, 46 Pac. 756, *Affirmed* in 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Short v. Buillon-Beck & C. Mln. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720.

A different opinion is entertained by the Colorado supreme court, which, in answer to interrogatories propounded by the legislature, said

Rep. 652; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *State v. Peel Splint Coal Co.* 36 W. Va. 856, 17 L. R. A. 385, 15 S. E. 1000.

"Due process of law" implies at least a conformity with natural and inherent principles of justice, and forbids that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The words "due process of law" and "the equal protection of the laws" had for centuries possessed a well-known signification

that it is not competent for the legislature to single out the mining, manufacturing, and smelting industries of the state, and impose upon them restrictions with reference to the hours of their employees from which other employers of labor are exempt. *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328.

And in a later case the same court held that a statute making it unlawful to work more than eight hours per day in mines and smelters unjustly and arbitrarily singled out a class of persons, and imposed upon them restrictions from which others similarly situated and substantially in the same condition were exempt. *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071. This statute, the court held to be such an infringement of a constitutional right to enjoy liberty and to acquire and possess property that it could not be justified as an exercise of the police power to protect the public health. The court refused to follow either *State v. Holden*, 14 Utah, 71, *sub nom.* *Holden v. Hardy*, 37 L. R. A. 103, 46 Pac. 756, or *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, *supra*, saying that the decision of the Utah supreme court in construing the Utah statute was not an authority, because the decision was based entirely upon the mandatory character of a provision of the Utah Constitution not present in the Colorado Constitution; and that, in affirming the judgment of the Utah court, the decision of the Supreme Court of the United States was not a precedent in the case at bar, because the sole question before the Federal court was whether or not the Utah act violated the Federal Constitution, and that it might well be the case that a law is valid so far as the Federal Constitution is concerned, and yet run counter to an express inhibition of a state Constitution.

b. Laundries.

A municipal ordinance prohibiting laundry operations within certain prescribed territorial limits from 10 P. M. until 6 A. M. is not obnoxious to U. S. Const. 14th Amend. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

c. Railroads.

The authority of a state legislature to prohibit railway companies from requiring certain of its employees who have been at work for

which became a part of the Constitution. They are synonymous with "the law of the land." They mean a law binding upon every member of the community under similar circumstances.

Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511.

They were intended to secure the individual from arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 599.

They condemn arbitrary, unequal, and partial legislation.

State v. Loomis, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 351.

twenty-four consecutive hours again to go on duty until they have had at least eight hours rest was said, in *Wheeling Bridge & Terminal R. Co. v. Gilmore*, 8 Ohio C. C. 658, to be undoubted.

Such a statute would seem clearly to be sustainable because of the direct interest which the public has in seeing that the safety of the human freight intrusted to the railway companies should not be imperilled by the employment of other than alert and unwearied employees.

But the constitutional guaranties of liberty of action, the security of property, and the equal protection of the laws have been held to be infringed by the absolute prohibition of a state statute against employing certain classes of railway employees more than ten hours per day unless given extra pay for overwork. *Wheeling Bridge & Terminal R. Co. v. Gilmore*, 8 Ohio C. C. 658.

To the contrary is *Re Ten-Hour Law for Street Railway Corporations* (R. I.) 61 L. R. A. 612, 54 Atl. 602, which holds that the legislature may, under the police power, properly prohibit the employment of street-railway employees for more than ten hours within the twenty-four hours of the natural day, to be performed within twelve consecutive hours. And such statute is not rendered arbitrary, partial, or oppressive because it exempts from its operation cases of existing written contracts.

d. Bakeries.

A statute prohibiting employment in bakeries or confectionery establishments for more than sixty hours a week, or more than ten hours a day, unless for the purpose of making a shorter work day on the last day of the week, is a valid exercise of the police power to protect the public health. *People v. Lochner*, 177 N. Y. 145, 69 N. E. 373.

But see *infra*, III. e.,—*People v. Orange County Road Constr. Co.* 175 N. Y. 84, 67 N. E. 129.

e. Public work.

A sharp conflict exists as to the validity of statutes similar to the one upheld in *Atkin v. Kansas*. In addition to the decision of the Kansas supreme court in this case (*State v. Atkin*, 64 Kan. 174, 67 Pac. 519), the Kansas eight-hour law being limited to persons employed by the state, or by any of its political subdivisions, had previously been sustained in

They mean, not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 398.

The 14th Amendment suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 359.

Classification must have some reasonable basis. The differences which will support class legislation must be such as, in the

nature of things, furnish a reason for separate laws. Arbitrary designation is not classification.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 439; *State ex rel. Richards v. Hammer*, 42 N. J. L. 438; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 363.

The legislature is not the sole judge as to whether or not a classification is necessary and proper.

State ex rel. Pell v. Newark, 40 N. J. L. 79; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 439; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The arbitrary and unreasonable classification which is made the basis of the legis-

Re Dalton, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336, as a mere direction of the state to its agents. "The position which the state has taken," said Smith, J., in "nowise differs from that of an individual who, in the employment of labor, refuses to permit his employees to labor more than eight hours. . . . Whatever orders the state may give directly to its own agents, it may require of its political subdivisions,—instrumentalities of said government, such as counties, cities, and townships."

So, a statute providing that in contracting for work to be done for the city of Buffalo the contractor shall bind himself not to accept more than eight hours as a day's work, to be performed within nine consecutive hours, or, except in case of necessity, to employ anyone for more than eight hours in twenty-four consecutive hours, does not violate either the Federal or the New York Constitution. *People v. Warren*, 77 Hun, 120, 28 N. Y. Supp. 303; *People ex rel. Warren v. Beck*, 10 Misc. 77, 30 N. Y. Supp. 473, *Reversed on other grounds* in 144 N. Y. 225, 39 N. E. 80. But see, *infra*, *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 67 N. E. 129.

These seem to be the only decisions upholding the validity of such legislation, although some importance might be given to the language of McEnery, J., in delivering the opinion of the court in *State v. McNally*, 48 La. Ann. 1450, 36 L. R. A. 533, 21 So. 27, where, in holding invalid a municipal ordinance regulating the hours of labor on public works because it made a violation of its provisions an indictable offense which the general assembly alone can create, he said: "The city has the absolute control of its own property, and can regulate the hours of work to be employed on the same. The ordinance violates no law so far as it designates the number of hours in which laborers may be employed on public works."

On the other hand, a municipal ordinance making it a misdemeanor for any contractor, when having labor performed for the purpose of carrying out a contract with the city, to demand, receive, or contract for more than eight hours' labor in one day has been held to be void as a direct infringement of the rights of persons engaged in a lawful business to make and enforce their contracts. *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737. And an ordinance almost identical in its terms was likewise held invalid in *Seattle v. Smyth*, 22 Wash.

327, 60 Pac. 1120, as an interference with the constitutional right of freedom to contract.

The Ohio statute limiting to eight hours per day the work of laborers, workmen, and mechanics employed on behalf of the state or any political subdivision thereof, and requiring every contract for public work to contain a stipulation to that effect, penalizing its violation, and making noncompliance a misdemeanor, abridges the right of contract, and invades the right of liberty and property, and is not sustainable as a valid exercise of the police power, because it does not appear that the services to be performed were unlawful or against public policy, or that they were of such character that such limitation was necessary to the public welfare. *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885. To the contention upheld in *Re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336, *supra*, and indorsed in *ATKIN V. KANSAS*, that the statute is only in the nature of a direction by a principal to his agent, and therefore within the legislative authority, the court replied that the fallacy of this argument lay in the unfounded assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contracts shall contain, although such contracts may, as in this case, relate only to matters of local improvement. Further, the court said such statute was much more than a mere direction by a principal to an agent, and that its provisions applied, not only to officers and agents of the state, but, with equal force, to all persons who would enter into contracts with the state or any of its political subdivisions, and undertook to limit and restrict such persons in their right to contract by prohibiting the making of contracts for a day's work of more than eight hours.

The provision of N. Y. Penal Code, § 384h, subd. 1, making it a criminal offense for any person or corporation contracting with the state or a municipal corporation to require more than eight hours' work for a day's labor, was condemned in *People v. Orange County Road Constr. Co.* 37 Misc. 341, 75 N. Y. Supp. 510, on a demurrer to an indictment for its violation, as an unconstitutional interference with the rights of the individual. On appeal to the appellate division of the New York supreme court, the judg-

lation under consideration is forcibly pointed out in many recent decisions, some of them being based upon statutes almost identical with that under consideration.

People ex rel. Rodgers v. Coler, 166 N. Y. 18, 52 L. R. A. 814, 59 N. E. 716; *Cleveland v. Clement Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Wiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985; *Seattle v. Smyth*, 22 Wash. 327, 60 Pac. 1120; *Low v. Recs Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Hawn*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 378, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *Godcharles v. Wige-*

man, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 32 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 182, 6 L. R. A. 359, 10 S. E. 288; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 51 N. E. 275; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 58 N. E. 1007; *Re Preston*, 63 Ohio St. 428, 52 L. R. A. 523, 59 N. E. 101; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Denver v. Bach*, 26 Colo. 530, 46 L. R. A. 848, 58 Pac. 1089; *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 183; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 67 N. E. 129; *Street v. Varney Electrical Supply Co. (Ind.)* 61 L. R. A. 154, 66 N. E. 895.

The argument that a contractor's rights are not infringed because he is at liberty to bid or not to bid, as he may see fit, for

ment of the lower court was reversed, and the validity of the enactment sustained on the authority of *People v. Warren*, 77 Hun, 120, 28 N. Y. Supp. 303, which the court said was the only authoritative expression of opinion by the supreme court on this question. *People v. Orange County Road Constr. Co.* 73 App. Div. 580, 77 N. Y. Supp. 16. When this case reached the New York court of appeals Cullen, J., in an opinion concurred in by a bare majority of the court, said that the statute could not be upheld as an exercise of the police power because of the arbitrary distinction drawn between persons contracting with the state and other employers; that the enactment could not be sustained because the work to be done was state work, for the manner of performance of which the legislature might prescribe rules, because the act applies to independent contractors, and no such right of regulation exists where the state has let out the performance of the work to a contractor, unless it is reserved in the contract; and that, assuming that a statute might be upheld which purported to punish criminally the violation by a contractor of his contractual obligation assumed because of the provisions of the labor law (N. Y. Laws 1897, chap. 415, § 3, as amended by Laws 1899, chap. 567), requiring municipal or state contracts to contain an eight-hour stipulation, the statute in question does not assume to punish an offender against its provisions because he has violated any contract, but solely because he has required more than eight hours' labor regardless of the terms and conditions of the contract. 175 N. Y. 84, 67 N. E. 129. The force of these observations as furnishing an authoritative precedent is materially weakened because of the fact that the judge goes on to say that, assuming that the statute can be upheld as one inflicting punishment for the wilful violation of a contract, and that the statute *ex proprio vigore* imported into every contract subsequently made an agreement by the contractor not to require more than eight hours' work a day from his employees, the in-

dictment was fatally defective for failure to state that the contract therein referred to was made subsequent to the enactment of the statute. On this point, which clearly is sufficient to sustain the decision reversing the order appealed from and sustaining the demurrer to the indictment, all the judges, except Haight, J., dissenting, concurred. Indeed, the dissentient judge thought that the constitutional question was not decided at all in this case, as appears from this language from his dissenting opinion: "The question discussed upon the argument of this appeal was the constitutionality of the eight-hour clause of the statute. This was the question raised by the demurrer, and I think it should now be decided by this court. If questions other than this are to be now determined then I think a reargument should be ordered so that the court may have the aid to be derived from a careful discussion of the questions by counsel."

IV. Women and children.

Statutes restricting the hours of labor for women and children have, with one exception, been sustained. The leading case is *Com. v. Hamilton Mfg. Co.* 120 Mass. 383, where a statute prohibiting the employment of any woman or minor under eighteen years of age in a manufacturing establishment for more than ten hours per day, except in certain cases, and in no case for more than sixty hours per week, was sustained as a valid health and police regulation.

An enactment of the Pennsylvania legislature making it a penal offense to employ minors or females in any manufacturing establishment, mercantile industry, laundry, workshop, renovating works or printing office for more than twelve hours a day or sixty hours a week was upheld in *Com. v. Beatty*, 15 Pa. Super. Ct. 5, as a valid exercise of the police power.

A statute forbidding the employment of females in mechanical or mercantile establishments, laundries, hotels, and restaurants more

public work, would justify any discrimination in which a legislature might see fit to indulge.

Marshall & B. Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815.

Contracts for the paving of streets are matters pertaining to cities in their private corporate capacity.

Jansen v. Atchison, 16 Kan. 378; *Shawnee County v. Topeka*, 39 Kan. 197, 18 Pac. 161; *Hari v. Ohio Twp.* 62 Kan. 318, 62 Pac. 1010; *Jones, Neg. Mun. Corp.* § 58, pp. 110, 111; *Lexington v. Thompson*, 24 Ky. L. Rep. 384, 57 L. R. A. 775, 68 S. W. 477; *People ex rel. Rodgers v. Coler*, 166 N. Y. 13, 52 L. R. A. 814, 59 N. E. 716; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 19 L. R. A. 789, 54 N. W. 1044.

The theory upon which the supreme court of Kansas decided the case at bar was presented and urged in support of the constitutionality of the eight-hour law of the state of Ohio.

Cleveland v. Clements Bros. Constr. Co.

than ten hours a day does not deprive them of life, liberty, or property, without due process of law. *State v. Buchanan*, 29 Wash. 602, 59 L. R. A. 342, 70 Pac. 52.

The Nebraska statute restricting the hours of labor for females in manufacturing, mechanical, and mercantile establishments, hotels, and restaurants to a maximum of sixty hours a week and ten hours a day is a legitimate exercise of the police power, and does not violate the constitutional guaranties of the personal and property rights of either employer or employee. *Wenham v. State (Neb.)* 58 L. R. A. 825, 91 N. W. 421. And such statute is not unconstitutional as special or class legislation, since the law applies alike to all women who shall engage in labor in any of the establishments mentioned. *Ibid.*

The contrary view is strongly upheld in *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454, where a statute prohibiting the employment of females in any factory or workshop more than eight hours a day is held to be unconstitutional as partial and discriminating in its character, whether applying only to manufacturers of wearing apparel and like articles, or as applying to manufacturers of all kinds of products; and is further declared to be invalid as a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employee in a matter about which they are competent to agree with each other. To the contention that such statute was a proper exercise of the police power for the promotion of the public health on the ground that it is designed to protect women on account of their sex and physique, the court replied that sex is no bar, under the Illinois Constitution or laws, to the right to contract; that the mere fact of sex will not justify the exercise of the police power for the purpose of limiting the exercise of such rights by a woman, unless there is some fair, just, and reasonable connection between

67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 887.

The court of appeals of Kentucky holds that the state cannot fix the compensation of city employes.

Lexington v. Thompson, 24 Ky. L. Rep. 384, 57 L. R. A. 775, 68 S. W. 477.

A municipality in its capacity as a private corporation exercises rights and powers inherent in the people of the community which have never been surrendered to any department of the government, and which are property rights within the protection of the Constitution.

State ex rel. Geake v. Fox, 158 Ind. 126, 56 L. R. A. 893, 63 N. E. 19; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 240, 15 Am. Rep. 202; *Blades v. Detroit Water Comrs.* 122 Mich. 366, 81 N. W. 271; *Helena Consol. Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Dill. Mun. Corp.* 4th ed. p. 129; 13 Harvard Law Review, p. 441, *Right to Local Self-Government*; *Stockwell v. Rutland (Vt.)* 53 Atl. 132; *Peters v. Lindsborg*, 40 Kan.

such limitation and the public health, safety, and welfare; and that there is no reasonable ground why a woman should be deprived of the right to determine for herself how many hours each day she can and may work in an employment conceded to be lawful in itself and suitable for her to engage in, even if the police power can be exercised to prevent injury to the individual engaged in a particular calling, which the court regarded as questionable. Referring to *Com. v. Hamilton Mfg. Co.* 120 Mass. 385, *supra*, the court said that such decision was evidently made in view of the large discretion vested by the Massachusetts Constitution in the legislative branch of the government to enact such statutes as it should judge to be for the "good and welfare of the commonwealth," and that it was said therein that the act might be maintained as a health or police regulation, because the legislature deemed the employment of manufacturing dangerous to health. The court added: "But the Massachusetts case is not in line with the current of authority, as it assumes that the police power is practically without limitation. As has already been stated, the legislature cannot so use that power as to invade the fundamental rights of the citizen; and it is for the courts to decide whether a measure which assumes to have been passed in the interest of the public health really 'relates to, and is convenient and appropriate to promote, the public health.'"

V. Sunday laws.

No attempt has here been made to collate the authorities respecting the validity of laws restricting labor on Sunday. The constitutionality of Sunday laws generally is discussed in a note to *Judefind v. State*, 22 L. R. A. 721.

What is and what is not unlawful Sunday labor are considered in a note to *Quarles v. State*, 14 L. R. A. 192.

The prohibition of Sunday sports or games is the title of a note to *State v. O'Rourke*, 17 L. R. A. 830.

654, 20 Pac. 490; *La Clef v. Concordia*, 41 Kan. 323, 21 Pac. 272; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949.

The legal distinction between municipal corporations proper—cities—and quasi corporations has often been recognized and enforced in the state of Kansas.

Beach v. Leahy, 11 Kan. 23; *State ex rel. Godard v. Downs*, 60 Kan. 790, 57 Pac. 962; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 771, 40 U. S. App. 257, 76 Fed. 271; *State ex rel. Godard v. Topeka Water Co.* 61 Kan. 547, 60 Pac. 337; *State ex rel. Atwood v. Hunter*, 38 Kan. 582, 17 Pac. 177.

The provisions of the statute, in so far as they limit the hours of employment on public work, have no relation whatsoever to the public health, safety, or morals, and cannot be held valid as a police regulation.

People ex rel. Warren v. Beck, 10 Misc. 83, 30 N. Y. Supp. 473; *State v. Martindale*, 47 Kan. 147, 27 Pac. 852; *Holden v. Hardy*, 169 U. S. 365, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Statutes regulating the hours of labor have been upheld as an exercise of the police power of the state in three classes of cases: (1) Occupations injurious to the health of employees; (2) occupations in which women and children are employed; (3) occupations involving the public safety and welfare.

Holden v. Hardy, 169 U. S. 365, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *People v. Phyfe*, 136 N. Y. 554, 19 L. R. A. 141, 32 N. E. 978.

The statute in question is not justified because it is an encroachment upon the right of the individual employer and employee to contract as they shall see fit.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 67 N. E. 129; *People ex rel. Rodgers v. Coler*, 166 N. Y. 18, 52 L. R. A. 814, 59 N. E. 716.

Messrs. C. C. Coleman and N. H. Loomis submitted the cause for defendant in error:

Whenever assailed the law has received the sanction of the highest courts of the state.

Re Ashby, 60 Kan. 101, 55 Pac. 336; *Re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336; *State v. Atkin*, 64 Kan. 174, 67 Pac. 519.

In enacting the law in question, the legislature of Kansas but followed the precedent of the general government, as shown by the act of Congress declaring that "eight hours

shall constitute a day's work for all workmen employed by or on behalf of the government of the United States," which enactment was upheld by this court.

United States v. Martin, 94 U. S. 400, 24 L. ed. 128.

Cities and other municipal organizations, in so far as their control of highways is concerned, are but agencies of the state for the exercise of its governmental functions.

Re Dalton, 61 Kan. 264, 47 L. R. A. 380, 59 Pac. 336.

This court has often announced a similar doctrine.

Williams v. Eggleston, 170 U. S. 310, 42 L. ed. 1049, 18 Sup. Ct. Rep. 617; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Forsyth v. Hammond*, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665.

It is not a case where the law seeks to interfere with contracts between citizens, but it is one in which the state itself is a party to the contract through one of its lawful agencies.

People ex rel. Warren v. Beck, 10 Misc. 77, 30 N. Y. Supp. 473; *People ex rel. Rodgers v. Coler*, 116 N. Y. 1, 52 L. R. A. 814, 59 N. E. 727.

Unless it appears from the law itself, or from the facts of the case at bar, that some discrimination is exercised or exerted against the plaintiff himself, he cannot be heard to say, in opposition to the law, that the rights of some other person or class of persons are infringed by it.

State v. Smiley, 65 Kan. 240, 69 Pac. 199; *Kansas City v. Union P. R. Co.* 59 Kan. 427, 52 L. R. A. 321, 53 Pac. 468; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582.

The paving of a street is a governmental power.

Branson v. Philadelphia, 47 Pa. 329; *State ex rel. Atty. Gen. v. Shawnee County*, 28 Kan. 431.

Mr. Justice **Harlan** delivered the opinion of the court:

This case involves the validity under the Constitution of the United States of the statute known as the eight-hour law of Kansas of 1891, chap. 114, being §§ 3827, 3828, and 3829 of the General Statutes of 1901 of that state.

By the 1st section of that act it was provided that "eight hours shall constitute a day's work for all laborers, workmen, *me-[208]chanics, or other persons now employed, or who may hereafter be employed by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other

municipality of said state, except in cases of extraordinary emergency which may arise in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life: provided, that in all such cases the laborer, workmen, mechanics, or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work: provided further, that not less than the current rate of *per diem* wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, and other persons so employed by or on behalf of the state of Kansas, or any county, city, township, or other municipal of said state; and laborers, workmen, mechanics, and other persons employed by contractors or sub-contractors in the execution of any contract or contracts within the state of Kansas, or within any county, city, township, or other municipality thereof shall be deemed to be employed by or on behalf of the state of Kansas or of such county, city, township, or other municipality thereof."

The 2d section declared that "All contracts hereafter made by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality of said state, with any corporation, person, or persons, for the performance of any work or the furnishing of any material manufactured within the state of Kansas, shall be deemed and considered as made upon the basis of eight hours constituting a day's work; and it shall be unlawful for any such corporation, person, or persons to require or permit any laborer, workman, mechanic, or other person to work more than eight hours per calendar day in doing such work or in furnishing or manufacturing such material, except in the cases and upon the conditions provided in § 1 of this act."

[209] The 3d section makes any officer of Kansas, or of any *county, city, township, or municipality of that state, or any person acting under or for such officer, or any contractor with the state, or any county, city, township, or other municipality thereof, or other person violating any of the provisions of the act, liable for each offense, and subject to be punished by a fine of not less than \$50 nor more than \$1,000, or by imprisonment not more than six months, or by both fine and imprisonment, in the discretion of the court.

It may be stated that the act exempts existing contracts from its provisions.

The present prosecution was under the above act, and was commenced in one of the courts of Kansas.

The complaint in its first count charged that Atkins contracted with the municipal

corporation of Kansas City to do the labor, and furnish all materials for the construction of a brick pavement upon Quindaro boulevard, a public street of that city; and having hired one George Reese to shovel and remove dirt in execution of the work, did knowingly, wilfully, and unlawfully permit and require him to labor ten hours each calendar day upon said work; there being no extraordinary emergency arising in time of war, nor any necessity for him to labor more than eight hours per day for the protection of property or of human life.

The 2d count contained the same allegations as to the general nature of Atkins's contract, and charged that he unlawfully hired Reese to labor on the basis of ten hours as constituting a day's work by contracting to pay the current rate of wages, which in that locality was the sum of \$1.50 per day, and unlawfully exacted and required of him that he labor ten hours each calendar day in order to be entitled to the current wages of \$1.50 per day, there being no extraordinary emergency arising in time of war, nor any necessity for him to labor more than eight hours for the protection of property or of human life.

The defendant moved to quash each count, upon the grounds, among others, that the statute in question, in violation of the *1st section of the 14th Amendment to the [210] Constitution of the United States, deprived him of his liberty and property without due process of law, and denied him the equal protection of the laws.

The motion to quash was overruled, and the case was heard upon an agreed statement of facts.

It appears from that statement that the parties stipulated, for the purposes of the case, that Kansas City was under a duty to keep its streets and highways in repair, and make all contracts to grade and pave them and for all other public improvements within its limits; that the defendant entered into a contract with the city to construct a pavement on Quindaro boulevard, a public highway in that city, and employed, among others, one George Reese to perform the labor of shoveling and removing dirt in the prosecution of that work; permitted him to work more than eight hours on each calendar day, although there was no extraordinary emergency arising in time of war, nor any necessity that he or any other person engaged on the work should work more than eight hours for the protection of property or human life; that the agreement with Reese was to pay \$.15 per hour, and no more, the current rate of wages for such work in that locality being \$1.50 for ten hours' labor per day; and that the defendant exacted and required of him that he work ten hours each

calendar day, in order to be entitled to the current wages of \$1.50 per day; that if the contractor had been compelled to pay Reese and other laborers at the rate of \$1.50 per day for eight hours' work, his compensation would have been diminished by \$100; that Reese was not compelled, required, or requested to work more than eight hours in any one day, but did so voluntarily, and was permitted and allowed to work ten hours in each calendar day in order to earn \$1.50 in a calendar day; that he was employed at his own solicitation, and entered into the agreement with Atkin freely, and worked at the time and place mentioned in the complaint with the knowledge, consent, and permission [211] of defendant; that it was not the *intention, expectation, desire, or agreement of Reese or of the defendant that the former should ask, demand, or receive the same compensation for eight hours' work as was paid for ten hours' work each calendar day to laborers doing the same kind of work for persons having contracts with private persons or corporations; that he was hired and employed without the knowledge or consent of the city, and neither the city nor its officers had or exercised any control or supervision over him, he being the servant of the defendant, and not of the city; and that the contract between the defendant and the city did not contain any provision as to the number of hours laborers should work in a calendar day, nor any provision as to their compensation, but left the contractor free as to the means and manner of performing his contract.

It was also stipulated that the labor performed by Reese was healthful outdoor work, not dangerous, hazardous, or in any way injurious to life, limb, or health, and could be performed for a period of ten hours during each working day of the week without injury from so doing, and that the labor he was employed to perform, and did perform, "was in no respect or manner more dangerous to the health or hazardous to life or limb or to the general welfare of the said George Reese or other persons doing such work than the labor performed by persons doing the same kind of or character of work as the employees or [of] contractors having contracts to do the same kind of work for private persons, firms, or corporations, or as the servants of private persons, firms, or corporations."

It was further stipulated that the work of shoveling and removing dirt in the construction of a pavement was in all respects the same whether the pavement be constructed for a city or other municipality or for a private person, firm, or corporation.

Such was the case presented for the determination of the trial court.

The prosecution resulted in a judgment against the defendant, and he was sentenced to pay a fine of \$50 on each *count of the [212] complaint. Motions in arrest of judgment and for new trial having been denied, the case was taken to the supreme court of Kansas, which affirmed the judgment, and sustained the validity of the statute.

The case has been stated quite fully, in order that there may be no dispute as to what is involved and what not involved in its determination.

No question arises here as to the power of a state, consistently with the Federal Constitution, to make it a criminal offense for an employer, in purely private work in which the public has no concern, to permit or to require his employees to perform daily labor in excess of a prescribed number of hours. One phase of that general question was considered in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, in which it was held that the Constitution of the United States did not forbid a state from enacting a statute providing—as did the statute of Utah there involved—*that in [219] all underground mines or workings and in smelters and other institutions for the reduction or refining of ores or metals, the period of the employment of workmen should be eight hours per day, except in cases of emergency, when life or property is in imminent danger. In respect of that statute, this court said: "The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting."

As already stated, no such question is presented by the present record; for the work to which the complaint refers is that performed on behalf of a municipal corporation, not private work for private parties. Whether a similar statute applied to laborers or employees in purely private work

would be constitutional is a question of very large import, which we have no occasion now to determine or even to consider.

Assuming that the statute has application only to labor or work performed by or on behalf of the state, or by or on behalf of a municipal corporation, the defendant contends that it is in conflict with the 14th Amendment. He insists that the Amendment guarantees to him the right to pursue any lawful calling, and to enter into all contracts that are proper, necessary, or essential to the prosecution of such calling; and [220] that the statute of Kansas unreasonably interferes with the exercise of that right, thereby denying to him the equal protection of the laws. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128. In this connection, reference is made by counsel to the judgment of the supreme court of Kansas in *Ashby's Case*, 60 Kan. 101, 106, 55 Pac. 336, in which that court said: "When the eight-hour law was passed, the legislature had under consideration the general subject of the length of a day's labor for those engaged on public works at manual labor, without special reference to the purpose or occasion of their employment. The leading idea clearly was to limit the hours of toil of laborers, workmen, mechanics, and other persons in like employments, to eight hours, without reduction of compensation for the day's services."

"If a statute," counsel observes, "such as the one under consideration is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the state and its municipalities? . . . Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other?"

These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a state and its municipal corporations. Such corporations are the creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxili-

aries of the state for the purposes of local government. They may be created, or, having been *created, their powers may be re-[221] stricted or enlarged or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. *Rogers v. Burlington*, 3 Wall. 654; 663, 18 L. ed. 79, 82; *United States v. Baltimore & O. R. Co.* 17 Wall. 322, 328-9, 21 L. ed. 597, 600; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 525, 25 L. ed. 699, 701; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 380, 14 L. ed. 977, 981; *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. ed. 887, 889, 10 Sup. Ct. Rep. 562; *Barnett v. Denison*, 145 U. S. 135, 139, 36 L. ed. 652, 653, 12 Sup. Ct. Rep. 819; *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617. In the case last cited we said that "a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and, as such, it is subject to the control of the legislature." It may be observed here that the decisions by the supreme court of Kansas are in substantial accord with these principles. That court, in the present case, approved what was said in *Clinton v. Cedar Rapids & M. River R. Co.* 24 Iowa, 455, 475, in which the supreme court of Iowa said: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature." See also *Re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336; *State ex rel. Barton County Attorney v. Lake Keon Nav. Reservoir & Irrig. Co.* 63 Kan. 394, 65 Pac. 681; *State ex rel. Atty. Gen. v. Shawnee County*, 28 Kan. 431, 433; *Frederick v. Groshon*, 30 Md. 436, 444, 96 Am. Dec. 591.

The improvement of the boulevard in question was a work *of which the state, if [222] it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government

to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private character.

If then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of anyone. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work *for it or for one of its municipal agencies* should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its [223] affairs, to prescribe *the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best,—as undoubtedly it is,—and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day is in derogation of the liberty both of em-

ployees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of *the statute of Kansas [224] that it is plainly inconsistent with that instrument; indeed, its constitutionality is beyond all question.

Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employee the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the state or of its municipal subdivisions, and alike to all employed to perform labor on such work.

Some stress is laid on the fact stipulated by the parties for the purposes of this case, that the work performed by defendant's employee is not dangerous to life, limb, or health, and that daily labor on it for ten hours would not be injurious to him in any way. In the view we take of this case, such considerations are not controlling. We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regula-

tions, infringe the personal rights of others; and that has not been done.

The judgment of the Supreme Court of Kansas is *affirmed*.

The CHIEF JUSTICE, Mr. Justice **Brewer**, and Mr. Justice **Peckham** dissent.

[225] *LOUISVILLE TRUST COMPANY, Receiver of the Estate of the Evening Post Company, *Appt.*,

v.

STUART R. KNOTT *et al.*

(See S. C. Reporter's ed. 225-236.)

Direct appeal from circuit court — case in which jurisdiction is in issue.

The question whether a Federal circuit court, under the principles of equity and comity governing all courts having concurrent jurisdiction over the same subject-matter, has authority to administer a trust estate after a suit with reference thereto has been begun in a state court, does not involve the jurisdiction of the circuit court as a Federal tribunal, which alone, under the act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 549), can furnish ground for a direct appeal to the Federal Supreme Court as a case in which "the jurisdiction of the court is in issue."

[No. 389.]

Submitted October 13, 1903. Decided November 30, 1903.

A PPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a denial of a motion to direct its receiver to surrender possession to a receiver appointed by a state court. *Dismissed* for want of jurisdiction.

See same case below, 124 Fed. 342.

The facts are stated in the opinion.

Messrs. John L. Dodd, David W. Baird, and Aaron Kohn submitted the cause for appellant. **Messrs. J. C. Dodd and T. W. Spindle** were with them on the brief.

Messrs. Alexander P. Humphrey and James P. Helm submitted the cause for appellants.

Mr. Justice **Harlan** delivered the opinion of the court:

This case arises out of the conflicting claims by the circuit court of the United States for the western district of Kentucky, and the circuit court of Jefferson county, Kentucky, chancery branch, as to the right

to administer the property and affairs of the Evening Post Company, a corporation of Kentucky.

The Federal court having possession, by its receiver, of the property of that company, declined to surrender possession to the Louisville Trust Company, the receiver appointed by the state court. From the final order dismissing the intervening petition of the latter company, the present appeal was prosecuted. That order stated: "This appeal is granted solely upon the question of jurisdiction over the subject-matter of the trust estate of the Evening Post Company in controversy, and the question of whether this court, or the said Jefferson *circuit[226] court, chancery branch, first division, has prior jurisdiction in [is] the single question upon which this cause is decided as to the said Louisville Trust Company; this court holding that its jurisdiction over the said trust estate of the Evening Post Company is prior and exclusive of the said Jefferson circuit court, chancery branch, first division, all of which is hereby certified on the appeal of the said Louisville Trust Company as receiver, etc., to the Supreme Court of the United States for review as required by law."

It will be more satisfactory and conducive to a clear understanding of the precise ground upon which our decision must rest if the principal facts in the history of this controversy be stated.

On the 30th day of April, 1903, at a meeting of the stockholders of the Post Company, a resolution was adopted—all the stockholders except the owners of 48 shares concurring—by which the Columbia Finance & Trust Company was appointed liquidator of that corporation, with authority to conduct its business and affairs for the benefit of stockholders until its property could be sold and possession delivered to the purchaser in accordance with the statute of Kentucky. The liquidator was directed from the proceeds of sale to pay the debts of the corporation, and to distribute any balance remaining among stockholders according to their legal rights. It took immediate possession of all the property, books, and papers of the Post Company.

On the 10th day of May, 1903, another corporation was organized under the laws of Kentucky. It is referred to in the record as the New Evening Post Company. To that company the liquidator on May 18th, 1903, leased the property and assets of the old company, until a sale should take place.

Prior to the making of that instrument, to wit, on May 12th, 1903, the executors and executrix of the estate of W. N. Haldeman commenced a suit in the Jefferson (Kentucky) circuit court, chancery branch, first

NOTE.—On direct appeal to Federal Supreme Court from circuit or district court—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

[227] division, against the old Post *Company, the Columbia Finance & Trust Company, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott, and Laura G. Boyle; the plaintiffs and the individual defendants being respectively owners of stock in the old company. The object of that suit, as disclosed by the petition, was to obtain a settlement of the accounts of the company and of its liquidator; and to that end the plaintiffs asked a reference of the cause to the commissioner of the court to audit and settle the accounts of the Columbia Finance & Trust Company, and after such auditing and settlement, that the assets of the company be sold, and the proceeds distributed according to law. The plaintiffs further prayed that pending the action, and until the final liquidation of the affairs of the old company, and the sale of its assets, the court determine whether its affairs should be continued in operation, and if so, that the management of the plant be under the direction of the court; further, that a preliminary order be entered, commanding and directing the defendants and each of them to allow the plaintiffs reasonable access to, and an examination of, the books, papers, documents, and affairs of the old company, including all documentary information in connection therewith in the possession of defendants or of either of them.

On the 19th of May, 1903, upon due notice, the plaintiffs moved for an order directing the defendants to allow the plaintiffs, their counsel, and accountant, reasonable access to, and inspection of, the books, records, and documents of the old company, relating to its assets, liabilities, and business affairs. To that motion the defendants objected, and the motion was assigned for hearing on May 23d, 1903. On the day last named the parties appeared, the plaintiffs filed affidavits in support of their motion, and the defendants interposed a demurrer to the petition, as well as filed their several answers. The motion and demurrer were heard in part, and the further hearing of them was postponed until May 25th, 1903. On the latter day, the hearing not being concluded, the cause was postponed until the 30th of May, on [228] which day it was submitted *on the pending motion of plaintiffs, on defendants' demurrer to the petition, and on a motion of the Columbia Finance & Trust Company, entered on that day, for leave to file an amended and supplemental answer. By an order entered June 4th, 1903, the plaintiffs' motion, made on the 19th day of May, 1903, was sustained, and the defendants, and each of them, were commanded and directed, until the further orders of the court, to allow and afford the plaintiffs, their attorneys, or accountant, during business hours, reasonable access to,

and an inspection of, the books, records, and documents of the Post Company, touching its conditions and business affairs, and especially touching its assets and liabilities, and the considerations paid or received therefor. The demurrer of the defendants was also overruled, and the objection to the filing of the amended and supplemental answer of the Columbia Finance & Trust Company, trustee, tendered May 30th, 1903, was sustained.

While the above motion in the state court was pending, Stuart R. Knott, a citizen of Missouri, and not a party to the suit in the state court, obtained, May 26th, 1903, in the circuit court of the United States for the western district of Kentucky, a judgment against the old company for \$6,000 with interest from April 30th, 1903. Upon that judgment execution immediately issued and was returned the next day, May 27th, 1903, "no property found." And on the latter day the present suit was commenced by him in the United States circuit court, against the Evening Post Company, Columbia Finance & Trust Company, R. W. Knott, B. G. Boyle, and E. Q. Knott, each defendant being a citizen of Kentucky. The prayer of the bill was that the court at once appoint a receiver of all the rights, properties, franchises, books of account, records, documents, choses in action, and all other things belonging to the Post Company, forthwith to report what such property is, and what arrangement can be made for the continued publication of said paper until a decree could be entered directing a sale herein; that all proper *equitable relief may be had looking to the [229] administration of the estate of the company and the payment of its just debts; and to that end the sale of its property and the bringing of any money produced by such sale into the registry of the court for distribution among creditors.

On the 23th day of May, 1903, all the defendants in the suit in the United States circuit court assenting thereto, a receiver of the property and assets of the Post Company was appointed by that court, and the defendants were directed forthwith to deliver to him all such property and assets of every kind and description. That receiver took immediate possession and, under the authority of the court, entered into a contract with the new company for the publication of the paper until the assets of the old company were sold.

The plaintiff in the suit in the state court entered, June 13th, 1903, a formal motion to appoint a receiver to take charge of and manage the property and affairs of the Post Company; and on June 18th the defendants in that suit appeared and objected to the motion upon the ground that the assets of

the company were already in the possession and under the control of a receiver appointed by the United States circuit court in the suit instituted by Stuart R. Knott. This objection was overruled, and the state court, by order entered June 27th, 1903, appointed the Louisville Trust Company receiver, with authority to claim and take possession of the property and assets of the Post Company. By the same order the commissioner of the court was directed to audit, state, and settle the accounts of the Columbia Finance & Trust Company as liquidator and trustee of the old Post Company.

[230] Subsequently, June 30th, 1903, the state court, by order then entered, directed its receiver to intervene in the suit instituted in the Federal court, and claim the estate in question for administration and settlement in the state court. The latter court was of the opinion that its jurisdiction to administer the said trust estate first attached, and in order that the relief sought at its hands might be granted it was necessary *that it have possession and control of the property of the Post Company. Its receiver was therefore ordered to intervene in the suit pending in the Federal court, claim the trust estate for administration and settlement in the state court, and test the question as to the prior jurisdiction of the state court over the subject-matter.

Pursuant to that order the Louisville Trust Company intervened in the suit in the Federal court, and moved that its receiver be directed to turn over the property to the receiver of the state court. This motion was denied, Judge Evans, of the Federal court, accompanying the denial of the motion with an elaborate opinion (*Knott v. Evening Post Co.* 124 Fed. 242), which concluded as follows: "First, that the proceedings in the suit in the state court, when given their just effect, had not, in any way, when this court's receiver was appointed, brought into the custody of that court any property of the Evening Post Company, nor could they be regarded as having, in fact, done so even if their scope were measured by the prayer of the plaintiff's petition rather than its averments; second, that it was, therefore, open to this court to appoint a receiver, and thereby judicially seize the property of the company at the instance of a judgment creditor; and, third, that having thus first acquired jurisdiction over the property thus seized, the established principles of law and the plain rights of the judgment creditor demand that this court shall maintain its jurisdiction over it under these circumstances as certainly as it would have abandoned it if the first seizure had been by the state court. It results that the motion of the intervening petitioner must be over-

ruled and denied and intervening petition dismissed."

We are of opinion that the judgment of the circuit court dismissing the intervening petition of the Louisville Trust Company is not subject to review here upon direct appeal or writ of error to that court.

*By the judiciary act of March 3d, 1891,[232] chap. 517, 26 Stat. at L. 826 (U. S. Comp. Stat. 1901, p. 549), an appeal or a writ of error, as the one of the other mode may be proper, can be taken directly from a circuit court to this court in certain specified cases, among which is "any case in which the jurisdiction of the court is in issue;" and "in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." § 5. In all cases, other than those specified in § 5 of that act, the circuit court of appeals is given appellate jurisdiction. § 6.

The question presented by the certificate of the circuit court is not one of *jurisdiction*, within the meaning of the 5th section of the act of 1891, and the jurisdiction of that court was not "in issue." There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the circuit court, as a Federal court, to take cognizance of it. The issue made by the intervening petition of the Louisville Trust Company did not involve the jurisdiction of that court, as a Federal tribunal, to appoint a receiver of the assets and property of the Evening Post Company. What the circuit court did in that respect was questioned by the Trust Company, on behalf of the state court, solely upon the ground that the taking by the Federal court of possession of the property and assets of the Post Company—after the state court, by the institution of the Haldeman suit, had acquired authority to appoint a receiver of such property and assets for administration—was in violation of the rule recognized in courts of equity, whether of Federal or state origin, that "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court;" that as the object of the suit in the state court could not be accomplished without possession of the property and assets of the Post Company, the seizure of such property and assets under the order of the Federal court, whereby the state court was prevented from giving any *effectual relief to the parties before it,[233] was inconsistent with the relations which, upon principles of comity and right, always exist between courts having concurrent jurisdiction over the same subject-matter.

Peck v. Jenness, 7 How. 624, 12 L. ed. 846; *Taylor v. Carryl*, 20 How. 596, 15 L. ed. 1032.

In all this there was nothing involving the jurisdiction of the circuit court as a Federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other.

We think this question was substantially so determined in *Smith v. McKay*, 161 U. S. 355, 357, 40 L. ed. 731, 16 Sup. Ct. Rep. 490. That was a suit in equity for an injunction to restrain the defendants from using certain patented machines until they had fully paid the fees they had agreed to pay to the patentee. The defendants moved to dismiss the bill upon the ground that there was a plain, adequate, and complete remedy at law,—thus raising only a question of equity jurisdiction. The motion to dismiss was denied. After final decree for the plaintiff, the case was brought directly to this court by appeal, and it was assigned for error that the circuit court erred in not dismissing the suit for want of jurisdiction. The position of the appellee in that case was that only questions of Federal jurisdiction could be brought directly here; and that if the circuit court had jurisdiction of the parties and of the matters in dispute, the fact that the remedy of the plaintiff was at law, rather than in equity, raised no question of jurisdiction within the meaning of the 5th section of the judiciary act of March 3d, 1891, under which the appeal was taken.

The court observed that the question had never been directly decided by it, but that it arose in the *World's Columbian Exposition Case*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. [234] 654, in which the circuit court, *sitting in equity, granted an injunction to prevent the opening of the Exposition Grounds to the public on Sunday. That case was taken by appeal to the circuit court of appeals for the seventh circuit, and a motion was there made to dismiss the appeal. Chief Justice Fuller, speaking for that court, said: The "appellees have submitted a motion to dismiss the appeal upon the ground that the jurisdiction of the circuit court was in issue; that the case involved the construction or application of the Constitution of the United States; that the constitutionality of laws of the United States was drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United States, and not to this

court; and hence that this appeal, which is from an interlocutory order, cannot be maintained under the 7th section of the judiciary act of March 3d, 1891. We do not understand that the power of the circuit court to hear and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power. The jurisdiction of the circuit court was, therefore, not in issue within the intent and meaning of the act."

Referring to these observations of the Chief Justice, this court in *Smith v. McKay* said: "We regard this as a sound exposition of the law, and, applied to the case now in hand, it demands a dismissal of the appeal, on the ground that the objection was not to the want of power in the circuit court to entertain the suit, but to the want of equity in the complainant's bill. The applicants' contention in this respect would require us to entertain an appeal from the circuit court in every case in equity in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law. When the requisite citizenship of the parties appears, and the subject-matter is such that the circuit court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's *prayer for [235] equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the circuit court of appeals." 161 U. S. 355, 358, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490, 492.

In principle, the judgment in *Smith v. McKay* embraces the present case. The issue presented by the intervening petition did not raise any question under the Constitution or statutes of the United States, and depended only upon principles of general law applicable to all courts having concurrent jurisdiction over the same subject-matter. We repeat that the jurisdiction of the circuit court was not and is not questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such question should be the basis of a direct appeal to this court from a circuit court.

The question again arose in *Blythe v. Hinckley*, 173 U. S. 501, 506, 43 L. ed. 783, 785, 19 Sup. Ct. Rep. 497, where this court

said: "Appeals or writs of error may be taken directly from the circuit court to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this court. The circuit court held that the remedy was at law, and not in equity. That conclusion was not a decision that the circuit court had no jurisdiction as a court of the United States. *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Blythe Co. v. Blythe*, 172 U. S. 644, 43 L. ed. 1183, 19 Sup. Ct. Rep. 873. The circuit court dismissed the bills on another ground; namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the circuit court was a Federal court, but a decision that the circuit court was unable to grant relief because of the judgments rendered by those other courts. If we were to

[236]take jurisdiction *on this certificate, we could only determine whether the circuit court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect."

It is proper to observe that this court in *Shields v. Coleman*, 157 U. S. 168, 177, 39 L. ed. 660, 663, 15 Sup. Ct. Rep. 570, assumed jurisdiction upon direct appeal from a circuit court in a case involving the question whether that court had authority to appoint a receiver of property which was at the time in the possession of a receiver appointed by a state court. As the Federal court had, in that case, taken property out of the physical possession of a receiver of the state court, this court expressed its views upon the question whether the possession of the state court should have been disturbed by the Federal court, and it rendered judgment accordingly. But the precise question here presented as to the jurisdiction of this court under the act of 1891, on direct appeal from the circuit court, was not there raised or considered. In *United States v. More* (1805) 3 Cranch, 159, 171, 2 L. ed. 397, 401, it was held that 'this court was without jurisdiction, under the law as it then was, to review the final judgment of the circuit court of the District of Columbia in a criminal case. It was suggested at the bar, in that case, that this court had, in a previous case, exercised appellate jurisdiction in a criminal case. Chief Justice Marshall met that suggestion by saying: "No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the court does not consider it-

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self as bound by that case." To the same effect, 'substantially, are *United States v. Sanges*, 144 U. S. 310, 319, 36 L. ed. 445, 449, 12 Sup. Ct. Rep. 609, and *Cross v. Burke*, 146 U. S. 83, 36 L. ed. 896, 13 Sup. Ct. Rep. 22.

In the circumstances of the present case, and to avoid misapprehension in the future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the 5th section of the judiciary act of 1891.

For the reasons stated, *the appeal from the Circuit Court must be dismissed* for want of jurisdiction in this court.

It is so ordered.

*JACOB GERTGENS, *Plff. in Err.*, [237]
v.

JOHN P. O'CONNOR.

(See S. C. Reporter's ed. 237-247.)

Public lands—bona fide purchasers from railway company—bona fide settlers.

1. The preferential right of purchase from the government given by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, § 5, U. S. Comp. Stat. 1901, p. 1595), to "bona fide purchasers" from a railway company of lands excepted from the operation of its congressional land grant, inures to the benefit of a person seeking to bring settlers on such lands, who was given, by written agreement with the railway company, the right to purchase for himself and others lands within the indemnity limits of its grant when title thereto should be acquired by the company.
2. The protection afforded to bona fide settlers by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, § 5, U. S. Comp. Stat. 1901, p. 1595), against the preferential right of purchase given by that section to bona fide purchasers from the railway company of lands excepted from the operation of its congressional land grant, does not cover a subsequent settlement of land within the indemnity limits of such grant, made with knowledge that it had been withdrawn from entry, and had been selected to supply deficiencies claimed to exist within the place limits.

[No. 65.]

Argued November 9, 10, 1903. Decided November 30, 1903.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of the Sixteenth Judicial District of that State in favor of the plaintiff in an action of ejectment. *Affirmed.*

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

See same case below, 85 Minn. 481, 89 N. W. 866.

Statement by Mr. Justice **Brewer**:

This was an action in ejectment commenced on February 15, 1900, by John P. O'Connor against Jacob Gertgens, in the district court of the sixteenth judicial district of the state of Minnesota, to recover possession of the southwest section 9, township 125, range 45 west. The defendant appeared and answered. A trial was had before the court without a jury, resulting in a judgment for the plaintiff, which was, on April 4, 1902, affirmed by the supreme court of the state (85 Minn. 481, 89 N. W. 866), and thereupon this writ of error was sued out.

[238] *The facts are these: The tract was surveyed public land, situate in the county of Traverse, and lying within the twenty-mile indemnity limits of the grant to the St. Paul, Minneapolis & Manitoba Railway Company, as defined by acts of Congress dated respectively March 3, 1857 (11 Stat. at L. 195, chap. 99), and March 3, 1865 (13 Stat. at L. 526, chap. 105). It, with other lands, was withdrawn from settlement and entry under the land laws of the United States by executive withdrawal, dated May 25, 1869. In April, 1885, the tract, being within the indemnity limits, was, with other tracts, selected by the railway company as indemnity for deficiencies claimed to exist within the place limits. These selections were all finally canceled on October 23, 1896.

Prior to April 15, 1891, the land was unoccupied, but at that time the defendant, being fully qualified as a homestead claimant, took possession with a view of claiming it as a homestead under the laws of the United States, has ever since occupied it as his homestead, and made improvements thereon of the value of \$1,200. He made application at the local land office for a homestead entry but it was refused by the local land officials, and such refusal sustained on appeal by the Commissioner of the General Land Office. The refusal was on the ground that the land was within the 20-mile indemnity limits of the railway company, and had been selected by the company in 1885, long before the defendant went upon the land.

In July, 1880, the railway company entered into a written agreement with the Rev. John Ireland, a citizen of the United States, by which the company gave him the sole and exclusive right and authority to place settlers upon and sell to them all the lands in the counties of Big Stone and Traverse, to which the railway company might be entitled by virtue of the land grants of March 3, 1857, and March 3, 1865, and which were included within the indemnity limits of said grants.

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This contract expired December 31, 1881. On March 30, 1883, the railway company made a new agreement, which, after referring to the prior contract, contained this stipulation:

*"Now, therefore, the contract herein referred to having expired on the 31st day of [239] of December, A. D. 1881, and the R. R. Co. not yet having acquired title to the lands in question, it is now agreed between the R. R. Co. and the Rev. John Ireland that when title to these lands are acquired by the R. R. Co., and notice of the same is given to Rev. John Ireland, he shall have the privilege and the right at any time within sixty days of date of said notice of purchasing for himself or such parties as he may designate, due regard being had, as stated in supplement to said contract, for settlers who may have obtained any claim upon such lands previous to the date of said contract, any or all of the lands included in said contract, not to exceed the amount of 50,000 acres at uniform price of \$4 per acre, 10 per centum of all receipts from said lands at the above price to be furthermore paid to the said Rev. John Ireland, according as the monies are received by the company, when such lands shall be purchased by Rev. John Ireland or those whom he may designate, the conditions of sale usual with the company shall be observed, or, at least, the interest upon the purchase money shall be paid from the date of purchase to the 15th day of December following, when the usual condition shall be enforced."

This agreement was duly recorded in the office of the register of deeds of Traverse county, Minnesota. On February 8, 1896, Ireland made application to the Land Department for leave to purchase from the government the land in controversy under the provisions of the 5th section of the act of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595). This application was contested by the defendant, but the claim of Ireland was sustained by all the officials of the Land Department, from the local officers up to the Secretary of the Interior. A patent was thereupon issued to Ireland, from whom the plaintiff obtained a conveyance. The act of March 3, 1887, was an act directing the Secretary of the Interior to adjust, in accordance with the decisions of the Supreme Court, *the several railroad land grants made [240] by Congress. Section 5, under which Ireland made his claim is copied in the margin.†

†Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coter-

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Messrs. S. M. Stockslager and Thomas Kneeland argued the cause, and, with *Messrs. George C. Heard and F. W. Murphy*, filed a brief for plaintiff in error:

A bona fide contract, agreement, or covenant is one that is legal, valid, subsisting; such a contract as imposes legal obligations, and may be enforced in the judicial tribunals of the country.

1 Am. & Eng. Enc. Law, 2d ed. p. C15; *Hale v. Darter*, 10 Humph. 95.

"Sale" is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to give and to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought or sold.

Huthmaker v. Harris, 38 Pa. 498, 80 Am. Dec. 502; *Williamson v. Berry*, 8 How. 544, 12 L. ed. 1191.

There can be no sale unless there is a purchase, as there can be no purchase unless there is a sale.

Butler v. Thomson, 92 U. S. 412, 23 L. ed. 684; *Richardson v. Hardwick*, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213; *Smith v. Reynolds*, 3 McCrary, 157; *Dorsey v. Packwood*, 12 How. 126, 13 L. ed. 921; *Stitt v. Huidekoper*, 17 Wall. 385, 21 L. ed. 644; *Johnson v. Jacobs*, 42 Minn. 168, 44 N. W. 6; *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897; *Clark*, Contr. pp. 16, 34, 35; *Graff v. Buchanan*, 46 Minn. 254, 48 N. W. 915; *Emerson v. Graff*, 29 Pa. 358; *McConkey v. Peach Bottom Slate Co.* 16 C. C. A. 8, 25 U. S. App. 280, 68 Fed. 830; *Wenham v. Switzer*, 8 C. C. A. 404, 15 U. S. App. 302, 59 Fed. 942; *Bailey v. Austriar*, 19 Minn. 535, Gil. 465; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669.

An option contract of purchase of lands neither conveys any interest or estate therein to the vendee; nor is such a contract in any sense a contract of sale.

Bishop, Contr. §§ 318, 321; 28 Am. & Eng. Enc. Law, p. 77; 1 Warvelle, Vendors, p. 187; *Smith*, Contr. § 154; 1 Wait, Act. & Def. p. 102; *Fisher v. Seltzer*, 23 Pa. 308, 62 Am. Dec. 335; *Ritenour v. Mathews*, 34 Ind. 279.

It would seem utterly impossible for one

to be a purchaser of lands under a contract which gave him no sort of interest, in law or equity, in the lands claimed to have been purchased.

Bostwick v. Hess, 80 Ill. 138.

Ireland could not prove any consideration as in compliance with the terms of the instrument other than as was expressly required therein.

Custeau v. St. Louis Land Improv. Co. 88 Wis. 311, 60 N. W. 425.

Voluntary services cannot be considered an election or part performance.

Gordon v. Darnell, 5 Colo. 303.

The doing of things by the promisee for himself is not consideration for an offer by the promisor.

Islam v. Therasson, 53 N. J. Eq. 10, 30 Atl. 469.

The option being without consideration for its making, and not having been accepted by Ireland in compliance with its terms, is a nude pact.

Provident Life & T. Co. v. Mills, 91 Fed. 435; *Weaver v. Burr*, 31 W. Va. 736, 3 L. R. A. 94, 8 S. E. 743; *Eliason v. Henshaw*, 4 Wheat. 225, 4 L. ed. 556; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139.

Where neither party could force the other to perfect a sale, there could certainly be no grounds for claiming a sale had been made, absolute or conditional, legal or equitable.

Bishop, Contr. § 78, and cases cited.

Again, before the option in the case at bar could become a contract binding on either party, it would have been necessary for Ireland to have complied with its terms by not only selecting the specific lands he would take out of the 50,000 acres, and notifying the company thereof, but also by paying or tendering the amount stated in the option, to wit, \$4 per acre.

Coleman v. Applegarth, 68 Md. 21, 11 Atl. 284; *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463; *Potts v. Whitehead*, 20 N. J. Eq. 55.

However much it may be insisted that the act of March 3, 1887, is remedial in character, and requires a liberal construction, it will hardly be contended that a simple

mlnous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which, at the date of such sales, were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States,

and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries, and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

executory agreement to purchase land from a railroad company, not based upon a valuable consideration, would support an application to purchase under its provisions.

Bishop, Contr. §§ 35, 40, 77; Comyn, Contr. p. 9; Chitty, Contr. pp. 6, 24; Travis, Sales, p. 1; Hughes, Contr. ed. 1902, § 35; 1 Wait, Act. & Def. pp. 90, 92.

In order to bring one within the terms of the act he must have purchased in good faith, and paid value for the lands.

United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368.

Antecedent consideration is insufficient.

3 Am. & Eng. Enc. Law, p. 838; 2 Am. & Eng. Enc. Law, p. 444; Warvelle, Vendors, § 11, note; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Cummings v. Boyd*, 83 Pa. 372; *Moore v. Ryder*, 65 N. Y. 441; *Clark v. Flint*, 22 Pick. 243, 33 Am. Dec. 733; *Mingus v. Condit*, 23 N. J. Eq. 315; *Hinds v. Pugh*, 48 Miss. 276.

Whether Ireland had any contract, or was a bona fide purchaser, are questions of law.

Culver v. Banning, 19 Minn. 303, Gil. 260; *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699; *Pierce v. Randolph*, 12 Tex. 290; *Heller v. Crawford*, 37 Ind. 279; *Brown v. Huger*, 21 How. 305, 16 L. ed. 125; *Estes v. Boothe*, 20 Ark. 583; *Richmond Trading & Mfg. Co. v. Furquar*, 8 Blackf. 89; *Bovill v. Pimm*, 36 Eng. L. & Eq. 441; *Doe ex dem. Holman v. Crane*, 6 Ala. 570; *Kidd v. Cromwell*, 17 Ala. 648; *Rogers v. Carey*, 47 Mo. 235, 4 Am. Rep. 322; *Woodman v. Chesley*, 39 Me. 45; *American Exch. Bank v. Inloes*, 7 Md. 380; *Carpentier v. Thirston*, 24 Cal. 268; *Shepherd v. White*, 11 Tex. 346; *Addington v. Etheridge*, 12 Gratt. 436; *Cox v. Freedley*, 33 Pa. 125, 75 Am. Dec. 584; Wells, Questions of Law & Fact, § 46; *Latham v. Westervelt*, 26 Barb. 256; *Chapin v. Potter*, 1 Hilt. 366; 21 Am. & Eng. Enc. Law, p. 518; 28 Am. & Eng. Enc. Law, p. 101; *White v. Brown*, 14 How. Pr. 282.

A bona fide purchaser is one who, at the time of his purchase, advances a new consideration, surrenders some security, or does some other act which would leave him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had a right to sell, without notice.

5 Cyc. Law & Proc. p. 719; 1 Perry, Tr. § 239; *Woolridge v. Thiele*, 55 Ark. 45, 17 S. W. 340; *Fargason v. Edrington*, 49 Ark. 207, 4 S. W. 763; *Alden v. Trubec*, 44 Conn. 455.

The essential elements which constitute a bona fide purchaser are three: A valuable

consideration, the absence of notice, and presence of good faith.

Pom. Eq. Jur. § 745.

It is the settled law of this court that, where the land officials err in construction of the law, or in application of the law to the undisputed facts, their action is reviewable by the courts.

Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Sanford v. Sanford*, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666; *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138.

Ireland's bona fides is a legal conclusion.

Warvelle, Vendors, p. 609; 12 Enc. Pl. & Pr. pp. 1031, 1033; *Wing v. Hayden*, 10 Bush, 280; 9 Enc. Pl. & Pr. 687, 688; *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104, 11 Sup. Ct. Rep. 476; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 577, 33 L. ed. 687, 10 Sup. Ct. Rep. 390; *Ritchie v. McMullen*, 159 U. S. 241, 40 L. ed. 135, 16 Sup. Ct. Rep. 171.

Ireland's option agreement, without consideration or mutuality of engagement, was invalid.

Campbell v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1; *Rafolovitz v. American Tobacco Co.* 73 Hun, 87, 25 N. Y. Supp. 1036.

Messrs. **Edward T. Young** and **Hiram F. Stevens** argued the cause, and, with Messrs. *Stevens, O'Brien, Cole, & Albrecht*, filed a brief for defendant in error:

An applicant under this section is a special pre-emptioner, and all matters affecting his status as a purchaser from the railway company, as well as his citizenship, are matters which constitute his qualifications as such special pre-emptioner.

Re Campbell, 8 Land Dec. 27; *Union Colony v. Fulmele*, 16 Land Dec. 273.

The matter of said Ireland's qualification as a purchaser under this section was a question of fact.

Vance v. Burbank, 101 U. S. 519, 25 L. ed. 929; *Bishop Iron Co. v. Hyde*, 66 Minn. 24, 68 N. W. 95, Affirmed in 177 U. S. 281, 44 L. ed. 771, 20 Sup. Ct. Rep. 592; *Potter v. Hall*, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545.

Agreements in all essential features similar to that here in question have been considered and upheld by the department as sufficient under the act.

Re Campbell, 12 Land Dec. 247; *Telford v. Keystone Lumber Co.* 18 Land Dec. 176, 19 Land Dec. 141; *Union P. R. Co. v. Norton*, 17 Land Dec. 314; *Jenkins v. Dreyfus*, 19 Land Dec. 272; *Holton v. Rutledge*, 20 Land Dec. 227; *Stephan v. Morris*, 21 Land Dec. 557; *Austin v. Luey*, 21 Land Dec. 507.

Purchase, in its broad and liberal sense, includes every mode of acquisition save that

of descent, and in the most narrow sense in which it was ever employed it means acquisition by the payment of a sum of money. But neither of these is the popular sense. In common use, and generally in statutes, as the Supreme Court says, "the word is employed in a sense not technical, only as meaning acquisition by contract between the parties."

Grandin v. La Bar, 23 Land Dec. 301; *Kohl v. United States*, 91 U. S. 374, 23 L. ed. 452.

The provisions of the act apply to indemnity as well as place lands.

Durrell v. Windom, 23 Land Dec. 508.

The term "bona fide purchaser," as used in this statute, is not to be taken in its strict or literal sense. It is intended rather to indicate one who made a contract intending to purchase and expecting to get the title in that way.

United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368.

A long and uniform course of construction of a statute by the tribunal expressly charged with its administration is entitled to great respect.

United States v. Moore, 95 U. S. 760, 24 L. ed. 588.

The right of the parties to a contract to place a practical construction thereon, and to give it an interpretation, is well recognized.

Reissner v. Oxley, 80 Ind. 580; *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Patterson v. Camden*, 25 Mo. 13; *Whitehead v. Bank of Pittsburgh*, 2 Watts & S. 172; *Chapman v. Bluck*, 5 Scott, 515; *Brown v. Pales*, 139 Mass. 21, 29 N. E. 211; *Etting v. Bank of United States*, 11 Wheat. 59, 6 L. ed. 419; *West v. Smith*, 101 U. S. 270, 25 L. ed. 812; *Citizens' Fire Ins. Security & Land Co. v. Doll*, 35 Md. 107, 6 Am. Rep. 360; *Williams v. McHatton*, 16 La. Ann. 196; *Mathews v. Danahy*, 26 Mo. App. 660; *Topliff v. Topliff*, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057.

Mr. Justice **Brewer** delivered the opinion of the court:

The patent was issued to Ireland after a contest between him and the defendant, in which the several officials of the Land Department, from the local officers to the Secretary of the Interior, sustained his contention. The decisions of the Land Department in such contest cases are conclusive upon all questions of fact. *Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018, and cases cited; *Johnson v. Drew*, 171 U. S. 93, 99, 43 L. ed. 88, 90, 18 Sup. Ct. Rep. 800; *Gardner v. Bonestell*, 180 U. S. 362, 45 L. ed. 191 U. S.

574, 21 Sup. Ct. Rep. 399; *De Cambra v. Rogers*, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519. The patent passed the legal title to Ireland. *It devolved upon the defendant, contesting that title, to show a superior right, legal or equitable, to the land. Both the trial and supreme courts of the state decided against the defendant's claim. We have thus the unanimous conclusions of all the officers of the Land Department of the United States and of the judges of the courts of the state, to whom the question could be presented, in favor of plaintiff's title.

In respect to certain requirements of § 5, under which the Land Department acted, there is no question. Ireland was a citizen of the United States. The tract was within the contract made by the company with him in 1883. It had never been conveyed to the company, or for its use. It was an odd-numbered section, within the limits of the grant, and coterminous with a constructed part of the road. It was excepted from the operation of the grant because of a defect in the selection of indemnity lands. All these matters being beyond dispute, there remain open the questions whether the land could be deemed to have been sold by the company to Ireland, and whether he was a bona fide purchaser; and further, conceding that Ireland comes within the provisions of the section, whether the equitable rights of the defendant as a homestead settler are superior.

Was there a sale, and was Ireland a bona fide purchaser within the scope of said section? It is contended on the one hand that these are questions of fact concluded by the decisions of the Land Department, and on the other that it is the duty of the court to construe a written instrument, and as the agreement between the company and Ireland was in writing, it is a question of law and not of fact whether there was a sale by the company, and a purchase by Ireland. Doubtless, whether a transaction evidenced by a written agreement was a real transaction or a sham, whether it was executed with a fraudulent intent or in good faith, may present questions of fact, and in so far as those questions are involved in this case the conclusions of the Land Department are final. We must accept the agreement between the company and Ireland as *genuine, made in good faith, and supported, so far as it can be, by all outside facts, such as a sufficient consideration.

It is, however, earnestly contended that there was no sale or purchase; that the company gave only a mere option, which, though binding on it, cast no obligations on Ireland. If he wanted to complete the contract and pay for the land, he might do so. If he did not, he was under no liability to the

company. Strictly speaking, this contention is correct. Ireland had made no payment for this land, had made no absolute promise to pay, and it was optional with him whether he took the land or not. And if it be a condition of acquiring a right under this section, that the party claiming must either have paid or promised to pay, then Ireland was not entitled to any benefit therefrom. But we think the section does not compel such construction. We have more than once held that the entire statute was remedial in its nature, and must be construed so as to carry out the intent of Congress, and secure to the parties the intended relief. Primarily, the purpose was to secure an adjustment of the various land grants in aid of railroads. Much confusion had existed in the construction and administration of those grants. There had been conflicting decisions, and Congress attempted, without displacing vested rights, to do equity to all parties claiming interests in lands within these various grants. It did not purpose to merely define legal rights or prescribe new methods for their enforcement. The courts were competent under the law, as it stood, without additional legislation to preserve such rights.

There were three parties whose interests and equities were to be regarded: First, the railway company, the beneficiary of the grant; second, parties who had dealt with the railway company in reference to lands claimed by it to be within the scope of its grant; and, third, parties who had attempted to secure title under the settlement laws of the United States. With reference to the railway company, it is sufficient to say that Congress aimed to limit its acquisition of [243] title to the *amount of land which it had in fact earned by the construction of the road, and prescribed that the adjustment with it should be made in accordance with the rulings of this court; authorized actions to recover any lands improperly conveyed to the company, or if the company had parted with them, the value thereof in money.

As to those who had dealt with the railway company, its evident purpose was to secure to them the lands they had contracted for, in so far as it could be done without trespassing on the rights of settlers. The scope of § 5 is disclosed by its opening words, "where any said company shall have sold." In case of a sale, certain privileges are given upon certain conditions. Nowhere does it provide as one of those conditions that the company shall have received full, or indeed any, payment. If there is a sale it is sufficient. Why, in a remedial statute, may not the word include a sale upon conditions,—one in which the proposed buyer has an election to accept the company's promise?

The section does not attempt to relieve any one whose transactions with the railway company were not in good faith. The term "bona fide purchaser" is used in the statute; but as we pointed out in *United States v. Winona & St. P. R. Co.* 165 U. S. 463, 480, 481, 41 L. ed. 789, 797, 17 Sup. Ct. Rep. 368, not in any technical sense, but simply as demanding good faith in the transactions between the individual and the company. It is true that the parties who, in that case, had dealt with the company had in fact purchased and paid value, and it was unnecessary to consider anything more than the effect of such transactions. But still it was distinctly held that the term "bona fide purchaser" was not intended in any technical sense, but only as one implying good faith.

In reference to Ireland's actions under his contracts with the company, the supreme court of the state said (p. 488, N. W. p. 868):

"Under his first contract with the railroad company, Ireland expended large sums of money, and devoted a great deal of time to a colonization enterprise, and the expenditure and labor were kept up until 1883, large numbers of people being *thereby induced to [244] settle in a new country tributary to the line of road belonging to the company.

"By it the company constituted Ireland its mere agent to make sales of the lands therein scheduled, to receive payments thereon, and to bind it to convey when its title should be perfected, or to return the money paid, in case it failed to obtain title.

"The agreement of March 30 was wholly different. The agency was at an end. Ireland was given the right to purchase for himself and for others 50,000 acres at a stipulated price per acre, and upon certain terms. The company could not then convey; when it could was uncertain, and it was agreed that purchasers should not be obliged to pay any part of the purchase price until it was within the power of the company to give good title. This was the construction placed upon the contract by the parties thereto, and it was the rational and proper one. Ireland proceeded under this contract, as he had under the first, to secure purchasers for these lands. They became actual residents and received contracts for conveyances. He expended much time and large sums of money in the scheme to populate the country in question, and his success was very noticeable."

It is not pretended that what he did under these contracts, including therein his outlays of time and money, were, under his last agreement, to be accepted by the company as so much payment for the land, but these facts are stated to show the bona fides of the transaction; that it was not an attempt by

means of a mere option to facilitate the acquisition of title from the government to the injury of bona fide settlers. On the contrary, Ireland was seeking to bring settlers on these lands, and thus aiding in carrying out the general purpose of the government to transform the vacant public lands into homes. Surely a purpose so in harmony with that of the government and an effort in the way that he pursued to carry that purpose into effect makes a case appealing to the favorable consideration of Congress, [245] and is in its nature essentially *different from a pure speculation in public lands at the expense of bona fide settlers. The rulings of the Land Department have been along the line of a recognition of the fact that attempts in good faith by a party to obtain from a railroad company for bona fide settlements lands believed to belong to it or expected to be acquired by it, present cases which were intended to be included within the act of 1887, and entitled to its protection. *Re Campbell*, 12 Land Dec. 247; *Telford v. Keystone Lumber Co.* 18 Land Dec. 176, 19 Land Dec. 141; *Holton v. Rutledge*, 20 Land Dec. 227; *Austin v. Luey*, 21 Land Dec. 507.

It must be borne in mind that the purpose of § 5 was not relief to the company, but to one dealing with it. Ireland by his contract had obtained rights from the company, even if he had not assumed obligations to it. The land was the property of the government, and property to which the company acquired no title, but being within the limits of its grant it had claimed a right, and contracted with Ireland as though it had or would receive the title. Section 5 gave to Ireland only a right to purchase this land from the government,—a preferential right,—paying to the government its price, no portion of which was to pass to the railway company, and gave him that preferential right because of his dealings with the company. He had sought to obtain title to this land from the company. He had made a contract by which, if the company acquired title, he could obtain that title; and Congress, by § 5, simply provided that, having so acted in respect to this land, he should have a preferential right of purchase. The company neither gains nor loses. The government receives its price for the land, and is, therefore, fully protected, and Ireland receives that in respect to which he certainly has some equitable claim of consideration,—a preferential right of purchase.

The third party is the settler under the land laws, and we pass to consider his status and rights. A settler is, as has often been said, favored in law, but it does not follow therefrom that he is the only one whose

[246] equities are to be considered. *Congress, by 191 U. S.,

§ 5, made provision for his protection,—such provision as it deemed sufficient. While it gave to purchasers from the railway company a preferential right of purchase, it excepted therefrom lands which at the times of such purchase “were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned.” In other words, it said that no purchaser from the railway company should have a preferential right of purchasing any lands which at the time of his dealings with the railway company were in the hands of a bona fide settler under the laws of the United States, unless such settler should voluntarily abandon his settlement. As between a purchaser from the railway company and a settler on the lands, the settler was given the prior right. But the defendant was not a settler at the time of Ireland’s contract, nor, indeed, until many years thereafter. Neither did he come under the protection of the second proviso, for, although his settlement was after December 1, 1882, it was not until long after the passage of the act.

It is well to look further into his equities. It will be borne in mind that he did not go upon the land until April, 1891. The tract was within the indemnity limits of the company’s grant, and was, therefore, subject to selection. It had been withdrawn from entry under the land laws, and that fact appeared on the records of the local land office. It had, in fact, been selected by the company, and that selection had not been canceled. Ireland’s contract of 1883 was of record in the office of the register of deeds of the county, and shown on the books of the company. The defendant applied for leave to enter the lands as a homestead, and was denied such leave by the local land officers on the ground that it was within the twenty-mile indemnity limits of the railway company’s grant, and had been selected by the company. He was charged with knowledge of the act of Congress giving a preferential right of purchase from the government in case the company’s title *should in any way [247] fail. Notwithstanding all this, he remained upon the land, and put his improvements on it, and now claims to be entitled to the rights of a bona fide settler. He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. He evidently took his chances on the possibility of the company’s failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts,—which showed that he had no right to enter,

—speculating upon possibilities which have not been realized, and having so speculated, he cannot complain if he suffer the consequences which often attend the failure of a speculation.

We think the judgment of the Supreme Court of Minnesota was right, and it is affirmed.

ALICE R. MOSHEUVEL and Anthony J. Mosheuvcl, *Plffs. in Err.*,
v.

DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 247-266.)

Highways—defects—knowledge — contributory negligence.

One who, with knowledge of the situation, elects, in descending the steps from her residence to the sidewalk, to cross over a projecting uncovered water box about 4 inches square, with its outer edge about 4 inches from a line drawn from the tread of the step nearest the sidewalk to the ground, instead of avoiding the box by stepping to one side, is not, as a matter of law, guilty of such contributory negligence as will defeat her action against the municipality to recover damages for the personal injuries sustained by reason of her failure to clear the box.

[No. 6.]

Argued October 20, 1902. Affirmed by Divided Court November 3, 1902. Reargued October 13, 1903. Decided November 30, 1903.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District entered on a directed verdict for the defendant in an action for personal injuries. *Reversed*, with instructions to reverse the judgment of the Supreme Court of the District, and to grant a new trial.

See same case below, 17 App. D. C. 401.

The facts are stated in the opinion.

Messrs. **Charles Cowles Tucker** and **Henry E. Davis** argued the cause and filed a brief for plaintiff in error:

The ruling in *District of Columbia v. Brewer*, 7 App. D. C. 113, is against the overwhelming weight of authority.

Coffin v. Palmer, 162 Mass. 192, 38 N. E. 509; *Huntington v. Breen*, 77 Ind. 29;

NOTE.—Respecting contributory negligence in the use of a sidewalk—see note to *Brush Electric Lighting Co. v. Kelley*, 10 L. R. A. 250.

On the contributory negligence of a person injured by a defect in a highway—see notes to *Woodman v. Metropolitan R. Co.* 4 L. R. A. 213; *Thompson v. Quincey*, 10 L. R. A. 740.

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Maulby v. Leavenworth, 28 Kan. 745. And see note appended to the report of the case last cited, in 28 Kan. 2d ed. 531.

Mere error of judgment does not amount to contributory negligence *per se*.

McClain v. Brooklyn City R. Co. 116 N. Y. 459, 22 N. E. 1062.

Mere miscalculation as to one's proximity to the known dangerous part of a highway will not have the effect of establishing conclusively a want of ordinary care.

Blood v. Tyngsborough, 103 Mass. 509.

When the negligence of the defendant is admitted, the trial court is not justified in directing a verdict for the defendant, because the act of the plaintiff shows that in some degree he may not have been as careful as the most cautious and prudent man would have been.

Jones v. East Tennessee, V. & G. R. Co. 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118.

Mere knowledge of a dangerous defect in a sidewalk is not sufficient to preclude a person injured from recovering against the municipality.

Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Maulby v. Leavenworth*, 28 Kan. 745; *East St. Louis v. Donahue*, 77 Ill. App. 574; *Beach, Contrib. Neg.* 2d ed. § 247; *Shearm. & Redf. Neg.* § 376; *Graney v. St. Louis*, 141 Mo. 185, 42 S. W. 941; *Seybold v. Terre Haute & I. R. Co.* 18 Ind. App. 390, 46 N. E. 1054; *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 2 L. R. A. 450, 19 N. E. 310; *Corts v. District of Columbia*, 7 Mackey, 288; *Muller v. District of Columbia*, 5 Mackey, 286; *Clayards v. Dethick*, 12 Q. B. 439; *Williamsport v. Lisk*, 21 Ind. App. 414, 52 N. E. 628; *Hanlon v. Keokuk*, 7 Iowa, 488, 74 Am. Dec. 276; *Rice v. Des Moines*, 40 Iowa, 638; *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662; *Whitford v. Southbridge*, 119 Mass. 564; *Stevens v. Walpole*, 76 Mo. App. 226; *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545; *Schwingschlegl v. Monroe*, 113 Mich. 683, 72 N. W. 7; *Frankfort v. Coleman*, 19 Ind. App. 373, 49 N. E. 474; *Boulton v. Columbia*, 71 Mo. App. 523; *Waltmeyer v. Kansas City*, 71 Mo. App. 358; *Gerdes v. Christopher & S. Architectural Iron & F. Co.* 124 Mo. 347, 25 S. W. 557, 27 S. W. 615; *Taylor v. Springfield*, 61 Mo. App. 263; *Bouga v. Weare Twp.* 109 Mich. 520, 67 N. W. 557; *Nichols v. Laurens*, 96 Iowa, 388, 65 N. W. 335; *Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416; *Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256; *Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 65.

The rule is that a person having knowledge of a defect or obstruction is bound to

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use care according, to the circumstances, to avoid injury.

Thompson v. Bridgewater, 7 Pick. 188; *Smith v. Smith*, 2 Pick. 621, 13 Am. Dec. 464; *Rindge v. Coleraine*, 11 Gray, 157; *Crompton v. Solon*, 11 Me. 335; *Jacobs v. Bangor*, 16 Me. 187, 33 Am. Dec. 652; *Garmon v. Bangor*, 38 Me. 443; *Noyes v. Morristown*, 1 Vt. 353; *Folsom v. Underhill*, 36 Vt. 580; *Koch v. Edgewater*, 14 Hun, 544; *Nicks v. Marshall*, 24 Wis. 139; *Earlville v. Carter*, 2 Ill. App. 34; *Craig v. Sedalia*, 63 Mo. 417; *Moore v. Shreveport*, 3 La. Ann. 645; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156; *Fox v. Glastenbury*, 29 Conn. 204; *Graham v. Oxford*, 105 Iowa, 709, 75 N. W. 473; *Barnes v. Maivus*, 96 Iowa, 675, 65 N. W. 984.

The question was one for the jury.

Baltimore v. Holmes, 39 Md. 243; *Kane v. Northern C. R. Co.* 128 U. S. 94, 32 L. ed. 341, 9 Sup. Ct. Rep. 16; *Prince George's County v. Burgess*, 61 Md. 31, 48 Am. Rep. 88; *Alleghany County v. Broadwaters*, 69 Md. 533, 16 Atl. 223; *Nichols v. Laurens*, 96 Iowa, 388, 65 N. W. 335; *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 29 N. E. 464; *Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322; *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20; *Simonds v. Baraboo*, 93 Wis. 40, 67 N. W. 40; *Shook v. Cohoes*, 108 N. Y. 648, 15 N. E. 531; *Gilbert v. Boston*, 139 Mass. 313, 31 N. E. 734; *Lyman v. Amherst*, 107 Mass. 339; *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662; *Elliott, Roads & Streets*, 2d ed. § 636; *Smith v. Lowell*, 6 Allen, 39; *Snow v. Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Frost v. Waltham*, 12 Allen, 85; *Fox v. Sackett*, 10 Allen, 535, 87 Am. Dec. 682; *Mahoney v. Metropolitan R. Co.* 104 Mass. 73; *Whittaker v. West Boylston*, 97 Mass. 273; *Humphreys v. Armstrong County*, 56 Pa. 204; *Smith v. St. Joseph*, 45 Mo. 449; *Rice v. Des Moines*, 40 Iowa, 638; *Griffin v. Auburn*, 58 N. H. 121; *Erd v. St. Paul*, 22 Minn. 443; *Aurora v. Dale*, 90 Ill. 46; *Dooley v. Meriden*, 44 Conn. 118, 26 Am. Rep. 433; *Henry County Turnp. Co. v. Jackson*, 86 Ind. 111, 44 Am. Rep. 274; *Coates v. Canaan*, 51 Vt. 131; *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Bullock v. New York*, 99 N. Y. 654, 2 N. E. 1; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Noble v. Richmond*, 31 Gratt. 271, 31 Am. Rep. 726; *Lincoln v. Power*, 151 U. S. 441, 38 L. ed. 227, 14 Sup. Ct. Rep. 387.

Mr. Andrew V. Duvall argued the cause, and with Mr. Edward H. Thomas, filed a brief for defendant in error:

One who, knowing the defective condition of a sidewalk, ventures upon it without tak-

ing the precaution necessary to prevent a fall, and is injured, cannot recover.

Aurora v. Brown, 12 Ill. App. 122; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Schaeffer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Wilson v. Charlestown*, 8 Allen, 137, 85 Am. Dec. 693; *Parkhill v. Brighton*, 61 Iowa, 103, 15 N. W. 853; *Cook v. Johnston*, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; *Black v. Manistee*, 107 Mich. 60, 64 N. W. 868; *Grandorf v. Detroit Citizens' Street R. Co.* 113 Mich. 496, 71 N. W. 844; *Kelly v. Doody*, 116 N. Y. 575, 22 N. E. 1084; *Irion v. Saginaw*, 120 Mich. 295, 79 N. W. 572.

One cannot assume a position of danger and then complain of injury from negligence which could cause no injury except to one in that dangerous position.

Baltimore & O. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125.

The question of negligence or no negligence is one of law for the court, where but one inference can reasonably be drawn from the evidence.

District of Columbia v. Moulton, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840.

If the trial court had submitted this case to the jury, and verdict had been rendered in favor of the plaintiffs, it would have been the duty of the court to set aside such verdict.

Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125.

The plaintiff, having preferred to take her chances with the known danger, and having met with the very accident that she had reason to, and did, expect, cannot lawfully recover.

7 Am. & Eng. Enc. Law 2d ed. p. 454; *Wilson v. Charlestown*, 8 Allen, 137, 85 Am. Dec. 693; *Boyle v. Mahanoy City*, 187 Pa. 1, 40 Atl. 1093; *Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. 211; *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Centralia v. Krouse*, 64 Ill. 19; *Durkin v. Troy*, 61 Barb. 437; *Schaeffer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Bruker v. Covington*, 69 Ind. 33, 35 Am. Rep. 202; *Boswell v. Wakley*, 149 Ind. 64, 48 N. E. 637; *Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439, 22 Ind. App. 601, 52 N. E. 242; *Corlett v. Leavenworth*, 27 Kan. 673; *Wright v. St. Cloud*, 54 Minn. 94, 55 N. W. 819.

Care in its very nature and signification

imports that to its existence there must be some degree of activity and caution.

Gilman v. Deerfield, 15 Gray, 577.

There was as great reason for plaintiff to avoid it as there was for the District to provide against it beforehand. She could as well judge of its safety from its appearance at the time as the authorities could anticipate the danger.

Black v. Manistee, 107 Mich. 60, 64 N. W. 868.

Inadvertence does not excuse.

Brucker v. Covington, 69 Ind. 33, 35 Am. Rep. 202; *Kelly v. Doody*, 116 N. Y. 581, 22 N. E. 1084; *McClain v. Brooklyn City R. Co.* 116 N. Y. 465, 22 N. E. 1062; *Blood v. Tyngsborough*, 103 Mass. 509.

Mr. Justice **White** delivered the opinion of the court:

The plaintiffs in error—husband and wife—sued to recover the amount of the damage alleged to have been sustained from a personal injury suffered by the wife as the result of a fall on a sidewalk in the District of Columbia. We shall hereafter refer to the wife as the plaintiff. The fall was al-
[252]leged *to have been caused by a hole resulting from an uncovered water box in the sidewalk, which appliance for a long time had been allowed to be in a dangerous condition through the neglect of the defendant. At the close of the evidence the court instructed a verdict for the defendant on the ground of the contributory neglect of the plaintiff; and, on appeal, the action of the court in so doing was affirmed. 17 App. D. C. 401.

It is not contended at bar, if it be found that error was committed in taking the case from the jury because of the contributory neglect of the plaintiff, nevertheless, the judgment should be affirmed because there was no adequate proof to go to the jury on the question of the negligence of the defendant. The sole controversy, hence, is whether the case was rightly taken from the jury because as a matter of law, contributory neglect on the part of the plaintiff was demonstrated.

Two elements of fact are involved in determining whether the alleged contributory neglect of the plaintiff was a question for the jury or for the court. The first is, what were the undisputed facts? and the second, whether such facts necessarily engender the ultimate inference of fact as to contributory neglect. The elementary law is that issues of fact are to be decided by the jury. But where the probative facts are undisputed, and where all reasonable minds can draw but one inference from them, the question to be determined is one of law for the court. *Marande v. Texas & P. R. Co.* 184 U. S. 173,
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186, 46 L. ed. 487, 494, 22 Sup. Ct. Rep. 340, and cases reviewed and cited.

In other words, the principle is that where there is no disputed issue of fact, and in reason no controversy as to the inferences to be drawn from the undisputed facts, there can be no real question of fact to be passed on by the jury. Were the facts bearing on the question of contributory negligence undisputed, and, if so, could reasonable minds deduce only one inference from them? The court below recited what it deemed to be the undisputed facts concerning the water box and the event which took place at the time of the fall of the plaintiff on the sidewalk, as follows:

*"The water box was in the sidewalk at [253] the bottom of three steps which led from a brick-paved landing at the front of the plaintiff's house: and there was no place of egress from the house to the street other than by these steps. The box was so situated about midway of the steps that, in order to go from the lowest step to the sidewalk, it was necessary to go either to the right or to the left, which it would have been safe to do, or to take an unusually long step, at all events, unusually long for the female plaintiff, in order to step over the box and clear it. It was about 4 inches square, projecting irregularly above the level of the street, and was without covering of any kind; and its condition was known to the District authorities, for the inspector of plumbing, who had come to the house at the plaintiff's request to inspect the plumbing, had made some remark to her about it. It was in the same dangerous condition at the time of the commencement of the plaintiff's occupancy of the house, about nine months before the accident, and so remained without change. And it may be added that it was visible from the door of the plaintiff's house.

"It appeared in evidence that a lady had stumbled over the obstruction in the early summer of 1899, and that the plaintiff herself had stumbled over it once before, although, as she testified, she always tried to be careful and usually went to one side or the other, and not over the box, for which as she knew, an unusually long stride was necessary.

"On the day of the accident mentioned in the declaration the plaintiff was going out to visit a neighbor in an adjacent house. She testifies that from the time she left her door she had the box in view a part of the time, and had it in mind all the time, and remembered its dangerous character; but that on this occasion she attempted to step over it, instead of going to one side, did not take a sufficiently long step, and put her foot into the hole and was thrown,

with the result that she suffered serious injury. This is the substance of her testimony in the case, which is set out more in detail in the bill of exceptions. But into that detail it is unnecessary for us here to enter."

[254] *We think the facts thus recited were undisputed, except as regards the statement that it would have taken "an unusually long step, at all events, unusually long for the female plaintiff, in order to step over the box and clear it." True, a statement to that effect was made by the injured woman while under cross-examination, but she subsequently qualified this by saying that she "judged" that she would have to take an unusually long step to pass over the box. The defendant, moreover, introduced testimony, as to which there was no dispute, concerning the situation of the water box and its dimensions, by which it was shown that the north, that is, the outer, side of the water box was 4 inches from a line drawn from the tread of the step nearest the sidewalk to the ground. The undisputed testimony, therefore, was not that it would require an unusually long step, or, at all events, one unusually long for plaintiff, to clear the water box, but that she *judged* it would require such a step on her part, descending from an elevation, to clear the box, although to do so would have required the making of a step covering but a distance of 4 inches. Were the undisputed facts, as thus corrected, of such a nature as to compel every reasonable mind to draw the inference that the plaintiff had been guilty of contributory negligence?

To determine the answer proper to be given to this question requires an ascertainment of the extent of the care which the law exacted under the conditions shown by the undisputed facts in the case.

The extent of the legal duty which the court below deemed rested upon the plaintiff must be ascertained from the following and only passage referring to the subject contained in its opinion:

"The case is, in some respects, a very meritorious case. The injured plaintiff has stated the circumstances most fairly and honestly, and her testimony is worthy of all commendation. She was almost lured to her injury by the continued neglect of the District to remove the dangerous ob-

[255]struction, which *was only one specimen of many such obstructions occurring to the common knowledge of all citizens in the streets and highways of this city, and which could be removed by reasonably careful inspection and at a greatly less cost than the amount of any one verdict against the District that has been recovered in any such case. Nevertheless, despite the fact that

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the negligence of the District has been great and is almost confessed on the record, we can find no difference in principle between this case and that of *District of Columbia v. Brewer*, 7 App. D. C. 113, upon the authority of which the court below proceeded. See also the case of *Kelly v. Doody*, 116 N. Y. 575, 22 N. E. 1084.

"In pursuance of the decision in the *Brewer Case*, and leaving the parties to their ultimate appeal to the Supreme Court of the United States, we must affirm, with costs, the judgment of the supreme court of the District of Columbia in the premises."

As the rule of law which the court deemed to be applicable was thus stated solely by reference to a prior case which the court had decided, that case must be examined to determine whether the extent of the duty which the court was of opinion rested upon the plaintiff in this case was correctly defined. *District of Columbia v. Brewer*—the case referred to—was decided in 1895. 7 App. D. C. 113. The case was this: The property owners on Brown street had constructed along a side of that street, where there was no paved sidewalk, a board walk. After the erection of this structure the District of Columbia graded the street, so that the bed of the street was lower than the board sidewalk by about 10 inches. When this grading was done, at the request of the property owners the board walk was left undisturbed. One of the residents of the street made a driveway from his premises to the street, cutting out for such purpose a space through the board walk 10 feet wide. On a winter night, snow being on the ground, Brewer, the plaintiff in the case, was on his way to his home, which could have been reached by another street than the one on which the board walk was situated. Brewer knew the *situation of the [256] board walk above grade and the cut through it for the private roadway. As, however, the street upon which the board walk existed was lighted, and the other street was not, and as there was less snow on the board walk than in the center of the street, Brewer chose to use the lighted street, and in doing so to walk along the board walk, instead of going into the middle of the street. On arriving at the commencement of the board walk he stepped up thereon, and on reaching the point where the board walk had been cut for the driveway he fell and suffered the injury for which he sought compensation. There was a verdict in his favor. The appellate court, after saying that the proof clearly established negligence on the part of the District of Columbia, approached the question of the contributory negligence of the plaintiff. It pointed out that the plain-

tiff knew of the dangerous condition of the board walk when he chose to go along it, and the magnitude of the risk which was taken by him in using the board walk in the nighttime, with the snow on it, was referred to. The court then described what took place at the moment when Brewer suffered the fall at the place where the roadway had been cut, and observed (p. 116): "A similar accident might have befallen him had he slipped at some other point and fallen from the raised board walk." This remark would tend to indicate that it was deemed that the board walk from its elevation above the grade, with snow on it, was equally dangerous at all points, to the knowledge of Brewer, as it was at the driveway. The statements previously referred to were, however, immediately followed by this:

"But, be that as it may, he deliberately took the risk of walking along this dangerous sidewalk, and received his injury in so doing. As this plainly appeared from the testimony of the plaintiff himself, who seems to have testified with perfect fairness, and there was no other evidence, the court should have instructed the jury to return a verdict for the defendant."

From this analysis of the opinion in the *Brewer Case*, we find it difficult to say precisely upon what theory the ruling there [257] *made was treated as decisive of this case.

We say this for the reason that the conclusion of the court in that case would seem to have been placed upon the very dangerous condition of the street and the extreme hazard arising from its use under the circumstances, thus precluding every reasonable inference that Brewer could, consistently with ordinary prudence, have elected to use the street at the time and under the conditions shown by the undisputed proof. It is insisted, however, that the *Brewer Case* was held by the court below to be applicable to this, because it was deemed that it had been decided in that case that where a defect existed in a highway, and was known to one who elected to use such highway, such election, even if it were justified by the dictates of ordinary prudence, nevertheless must be held, as a matter of law, to entail the consequences of a want of ordinary care and prudence. And this proposition substantially embodies the asserted principle of law which was relied upon at bar as sustaining the judgment below.

We are of the opinion, however, that the rule as thus contended for is unfounded in reason and unsupported by the weight of authority. When analyzed, the proposition comes to this, that no person can, as a matter of law, without assuming all the risk, use the streets of a municipality where he

knows of a defect therein, even although it be that, in the exercise of a sound judgment, it might be deemed that with ordinary care and prudence the street could be used with safety. The result of admitting the doctrine would be to hold that all persons in making use of the public streets assumed all risks possibly to arise from every known defect or danger. That this is the result of the proposition may be aptly illustrated. Take a street across which runs a railroad track, whereon cars are moved by steam or other motive power. All persons knowing of this fact would know also that there was some danger in crossing. They, therefore, must either abstain altogether from crossing, or, if they do so, be subject, as a matter of law, to the consequence of the reckless operation *of the railway, without reference [258] to the care exercised in the use of the street for the purpose of crossing. Indeed, the proposition would imply that everyone who used the public streets with the knowledge of a defect existing therein would be guilty, if an injury was by them suffered as a result of such defect, of contributory negligence, without the existence of any neglect whatever; for this would necessarily result from saying that one who had made a careful use of the streets was yet guilty of neglect in doing so. Reduced to its last analysis, the principle contended for but asserts that the ordinary rules by which negligence is to be determined do not apply to the use of the public streets, since those who use such streets with a knowledge of a possible danger to arise from a defect therein must, as a matter of law, have negligence imputed to them, although in choosing to make use of the streets, and in the mode of use, the fullest possible degree of judgment and care was exercised. The result of this would be to relieve the municipality of all duty and consequent responsibility concerning defects in highways, provided only it chose to give notice of the existence of the defects.

There may undoubtedly be found in some of the adjudged cases concerning the right to recover for damage suffered from the neglect of a municipality to repair a highway, expressions which lend support to the proposition relied on, and it may be true to say, also, that there are some cases which seem to directly support the contention. But, as we have shown, such a doctrine is inconsistent with reason, and, as we shall now proceed to point out, is in conflict with what we deem to be the weight of authority. In *Dewire v. Bailey*, 131 Mass. 169, 41 Am. Rep. 219, the action was brought to recover from the owner of a building for damages occasioned to one who had fallen on a plank sidewalk covered with snow and ice, on his

way out of the building. The proposition was that the injured person knew of the existence of the snow and ice on the walk, and therefore, by electing to use it, assumed the risk, and was, as a matter of law, conclusively presumed to be deemed guilty *of contributory negligence. In reviewing this contention, the court, through Field, J., said (p. 170, Am. Rep. p. 219):

"The rulings of the justice presiding at the trial all rest upon the proposition that knowledge on the part of the plaintiff, at the time he entered upon the sidewalk, of the accumulation of snow and ice and of the unsafe condition of the sidewalk resulting therefrom, is in law conclusive evidence that he was not in the exercise of due care in attempting to pass over the sidewalk.

"*Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, was an action by a tenant of a part of a building against the landlord to recover for injuries received in consequence of the giving way of one of the steps of a staircase used in common by the tenants, for the safe condition of which the landlord was responsible; and it was held 'that the fact, if proved, that the plaintiff had previous knowledge that the stairs were in a dangerous condition, would not be conclusive evidence that the plaintiff was not in the exercise of due care;' and *Whittaker v. West Roylston*, 97 Mass. 273, and *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662, are cited. Other recent cases to the same effect are *George v. Haverhill*, 110 Mass. 506; *Whitford v. Southbridge*, 119 Mass. 564; *Lyman v. Amherst*, 107 Mass. 339; *Mahoney v. Metropolitan R. Co.* 104 Mass. 73; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156; *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185."

The court further said:

"In *Mahoney v. Metropolitan R. Co.* 104 Mass. 73, it was held 'that the fact that the plaintiff saw the obstruction created by the defendant, and knew its dangerous character, is not conclusive proof that he was negligent in attempting to pass it. A person who, in the lawful use of a highway, meets with an obstacle, may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction and all the circumstances surrounding the party. In the case at bar, if the plaintiff had reasonable cause to believe that he could pass the *obstruction in safety, and used reasonable care in the attempt, he is entitled to recover.'

"It is evident that an obstruction may be of such a character that a court can say, as a matter of law, that no person in the exercise of reasonable prudence would attempt to pass over it; but the accumulation of

snow and ice, such as is described in the exceptions in this case, does not, in our opinion, constitute such an obstruction. . . .

"We think the law in a case of this kind is that only when the nature of the obstruction is such that the court can say that it is not consistent with reasonable prudence and care that any person having knowledge of the obstruction should proceed to pass over it in the manner attempted, can the court rule that such knowledge prevents the plaintiff from maintaining his action; and that the nature of the obstruction in this case, as shown by the exceptions, was such that it ought to have been submitted to the jury to determine whether the plaintiff, even if he knew the condition of the sidewalk at the time he attempted to pass over it, was, under the circumstances, in the exercise of reasonable prudence and due care in attempting to pass over it in the manner he did."

And the principle announced in the cases just referred to was substantially reiterated in *Pomcroy v. Westfield*, 154 Mass. 462, 28 N. E. 899; *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 29 N. E. 464; *Coffin v. Palmer*, 162 Mass. 192, 38 N. E. 509; and *Shipley v. Proctor*, 177 Mass. 498, 59 N. E. 119.

Although in New York the burden in negligence cases is cast upon the plaintiff to show affirmatively his observance of due care, the rule for determining the existence of contributory negligence is like that which was declared in the Massachusetts cases just cited. In *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43, the damage sued for was occasioned by a fall sustained in attempting to pass over an embankment of snow and ice which had accumulated upon the sidewalk. The defendant requested the court in effect to charge the jury that if the plaintiff saw the obstruction, and chose to attempt *to pass over it, [261] and not go around it, she could not recover. The action of the trial judge in refusing to give such instruction was approved by the court of appeals, that court saying (p. 469, N. E. p. 47):

"The charge of the judge sufficiently laid down the rule of law as to plaintiff's contributory negligence, and it would not have been proper for the judge to charge, as matter of law, that it was negligence for the plaintiff, under the circumstances disclosed in this case, to attempt to pass over the embankment. *Evans v. Utica*, 69 N. Y. 166, 25 Am. Rep. 165; *Brusso v. Buffalo*, 90 N. Y. 679; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Bullock v. New York*, 99 N. Y. 654, 2 N. E. 1.

The case just referred to was approved and followed in *Shook v. Cohoes*, 108 N. Y.

648, 15 N. E. 531. And also, in *Weston v. Troy*, 139 N. Y. 281, 34 N. E. 780, it was declared by the court:

"If she [the plaintiff] discovered the ridge, she was not required to leave the sidewalk, but she might, without being subjected to the charge of negligence, using due care, have kept on her way. But she could not heedlessly disregard the precautions which the obvious situation suggested, and proceed as though the sidewalk was free and unobstructed."

Quite recently, in a case decided October 6, 1903, and not yet officially reported (*Walsh v. Central New York Teleph. & Teleg. Co.* [N. Y.] 68 N. E. 146), the doctrine of the previous cases was recognized and applied.

The cases which are stated in the margin^[262] enforce, in substance, *the principle enunciated in the Massachusetts and New York cases just referred to.

We take from a few of those cases some pertinent passages. In *Gerdes v. Christopher & S. Architectural Iron & F. Co.* 124 Mo. 347, 24 S. W. 557, 27 S. W. 615, the rule was thus tersely stated:

"It is the duty of a traveler on a public street to exercise reasonable care; but it is held that the use of a street known to be defective or obstructed cannot be charged as negligence in law."

In *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416, the principle was thus stated:

"These instructions were properly refused. They announce, in substance, the proposition that, where a party goes upon a sidewalk which he knows to be in a dangerous condition, he is thereby guilty of negligence *per se*. Such is not the law. *Sandwich v. Dolan*, 133 Ill. 177, 24 N. E. 526; *Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091. The use of a sidewalk with knowledge of its dangerous condition may be evidence of negligence, but it is not negligence as a matter of law. *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091. In *Bloomington v. Chamberlain*, 104 Ill. 268, an instruction was held to be erroneous which

told the jury that 'the law required the plaintiff to go out into the street, and pass around the walk, if she knew it was defective.' Whether it is obligatory upon the plaintiff to pass over the walk known by her to be unsafe, or to pass around it upon the street, or to take the walk on the opposite side of the street, was a question which it was not the province of the court to determine as a matter of law. It is a question of fact for the jury whether, in passing over a walk known to be dangerous, instead of *taking some other route, the plaintiff is or is not in the exercise of ordinary care." *Sandwich v. Dolan*, 133 Ill. 177, 24 N. E. 526.^[263]

In *Graham v. Oxford*, 105 Iowa, 709, 75 N. W. 473, the court said:

"It is not true that one who knows of a defect in a walk is necessarily guilty of negligence if he attempt to pass over it. Much depends upon the character of the defect, the occasion for passing over it, and the care used in doing so. If a person knows of a defect in a walk, but believes that it can be passed in safety by the exercise of ordinary care, and he is justified as a reasonably prudent man in holding that belief, he is not negligent in attempting to pass over it in an ordinarily careful and prudent manner."

And the rule was well settled in the District of Columbia prior to the decision in the *Brewer Case*. Mr. Justice Cox, in delivering the opinion in *Muller v. District of Columbia*, 5 Mackey, 287, said:

"The law on the subject throws on the defendant, in an action of this kind, the onus of proving contributory negligence; and that proof is not made out by merely showing the knowledge by the complainant of the defect complained of in the highway. If the highway is wholly impassable and in such condition that no reasonable man would attempt to pass it, the plaintiff does it at his own risk. But if it is not,—and especially if it is the only access to his dwelling,—the only duty on his part is the exercise of proper care to avoid accidents; and the burden is upon the defendant, not only to show knowledge of the defect on the

†Alabama—*Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Blrmlingham v. Starr*, 112 Ala. 98, 20 So. 424. Georgia—*Samples v. Atlanta*, 95 Ga. 110, 22 S. E. 135. Illinois—*Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416. Indiana—*Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 65; *Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029; *Pittsburgh, C. C. & St. L. R. Co. v. Selvers*, 67 N. E. 680. Iowa—*Nichols v. Laurens*, 96 Iowa, 388, 65 N. W. 335; *Graham v. Oxford*, 105 Iowa, 709, 75 N. W. 473. Kansas—*Maultby v. Leavenworth*, 28 Kan. 745; *Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893; *Langan v. Atehlson*, 35 Kan. 318, 57 Am. Rep. 165, 11 Pac. 38; *Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217. Maryland—*Alleghany County v. Broad-*

waters, 69 Md. 533, 16 Atl. 223. Michigan—*Harris v. Clinton Twp.* 64 Mich. 447, 31 N. W. 425; *Dundas v. Lansing*, 75 Mich. 499, 5 L. R. A. 143, 42 N. W. 1011; *Germalne v. Muskegon*, 105 Mich. 213, 63 N. W. 78. Minnesota—*Mckenzie v. Northfield*, 30 Minn. 456, 16 N. W. 264. Missouri—*Maus v. Springfield*, 101 Mo. 618, 14 S. W. 630; *Cohn v. Kansas*, 108 Mo. 393, 18 S. W. 973; *Gerdes v. Christopher & S. Architectural Iron & F. Co.* 124 Mo. 347, 25 S. W. 557, 27 S. W. 615; *Beauvals v. St. Louis*, 169 Mo. 500, 69 S. W. 1043, and cases cited. Vermont—*Coates v. Canaan*, 51 Vt. 131, 137. Washington—*Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114.

part of the plaintiff, but to show, affirmatively, negligence, or the omission to take the proper care."

The same view of the law was taken subsequently in *Corts v. District of Columbia*, 7 Mackey, 277. The opinion of the court (p. 289) cites approvingly the following passage from the opinion in the case of *Prince George's County v. Burgess*, 61 Md. 31, 48 Am. Rep. 88.

[264] "The simple fact of its existence, with the knowledge of the *plaintiff, was not sufficient to bar recovery. It should appear that the hole rendered the bridge practically impassable, to effect a bar because of knowledge. The hole might possibly have been avoided with ordinary care in driving, and the knowledge of its existence ought to have prevented carelessness on the part of the plaintiff, and naturally would have induced care on his part; but the onus of showing that such care and prudence were not exercised still rested on the defendants."

The principle laid down in all these authorities harmonizes with the English rule as announced in the case of *Clayards v. Dethick*, 12 Q. B. 439. That case is thus digested in Pollock on Torts (p. 388):

"The plaintiff was a cab owner. The defendants, for purpose of making a drain, had opened a trench along the passage which afforded the only outlet from the stables occupied by the plaintiff to the street. The opening was not fenced, and the earth and gravel excavated from the trench were thrown up in a bank on that side of it where the free space was wider, thus increasing the obstruction. In this state of things the plaintiff attempted to get two of his horses out of the mews. One he succeeded in leading out over the gravel, by the advice of one of the defendants then present. With the other he failed, the rubbish giving way and letting the horse down into the trench. Neither defendant was present at that time. The jury were directed 'that it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous; that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger; though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained.' This direction was approved. Whether the plaintiff had suffered by the defendants' negligence, or by his [265] own *rash action, was a matter of fact and of degree properly left to the jury; 'the whole question was whether the danger was

so obvious that the plaintiff could not with common prudence make the attempt.'"

Concluding, as we do, that the fact that the plaintiff, when she elected to descend the steps from her residence to reach the sidewalk, had knowledge of the existence of the uncovered water box at the foot of the steps, was not alone sufficient to charge her with contributory negligence as a matter of law, it follows that the judgment below was erroneous if it rested upon such theory. But as the knowledge of the existence of the defective water box would have been sufficient to impute contributory negligence *per se*, as a matter of law, if the hazard resulting therefrom to one seeking to pass over it from the steps was so great that no reasonably prudent person would have made the attempt, it remains only to consider the case in that aspect. Of course, from that point of view the question is, Did the facts proved as to the situation of the water box and the attempt of the plaintiff to step across it from the stoop so conclusively give rise to the inference of a want of ordinary care in making the attempt that no reasonable mind could draw a contrary conclusion? This question is readily answered when it is seen that the undisputed fact was that the water box at its outer edge was only about 4 inches from a line drawn from the tread of the step nearest the sidewalk to the ground. Whilst it is true that the undisputed proof was that the plaintiff was aware of a danger from the box when she sought egress from her residence, and judged that a longer step than usual would be required to cross over it, it cannot be in reason said that all reasonable minds must draw the conclusion that contributory negligence necessarily, as a matter of law, resulted from the act of attempting to step over the box to the sidewalk. This is especially so in view of the undisputed testimony given by the plaintiff that she was keeping the water box in mind, and was exercising all possible care, and had on previous occasions safely stepped over the *box. [266] This condition of proof, we think, made a case proper to be passed upon by the jury.

The conclusion just stated is not affected by the contention that when the plaintiff reached the tread of the last step she might, by stepping to one side or the other, have avoided the water box, and therefore, as she elected to cross over the box, she was guilty of contributory neglect. This but reiterates in another form the proposition that by electing to use the steps to reach the sidewalk, with knowledge of the existence of the water box, contributory negligence as a matter of law resulted. The act of attempting to step from the tread of the last step over the water box is to be tested by

the general principle governing the right to use a highway with knowledge of a defect therein. Coming to apply such principle, the question is this, Was the situation of the water box and the hazard to result from an attempt to step over it so great that the plaintiff, with the knowledge of the situation, could not, as a reasonably prudent person, have elected to step across the box, instead of stepping to the sidewalk from either side of the tread of the last step? And this, we think, was, under the undisputed proof, a question for the jury, and not for the court.

The judgment of the Court of Appeals of the District of Columbia is reversed, with instructions to that court to reverse the judgment of the Supreme Court of the District of Columbia, and to grant a new trial.

Mr. Justice **Brewer**, Mr. Justice **Brown**, and Mr. Justice **Peckham** dissent.

[267] *JAMES McLOUGHLIN, *Plff. in Err.*,
v.

RAPHAEL TUCK & SONS CO., Limited.

(See S. C. Reporter's ed. 267-271.)

Copyright—affixing untruthful notice in foreign country—error in admission of testimony, when not reviewable.

1. The act of affixing in a foreign country to a publication a false statement that it was copyrighted under the laws of the United States is not within the provision of U. S. Rev. Stat. § 4963 (26 Stat. at L. 1109, chap. 565, U. S. Comp. Stat. 1901, p. 3412), as amended by the act of March 3, 1891, imposing a penalty for untruthfully impressing notice of copyright upon an article which was the subject of copyright in the United States.
2. Error, if any, committed by a trial court in the admission of proof is not reviewable in the Supreme Court of the United States on writ of error to a circuit court of appeals, where no error concerning the admission or rejection of testimony was assigned in the latter court, which considered the case upon the assumption that the correctness of the rulings of the lower court in this regard was unchallenged.

[No. 73.]

Argued November 11, 12, 1903. Decided November 30, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed the judgment of the Circuit Court for the Northern District of New York, entered upon a verdict directed for the defendant in a suit

for the statutory penalty imposed for affixing a false notice of copyright to a publication. *Affirmed.*

See same case below, 53 C. C. A. 508, 115 Fed. 85.

The facts are stated in the opinion.

Mr. **A. Bell Malcomson** argued the cause and filed a brief for plaintiff in error.

Mr. **Harold Binney** argued the cause, and, with Messrs. *Louis C. Raegener* and *S. L. Moody*, filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **White** delivered the opinion of the court:

Section 4963 of the Revised Statutes, as amended by the act of March 3, 1891 [26 Stat. at L. 1109, chap. 565, U. S. Comp. Stat. 1901, p. 3412] relating to the notice of copyright to be affixed to copyrighted articles, provided as follows:

"Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred dollars, recoverable one half for the person who shall sue for such penalty, and one half to the use of the United States."

*On March 3, 1897, the foregoing provisions were amended (29 Stat. at L. 694, chap. 392, U. S. Comp. Stat. 1901, p. 3412), by the following:

"Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph or other article, whether such article be subject to copyright or otherwise, for which he has not obtained a copyright, or shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country; or shall import any book, photograph, chromo, or lithograph or other article bearing such notice of copyright or words of the same purport, which is not copyrighted in this country, shall be liable to a penalty of one hundred dollars, recoverable one half for the person who shall sue for such penalty and one half to the use of the United States; and the importation into the United States of any book, chromo, lithograph, or photograph, or other article bearing such notice of copyright, when there is no existing copyright thereon in the United States, is prohibited; and the circuit courts of the United States, sitting in equity, are hereby authorized to enjoin the issuing, publishing, or selling of any article marked or

imported in violation of the United States copyright laws, at the suit of any person complaining of such violation: *Provided*, That this act shall not apply to any importation of or sale of such goods or articles brought into the United States prior to the passage hereof."

The state of the law prior to 1897, pertinent to this case, was therefore this: A penalty was imposed of \$100 for untruthfully impressing upon an article which was subject to be copyrighted in the United States the fact that the same had been copyrighted, but there was no provision or penalty concerning the importation from a foreign country of an article which was untruthfully stamped in such country as having been copyrighted in the United States, and no express provision or penalty concerning the sale of an article in the United States which was untruthfully stamped as copyrighted. The amendment *of 1897 caused the previous provision as to untruthfully stamping a notice of copyright to apply, although the article was not subject to copyright under the law of the United States, and prohibited the importation of an article untruthfully stamped from a foreign country, and also prohibited the sale of an article in the United States which was falsely stamped, the penalty previously provided being made applicable to the added prohibitions.

The plaintiff in error in 1898 commenced this action in the circuit court of the United States against the defendant in error, to recover the \$100 penalty, provided in the statute, for each of eighty-three alleged distinct violations of the statute. The basis of the first to the seventieth cause of action was asserted to be that on or about the 1st day of August, 1896, the defendant, "at the city of New York, in the state of New York, did publish and issue a certain picture book or booklet" (a distinct article being named in the statement of each of the seventy distinct causes of action), "and in and upon said book did knowingly insert and impress a false and fictitious notice that the same was copyrighted . . ." The seventy-first and seventy-second causes of action charged that the defendant on the 11th day of June, 1897, in the city of New York, "did knowingly issue and sell a certain picture book," described therein, with a false notice of copyright stamped on it. The seventy-third to the eighty-third and last cause of action charged the commission as to different publications, of like acts, in the city of New York on or about April 26, 1897.

On the trial to a jury the defendant admitted that all the publications referred to had on them an untruthful statement that they had been copyrighted under the laws of

the United States, which statement had been affixed in a foreign country at their request and for their account. It was also proved by the defendant, without conflict in the testimony, that all the publications having on them the untruthful statement of copyright were imported into the United States prior to the enactment of the amendment of 1897. Under this state of *the proof[270] the trial court instructed a verdict for the defendant. Error was prosecuted by the plaintiff to the circuit court of appeals, and that court affirmed the judgment. 53 C. C. A. 508, 115 Fed. 85. The court held that the penal provisions of the law had no extraterritorial operation, and therefore did not embrace the act of affixing in a foreign country to a publication a false statement that it was copyrighted under the laws of the United States. Concerning the sales made after the passage of the amendment of 1897, the court held that the trial court had correctly instructed the jury that as the books so sold after the amendment of 1897 were imported into the United States prior thereto, the right to sell them in the United States was saved by the proviso of that amendment.

The court below was clearly right in its conclusions as to the nonextraterritorial operation of the law as it stood prior to the amendment of 1897. *Flash v. Conn*, 109 U. S. 376, 27 L. ed. 968, 3 Sup. Ct. Rep. 263. In saying this we do not wish to be considered as holding that where an act done in a foreign country against a penal provision of the law of the United States is but the initial step in accomplishing a subsequent violation in the United States of other penal provisions, that the act done in the foreign country might not, under some circumstances, be treated as having been performed in the United States. On this question we intimate no opinion whatever, as the circumstances of the case do not require us to do so. Under the law as it stood prior to 1897 there was no provision forbidding the importation of an article falsely stamped in a foreign country, or prohibiting the sale in the United States of an article falsely stamped. There could, therefore, be no possible relation between subsequent lawful acts performed in the United States concerning the article falsely stamped in a foreign country.

The court was also manifestly right concerning the articles falsely stamped which were imported into the United States prior to the amendment of 1897, but sold in the United States subsequent to that amendment. The proviso expressly excluded from the operation of that amendment "any importation *of or sale of such goods or articles[271] brought into the United States prior to the passage hereof." Whilst this was not dis-

puted in the argument at bar, it was insisted that the court below erred in affirming the act of the trial court in instructing a verdict on this subject, because the evidence did not unquestionably establish that the articles which were sold after March 3, 1897, were in fact imported prior to that date. To support this contention the evidence which is contained in the bill of exceptions is referred to. We are of opinion that the claim is without merit, and that from the testimony, as preserved in the bill of exceptions, it results that the trial court correctly instructed the jury on the subject.

It is urged, however, that error was committed by the trial court in the admission of proof concerning the date of the importation of the articles sold after March 3, 1897. Whilst we think the contention is without merit, we shall not review the grounds upon which it is based, because it is not open to inquiry upon the record before us. No error concerning the admission or rejection of testimony was assigned in the circuit court of appeals, and that court, in considering the case, treated it as involving only two issues,—the extraterritorial operation of the provisions of the law, as it stood prior to March 3, 1897, and the effect of the proviso which formed a part of that amendment. And this upon the assumption that the correctness of the ruling of the lower court concerning the admission of testimony was unchallenged by the plaintiff in error. We say upon the assumption, since the opinion of the court of appeals makes no reference to any question concerning the admissibility of testimony, and because the assignment of errors made for that court was directed to the adequacy of the "admissions and testimony" to sustain the action of the trial court in instructing a verdict.

Affirmed.

Mr. Justice **Holmes** did not hear the argument, and took no part in the decision of this case.

[272]*PEOPLE'S NATIONAL BANK OF
LYNCHBURG, *Appt.*,
v.

MORTON MARYE, Auditor of Public Accounts of the State of Virginia.

(See S. C. Reporter's ed. 272-288.)

Injunction against illegal taxation—necessity of payment or tender of amount justly due.

Payment, or at least a tender, of the amount of

the taxes shown from the bill on complainant's own theory justly and equitably to be due on shares of stock in a national bank, must be made before a court of equity will interfere by injunction with their collection because no notice was given of the assessment, and because such assessment, by reason of a failure to make the deduction prescribed by law, was at a greater rate than is assessed upon other moneyed capital.

[No. 24.]

Argued October 14, 15, 1903. Decided November 30, 1903.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia to review a decree dismissing a bill to restrain the collection of taxes on shares of stock in a national bank. *Modified* by providing that the dismissal be without prejudice, and as modified affirmed.

See same case below, 107 Fed. 570.

Statement by Mr. Justice **Peckham**:

This is an appeal, by the bank as complainant below, from a decree of the United States circuit court for the eastern district of Virginia, dismissing its bill, with costs. 107 Fed. 570.

The complainant and three other national banks in Lynchburg, Virginia, each commenced a suit in the above-named court, against the auditor of public accounts of the state, to restrain the collection of certain taxes assessed upon the share owners of stock in the several banks, on the ground that such taxes were illegally laid. This particular complainant has brought the case here by appeal as a test case, the same questions arising in all the others.

It is insisted upon the part of complainant that the laws under which these taxes were levied are unconstitutional and *void,[273] and the prayer of the bill is that the stockholders may be relieved and discharged from all liability on account of such unpaid taxes.

The original bill, which was filed July 22, 1896, seeks to enjoin the collection of taxes upon the stock of the shareholders in the complainant bank for the years 1891 to 1895, both inclusive; and a preliminary injunction order to that effect was granted. After the filing of the original bill and on February 10, 1900, a supplemental bill was filed by leave of the court, and it was therein sought to enjoin the collection of all taxes for the years 1891 to 1897, both inclusive.

Both bills were demurred to, and the cir-

NOTE.—Necessity of payment of tax due where injunction is sought against illegal taxation.

Where injunctive relief is sought against the

collection of illegal taxes by reason of the irregularity and erroneousness of the assessment, or its excessiveness, the court will refuse to inter-

cuit court sustained the demurrers and dismissed the bills.

It was averred in the bills that the acts of the legislature of Virginia providing for the taxation of bank shares, both in national and state banks, were in violation of the Federal Constitution, as well as that of Virginia, and were also in violation of the act of Congress (Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502) providing for the taxation of shares of national bank stock under state authority.

The taxes referred to in the original bill were levied under the act of Virginia passed March 6, 1890. Acts of Virginia Assembly 1890, p. 205. That act prohibited any assessment upon the capital stock of banks, either state or national, and provided for as-

sessing the stockholders on their shares in those banks upon the market value thereof, at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in the state. It will be observed that this rate of assessment is the condition upon which Congress, in the section of the Revised Statutes above mentioned, permits the taxation of national banks by or under state authority.

Under this Virginia act it was further made the duty of the banks to pay the amount of the tax, and if a bank failed to pay the same its cashier and his sureties were made liable for the tax and 20 per centum in addition, to be recovered by the auditor of public accounts upon notice.

*An assessment upon the real estate of the [274]

fere unless the amount actually due and owing is first paid or tendered, it being one of the maxims of equity that he who seeks equity must do equity. *Huntington v. Palmer*, 7 Sawy. 355, 8 Fed. 449; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901; *Tallassee Mfg. Co. v. Spigener*, 49 Ala. 262; *Alabama Gold L. Ins. Co. v. Lott*, 54 Ala. 499; *Whittaker v. Janesville*, 33 Wis. 76; *Kaehler v. Dobberpuhl*, 56 Wis. 480, 14 N. W. 644; *Kellogg v. Oshkosh*, 14 Wis. 624; *Myrick v. La Crosse*, 17 Wis. 443; *Bond v. Kenosha City*, 17 Wis. 284; *Ilersey v. Milwaukee County*, 16 Wis. 186, 82 Am. Dec. 713; *Warden v. Fond du Lac County*, 14 Wis. 618; *Milwaukee v. Rock County*, 15 Wis. 10; *Hallenbeck v. Hahn*, 2 Neb. 377; *Burlington & M. River R. Co. v. York County*, 7 Neb. 487, 495; *Iler v. Colson*, 8 Neb. 331, 1 N. W. 248; *Wood v. Helmer*, 10 Neb. 65, 4 N. W. 968; *Hunt v. Easterday*, 10 Neb. 165, 4 N. W. 952; *Miller v. Madden*, 35 Kan. 455, 11 Pac. 449; *Dudley v. Gilmore*, 35 Kan. 555, 11 Pac. 398; *Franz v. Krebs*, 41 Kan. 223, 21 Pac. 99; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Parmley v. St. Louis, I. M. & S. R. Co.* 3 Dill. 25, Fed. Cas. No. 10,768; *Lawrence v. Killam*, 11 Kan. 499; *Ottawa v. Barney*, 10 Kan. 270; *Smith v. Leavenworth County*, 9 Kan. 296; *Leavenworth v. Norton*, 1 Kan. 432; *Sleeper v. Bullen*, 6 Kan. 300; *Montgomery v. Sayre*, 65 Ala. 564; *Hudson v. Marietta*, 64 Ga. 286; *Fifield v. Marinette County*, 62 Wis. 537, 22 N. W. 705; *Blanc v. Meyer*, 59 Tex. 89; *Harrison v. Vines*, 46 Tex. 22; *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649; *Overall v. Ruenzi*, 67 Mo. 203; *Palmer v. Napoleon Twp.* 16 Mich. 176; *Smith v. Humphrey*, 20 Mich. 398; *Morrison v. Hershire*, 32 Iowa, 271; *Hagaman v. Cloud County*, 19 Kan. 394; *George v. Dean*, 47 Tex. 73; *Labadie v. Dean*, 47 Tex. 90; *Pillsbury v. Humphrey*, 26 Mich. 245; *Rinard v. Nordyke*, 76 Ind. 130; *Johnson v. Roberts*, 102 Ill. 655; *Ewing v. Batzner*, 24 Ind. 409; *Roseberry v. Huff*, 27 Ind. 12; *Faris v. Reynolds*, 70 Ind. 359; *Mullikin v. Reeves*, 71 Ind. 281; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Wilson v. Weber*, 3 Ill. App. 125; *Mobile v. Waring*, 41 Ala. 139; *Worthen v. Badgett*, 32 Ark. 496; *Lewis v. Spencer*, 7 W. Va. 689, 23 Am. Rep. 619; *Union P. R. Co. v. Ryan*, 2 Wyo. 408; *Steuart v. Meyer*, 54 Md. 454; *Northern P. R. Co. v. Clark*, 153 U. S. 252, 38 L. ed. 706, 4 Inters. Com. Rep. 641, 14 Sup. Ct. Rep. 809; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 191 U. S.

37 L. ed. 91, 13 Sup. Ct. Rep. 194; *Wells, F. & Co.'s Express v. Crawford County*, 63 Ark. 576, 37 L. R. A. 371, 40 S. W. 710; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514, 777; *Thompson v. Lexington*, 20 Ky. L. Rep. 457, 46 S. W. 481; *Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514; *Dakota Loan & T. Co. v. Codington County*, 9 S. D. 159, 68 N. W. 314; *St. Louis & S. F. R. Co. v. Gracy (Mo.)* 28 S. W. 736, Affirmed on other grounds in 126 Mo. 472, 29 S. W. 579; *Bank of Garnett v. Ferris*, 55 Kan. 120, 39 Pac. 1042; *Welch v. Clatsop County*, 24 Or. 452, 33 Pac. 934; *Dayton v. Multnomah County*, 34 Or. 239, 55 Pac. 23; *Alliance Trust Co. v. Multnomah County*, 38 Or. 433, 63 Pac. 498.

And this is so no matter whether the tax be general or special.

Lawrence v. Killam, 11 Kan. 499; *Challiss v. Atchison County*, 15 Kan. 49.

The execution of a tax deed upon a certificate of sale embracing three assessments, only one of which is valid, will not be restrained without a tender of the amount due for such valid assessment. *Yates v. Milwaukee*, 92 Wis. 352, 66 N. W. 248.

A suit in equity for an injunction to restrain a sale for collection of a tax will not lie to correct mere errors or irregularities in the proceedings, even such as would render the sale void, where the plaintiff makes no offer to pay what is due. *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Irregularity must be shown, and payment or tender made. *Pillsbury v. Humphrey*, 26 Mich. 245; *Cheney v. Jones*, 14 Fla. 587.

And there must be no demand of a receipt in full. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663.

Payment is not required. A tender is sufficient. *Dakota Loan & T. Co. v. Codington County*, 9 S. D. 159, 68 N. W. 314.

A mere offer to pay, or payment into court, is not enough. *Parmley v. St. Louis, I. M. & S. R. Co.* 3 Dill. 25, Fed. Cas. No. 10,768.

Averments of willingness to pay and willingness to bring the money into court, without having made the tender, are insufficient. *State Nat. Bank v. Carson (Okla.)* 50 Pac. 990.

But in *Connors v. Detroit*, 41 Mich. 128, 1 N. W. 902, the failure to tender the amount due was held not to be a ground for the refusal of relief if the claimant concedes an amount due and offers to pay it; but he will subject him-

bank was also to be made against the bank itself for the same taxes as other real estate was assessed for. The ground of the alleged illegality of the taxes is stated to be the want of any provision for notice of time and place of valuation of the shares in arriving at market value, and the failure to provide for deducting the value of real estate from such market value, and also the failure to permit deductions for the debts of the shareholders.

The taxes spoken of in the original bill (1891-1895) were not paid, and no proceedings seem to have ever been taken to enforce their collection, under that act, against the cashier or his sureties. It might be surmised that they were not taken because of a doubt as to the constitutionality of that part of the act which provided for the liability of the cashier and his sureties, if the bank failed to pay the tax assessed upon its shareholders. However that may be, the authorities did not, in fact, take any proceedings to enforce the payment of the taxes until the passage of the act of March 3, 1896. Acts of Assembly of Virginia 1898, p. 700. That act provided a pro-

cedure for the collection of the taxes theretofore assessed against the stockholders of banks and then remaining unpaid. By its provisions the taxes were made a first lien upon the stock, no matter in whose hands found, and it was made the duty of the auditor of public accounts immediately to furnish the cashiers of banks with a list of their stockholders theretofore assessed with taxes upon their bank stock and who had not paid the same; and each bank so desiring and electing was authorized to pay to the auditor the taxes assessed upon the stock held by its stockholders, provided payment was made before the first day of July, 1896. If the bank did not choose to make such payment, it was made the duty of the auditor to give a copy of the lists to the attorney general, and it was made his duty to proceed by motion to collect the taxes from the individual stockholders. The motion was to be cognizable in the circuit court of Richmond city, after ten days' notice to the stockholder, and might be served upon non-resident *defendants in the mode provided [275] by § 3208 of the Virginia Code.

By the supplemental bill the taxes for the

self to costs by reason of such nontender before action.

And the averment of an offer to pay the amount due was held unnecessary when the bill stated the amount to be illegal. *Clement v. Everest*, 29 Mich. 19.

A constitutional provision in Florida (Const. 1885, art. 9, § 8) requires payment of the legal taxes before relief against the collection of illegal taxes can be granted. But this provision does not require such payment as a prerequisite to beginning proceedings for injunctive relief against illegal taxes, but only that such payment must be made before the relief will be granted. If it is made to appear to the court that any tax is due by the applicant which it is his duty to pay before obtaining the relief sought by his application, the court should afford him an opportunity to pay the tax legally assessed, and, if not paid as required, dismiss his application. *Pickett v. Russell*, 42 Fla. 116, 28 So. 764.

The use of every other means of relief must be shown, and willingness to pay alleged. *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649.

Plaintiffs must pay, or offer to pay, that part of the taxes over which there is no dispute, and offer in their petition to pay such further portion of the tax as the court may determine to be legal and just. *Collins v. Green*, 10 Okla. 244, 62 Pac. 813; *Lasater v. Green*, 10 Okla. 335, 62 Pac. 816; *Haiff v. Green*, 10 Okla. 338, 62 Pac. 816; *Russell v. Green*, 10 Okla. 340, 62 Pac. 817.

Injunction against the collection of an illegal tax will be granted upon condition of paying the taxes legally collectible, although the tender made was insufficient, where the taxpayer at the time the tender was made and the bill filed supposed that the amount tendered was sufficient, and made the tender in good faith. *Chicago, R. & Q. R. Co. v. Norton County*, 14 C. C. A. 458, 32 U. S. App. 227, 67 Fed. 413.

No tender is necessary, in the case of a void assessment, as distinguished from an excessive one. *Albany City Nat. Bank v. Maher*, 20 Blatchf. 341, 9 Fed. 884; *Chase v. Los Angeles*, 122 Cal. 540, 55 Pac. 414; *Northern P. R. Co. v. Kurtzman*, 82 Fed. 241; *Sioux City Bridge Co. v. Dakota County*, 61 Neb. 75, 84 N. W. 607; *Kerr v. Corsicana* (Tex. Civ. App.) 35 S. W. 694.

The requirement of Baillinger's Anno. Codes & Statutes (Wash.), § 5678, respecting the payment or tender of what is justly due as a prerequisite to a suit to enjoin the collection of an illegal tax does not apply when the assessment is alleged to be void. *Lewiston Water & P. Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544.

Where the amount due, if any, is uncertain, tender is unnecessary. *First Nat. Bank v. Covington*, 103 Fed. 523.

When the amount justly due cannot, because of the fault of the assessing board, be definitely determined by the party invoking equitable relief, the rule becomes inapplicable. *Hughson v. Crane*, 115 Cal. 404, 47 Pac. 120.

One seeking to enjoin the collection of an illegal portion of a tax need not first pay that part which is legally assessed, unless he knows how much he should pay. *Clements v. Norwood*, 1 Toledo Legal News, 298.

Payment of the taxes upon the original assessment is not essential to equitable relief against the extension of taxes on an increased assessment claimed to be illegal, where the amount of the taxes upon the original assessment was not known when the suit was begun. *Cox v. Hawkins*, 199 Ill. 68, 64 N. E. 1093.

On the general subject of injunction to restrain the collection of illegal taxes, see notes to *Odlin v. Woodruff*, 22 L. R. A. 699; *Dows v. Chicago*, 20 L. ed. U. S. 65; and *Ogden City v. Armstrong*, 42 L. ed. U. S. 445.

years 1896-7 were brought under review, and a perpetual injunction was asked to restrain the collection of all taxes from 1891 to and including 1897. The assessments for the years 1896-97 were assessed under another act of the legislature of Virginia, which was also passed March 3, 1896. Acts General Assembly of Virginia 1895-96, p. 726. The 17th section of that act provided for assessments upon the shares of state and national banks at the market value of the shares of stock held in the banks at the same rate that is assessed upon other moneyed capital in the hands of individuals residing in the state. The act provided, also, that the banks should make a report on the 1st day of February in each year, in which should be given the names of the shareholders, the number of shares owned or held or controlled by each, the market value of the stock, and the shareholders' residences; and it was then made the duty of the commissioner of revenue, on or after the 1st day of February in each year, to assess each stockholder upon the shares of stock held or owned by him at the market value, on the 1st day of February in each year, as therein stated. The section then provided for the retention of all the dividends by the bank, and for the application of the same to the payment of the tax assessed upon such stockholders, and that each bank might, if it so elected, pay the tax so assessed against the stockholders directly to the auditor of public accounts before the 1st day of June in each year.

Provision was then made that, if the bank failed to make such payment, the auditor of public accounts was to transmit a copy of the assessment list furnished him by the commissioner of revenue, and it was made the duty of the treasurer to collect the tax therein levied, and to that end to levy upon the stock of the taxpayer.

Other provisions were made in regard to the transferring of the stock to the purchaser at the sale upon the levy made *by the treasurer, and penalties were denounced upon the bank for a refusal to comply with its provisions.

Soon after the passage of the acts of March 3, 1896, the public authorities were about to take proceedings for the purpose of enforcing the collection and payment of the taxes for the years mentioned, and thereupon this suit was brought, and a preliminary injunction obtained restraining the collection of all taxes for those years upon the bank shares until the further order of the court.

The shareholders in these four banks in the city of Lynchburg have paid no taxes on their shares of stock in those banks since 1890.

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Mr. John D. Horsley argued the cause and filed a brief for appellant.

Mr. John H. Lewis also argued the cause, and, with *Messrs. Wilson & Manson* and *Blackford, Horsley, & Blackford*, filed a brief for appellant.

Mr. William A. Anderson argued the cause and filed a brief for appellee.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court:

The complainant objects to the legality of the taxes upon the ground, among others, that the acts of the Virginia legislature under which they were levied violated the provisions of the Constitution of that state, and were, therefore, entirely invalid. These objections are, as we think, untenable. They are technical, and relate to alleged defects in the titles of the acts, in not being sufficiently specific in stating the tax and the object to which it was to be applied, and also that the taxes were not equal and uniform. We think the objections are without merit, and we concur with what is stated upon this subject in the opinion of the circuit court herein. The state court has held the statutes do not violate any provision of the state Constitution, and we follow that court upon such a question. *Merchants' & Mfr's. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Schaefer v. Werling*, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

*The chief objections which are made to [277] the taxes are three:

1. No notice is provided for in any of the acts as to when or where the valuation of the shares of the bank for purposes of taxation will be made, and hence the shareholder has no opportunity to be heard upon that question, and the whole tax is void for that reason.

2. That the acts provide for a valuation of the bank's shares at the market value, without providing for a proportionate reduction on account of the value of the real estate owned by the bank, which is also by the law of Virginia to be assessed for its value against the bank itself; that by reason of this omission the shareholder is taxed once on the full market value of the stock, a part of which consists of the value of the real estate, and he is taxed again indirectly, for his proportion of the amount of the tax paid by the bank on this same real estate, and the result is that he is taxed upon his bank shares, as he insists, at a greater rate than upon other moneyed capital, etc.

3. That no provision is made under these

acts for permitting shareholders to deduct their indebtedness from the assessments upon their shares of stock, while it is alleged the holders of large amounts of other moneyed capital are by the laws of Virginia permitted to deduct their indebtedness from that capital, and are called upon to pay taxes only upon the balance.

On these grounds the complainant insists that the taxes were illegal and void, and upon such grounds it has based its prayer that the stockholders should be wholly freed from any liability to pay such taxes or any part thereof.

The defendant under his demurrer argues that, properly construed, although notice is not in terms provided for, yet the acts do provide an opportunity for a hearing before the tax can be enforced, and also that there is no illegal discrimination in the scheme enacted by the legislature of Virginia against the holders of national bank shares and in favor of other moneyed capital in the hands of individual citizens of the state. He denies that, so far as relates to the al-
 [278]leged failure *to deduct the value of the real estate of the bank from the market price of the stock, or the indebtedness of the shareholder from the amount upon which such shareholder is assessed (when the provisions of the general law of Virginia upon the subject of taxation of other property are compared), there was any violation of law or any illegality in the several taxes assessed on such shares. He also insists that the complainant could not legally represent the shareholders herein, or maintain this action. He further urges that, as neither the original nor the supplemental bill showed any payment or tender of an amount which would be justly due, even under the objections of complainant, the suit could not be maintained.

The circuit court held that, as to the taxes for 1891-1895, under the two acts already mentioned (acts of 1890 and 1896), the suit could not be maintained for the reason that the bank was under no obligation to pay the taxes for its shareholders, and there was no penalty or other inconvenience to the bank attending its refusal to pay, but that the case was different under the second act of 1896 as to the assessments made after 1895, and that as to those the bank was placed in such a position under that act as permitted it to maintain the suit. The court then examined the act with reference to the averments of the bill and supplemental bill, and with regard to the general laws of Virginia relating to the taxation of other property, and concluded that the act of 1896 was valid as construed by it, and that the assessments of 1896 and
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1897, under it, were legal, and therefore dismissed the bill.

In the view we take of this case, it is unnecessary to decide any other question than that which arises from the omission in either bill to aver payment, or at least a tender, of the amount of taxes equitably and justly due as a condition of obtaining the interference of a court of equity by enjoining the collection of the balance.

The prayer of the bill is "that the said defendant and all others may be perpetually enjoined from collecting taxes assessed on the stockholders by the state of Virginia for the *years 1891, 1892, 1893, 1894, 1895, 1896, [279] and 1897; that the said acts of the legislature of Virginia assessing the stockholders of your complainant with taxes may be declared unconstitutional and void, and that its stockholders, as well as your complainant, may be discharged and relieved from all liability growing out of the assessments."

From this it appears there has, in fact, never been any payment or tender of any part of the taxes assessed against the shareholders during the years above mentioned, and the omission of an averment of payment, or tender of payment, was, therefore, not a mere oversight.

In our view of the facts set forth in this case in the original and supplemental bills, the complainant was not entitled to any injunction unless it paid the amount equitably due; and if it made such payment, then the injunction would issue, restraining the collection of the balance. This is, of course, upon the assumption that the objections taken to the acts as above set forth are well founded. Whether they are or not, it is not necessary for this purpose to decide.

Taxation of shares of stocks in national banks is the universal rule, and probably there is no state in the Union in which such taxation is not provided for as a part of the property subject to taxation for the general support of the state government. The state of Virginia has by this legislation sought to provide for and enforce taxation of this kind of property. It is clearly shown that it intended to provide for a legal assessment,—one that complied with the conditions of the Federal statute, for the language of the various acts above mentioned in providing for such taxation is substantially the same as that used in the Federal statute, as they provide that the assessments shall not be on the capital of any bank, but shall be upon the shares at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in the state. This is the purpose of the laws, and if in attempting to effect that purpose some slip is made or some details

are provided for therein which may render assessments under them irregular or even [280]illegal, *that fact does not detract from the equitable duty of the shareholders in national banks to fulfil the plain demands of the laws, and pay a tax on their shares in like proportion as is assessed upon other moneyed capital, before they can establish any claim for interference in their behalf by a court of equity. To the extent (if any) that the assessment exceeds that amount, it may be assumed proper to ask a court of equity to enjoin its collection; but surely it offers no equitable foundation for an injunction restraining the collection of the whole tax, nine tenths of which may be justly due on every equitable principle.

The original and supplemental bills, taken together, show at least the amount that would be justly and equitably due on the theory of the complainant, for they show that if the two deductions (being all that are insisted upon by the complainant) had been made by the taxing officer, the complainant would not have had any ground of complaint as to the amount of the taxes. There are data in the original and supplemental bills from which it can be at once and definitely determined what the amount of the deductions claimed by complainant would be. The market value of the stock is stated for each year, as assessed by the taxing officer, and also the value of the real estate is stated for each year, and this last amount, complainant insists, should be deducted in arriving at the market value of the stock. The bills also show the different shareholders who had debts at the time the various assessments were made, and the amounts of the deductions they would, therefore, be entitled to for each of the years in controversy. These two classes of deductions being made, the complainant offers no equitable objection to taxes which might be assessed upon the balance. With these data thus appearing, from which the equitable amount of the taxes due by the shareholders is readily determined, we think this conceded amount should be paid before a court of equity ought to grant its aid by way of injunction. The universal rule of a court of equity is that he who seeks its equitable interposition must himself do equity. Is there any higher equity than [281]that a citizen *should pay the amount of a tax which he concedes to be just and equitable, before asking the aid of a court of equity to grant an injunction to enjoin the collection of any greater sum?

The complainant, however, insists that the rule does not exist where the assessments are void, and not merely irregular; and it asserts that these assessments are void because the acts under which they were

laid do not provide for notice to the shareholder before determining the value of the share upon which the tax is to be laid, and also because the assessment violated the act of Congress in being at a greater rate than is assessed upon other moneyed capital.

We are of opinion, however, that these assessments were not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction, because there could be no amount equitably due where there never had been a right to assess at all. Where, however, there is a statute which provides for an assessment, and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid for want of a notice to the taxpayer, or some other kindred objection, the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property, before he can ask the aid of the chancellor to enjoin the collection of the balance. This is the equitable rule, and it is good morals as well. To say that the act under which the tax is levied is unconstitutional, and therefore is the same as no law, and hence there is no duty to pay anything, because no tax can be levied without some law therefor, is to state the proposition too broadly. We concede that if the law were unconstitutional because, for instance, there was no constitutional *power to tax the particular [282] property, there is no necessity to pay anything. But where some part of the law may be unconstitutional because of a failure to comply with some matter of detail, but the amount which the owner of the property ought to pay is perfectly clear under the provisions of law, then if the taxpayer desire to be exempted from paying more than his share, he must pay or offer to pay his proportion, before equity will aid him in his effort to escape paying a disproportionate share.

The statute herein provides for a tax and creates the equitable obligation to pay some amount by reason of the shares, and even though there may be some obstacle which prevents its entire legality, yet the person assessed should recognize his equitable obligation to pay the tax to the extent stated, before he can base any claim for the assistance of equity to get rid of the balance of the tax. The mere lack of a provision in the

statute for notice did not take away the jurisdiction of the taxing officer to make an assessment under any circumstances.

What is the purpose of notice? Clearly, that the person assessed may have an opportunity to show some reason, if any, why he should not be assessed at all, or else not so much as he has been in fact. But suppose that, although there was no notice provided for in the act, the taxpayer had nevertheless heard of the assessment, and in fact had appeared before the assessing officer and made his case, showing he should not be assessed more than a certain stated amount, and the officer had allowed his claim to its full extent. Should he be thereafter permitted to resist by means of an injunction the collection of the tax so imposed, upon the ground that the statute provided for no notice to him, and none was officially given? Certainly not. So, when he comes into a court of equity to ask its aid, should it appear, on his own statement or otherwise, that if all the claims he makes were allowed he would still equitably owe the government a certain sum by reason of the statute providing for the assessment and his ownership of the property assessed, will he be heard to insist [283] that the court *grant him an injunction preventing the collection of any tax, because he had no notice of the assessment? He owes something to the government as a tax upon his shares, and ought any court of equity to aid him in escaping all obligation because, while insisting that the whole assessment is illegal, it yet clearly appears that a portion thereof, even if uncollectible, is nevertheless equitably and justly due. Is the equitable obligation arising by reason of these statutes and under these circumstances, to pay *some* tax, completely obliterated because the particular tax cannot legally be collected, and may be called void? We think clearly not. This same reason applies not only to a lack of notice, but also to the case of a claim that the tax is illegal because it did not allow the deductions which by the Federal statute should have been allowed. The tax under such circumstances is not void, but, at most, voidable for the illegal amount. *Albany County v. Stanley*, 105 U. S. 305, 315, 26 L. ed. 1044, 1051.

We refer to a few of the many authorities upon the subject.

In *State Railroad Tax Cases*, 92 U. S. 575, 616, 23 L. ed. 663, 674, it was said by Mr. Justice Miller, in delivering the opinion of the court, as follows:

"Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them. . . . It is not sufficient to

say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed."

This language is used in relation to taxes which were claimed *to be too high with ref-[284]erence to other property in the state, but the principle of the rule exists even where the tax is averred to be too great, because certain deductions provided by law were not made, or because there was no notice given of the assessment, and hence the taxpayer never had an opportunity to be heard. If, after hearing, there would appear something to be equitably due from the taxpayer, he should pay it before seeking relief from the court.

In *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903, where the question was whether the rule adopted by the local boards of assessment was in conflict with the state Constitution, the court held that it was, and that an assessment made under those circumstances was illegal, but that, nevertheless, the taxpayer was bound to pay the amount equitably due; and the opinion closes with the statement that "the complainant having paid to defendant, or into the circuit court for his use, the tax which was its true share of the public burden, the decree of the circuit court enjoining the collection of the remainder is affirmed."

In *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469, the general rule was held to be that the owner of taxable property seeking to enjoin the collection of a tax thereon, which he alleges to be in excess of what is lawful, must first pay or tender so much thereof as is justly due. Mr. Justice Miller, speaking for the court, said:

"The bill attempts to evade this rule by alleging that the tax is wholly void, and therefore none of it ought to be paid, and that by reason of the absence of all uniformity of values it is impossible for any person to compute or ascertain what the stockholders of the complainant bank ought to pay on the shares of the bank."

The *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663, were then referred to by the court, and quotations therefrom made, and the principles therein announced were held to be sufficient to decide the case at bar, thus holding that the mere fact that a

tax was void for some particular reason was not ground for the interposition *of a court of equity by injunction, where it could be seen there was an equitable obligation due from the taxpayer to pay a certain conceded amount, or an amount which could easily be ascertained, and which had not been paid.

These cases in this court are sufficient to show the propriety of the rule, and that it has been followed by us whenever the opportunity arose.

The same principle has been, however, decided by many of the state courts. In *Smith v. Humphrey*, 20 Mich. 398, 409, Mr. Justice Cooley, delivering the opinion of the court, said:

"He who comes into equity for relief must be willing to do equity; and there can be no ground upon which, in enjoining an excessive claim, the complainant can be discharged from that which is justly due. Story, Eq. Jur. § 64e, § 707; 1 Spence, Eq. Jur. 422. This is the rule even as between individuals; and there is at least equal reason for applying it in behalf of the state when it is seeking to collect its revenues. We have had occasion to apply it heretofore in suits to enjoin taxes. *Conway v. Waverly Twp. Board*, 15 Mich. 257; *Palmer v. Napoleon Twp.* 16 Mich. 176. See also *Hersey v. Milwaukee County*, 16 Wis. 185, 82 Am. Dec. 713; *Bond v. Kenosha*, 17 Wis. 288."

This Michigan case was one on appeal from an absolute decree perpetually enjoining a sale for unpaid taxes because of a demand of interest by the proper authorities at a rate not allowed by law. The court held that it could not be sustained, and that the payment of the amount due, with interest at the lawful rate, must be made, and then the sale would be perpetually enjoined.

In *Merrill v. Humphrey*, 24 Mich. 170, it was held that a property owner seeking to enjoin the collection of a tax on the ground that the amount is excessive should show by his bill, as near as may be practicable, what amount is just and what is excessive, and he should pay to the proper officer the amount which he concedes to be properly [286]*chargeable against himself. Mr. Justice Cooley, delivering the opinion of the court in that case, said (p. 175):

"We have already said that the complainant should be required to do equity as a condition of relief. What is just to the public cannot be done unless he pays within due time such proportion of the tax assessed upon him as he concedes to be fair; and we think this payment should be required by the injunction master to be made to the proper officer as a condition to the allowance of injunction. To this extent the case is within the principle of *Conway v. Waverly Twp. Board*, 15 Mich. 257, and *Palmer v.* 191 U. S.

Napoleon Twp. 16 Mich. 176, heretofore decided by us, and of several Wisconsin cases," etc.

In *Steuart v. Meyer*, 54 Md. 454, where it appeared that the sale of certain property in the city of Baltimore for the nonpayment of taxes was illegal in not complying with the statute, it was held (p. 468) that the complainant, as a condition of obtaining a decree setting aside the sale, must pay to the party entitled to receive it the full amount of the taxes in arrear at the time of the sale by the collector, together with the interest accrued thereon to the time of the payment, and also all taxes that had subsequently accrued due on the property, with interest.

In *Alexander v. Merrick*, 121 Ill. 606, 13 N. E. 190, it was held that, in accordance with the principle that a party seeking equity must do equity, a court of equity in setting aside a void tax sale as a cloud upon title would still require the complainant to refund the taxes paid by the holders of the certificates of purchase on their purchase, and also succeeding taxes to protect their purchase. In this case it was conceded that the tax sales were illegal and void, and that any deed issued by the county clerk, based upon such sales, would also be unlawful and void, but nevertheless would, on their face, appear to be valid official acts of the clerk, and would cause a cloud upon the title to the lands. At page 614 (N. E. p. 193), the court said:

"The complainant claims that the certificates of sale were clouds upon his title, and obstacles in the way of its beneficial *enjoy-[287]ment. He asks a court of equity to dissipate these clouds and remove these obstacles. He who asks equity must do equity. The court below, by its decree, should have required the complainant to refund the taxes paid by Reed and Forsythe as a condition to granting the relief prayed for. That such a requirement is proper in cases of this kind has been repeatedly held by this court."

In *Morrison v. Hershire*, 32 Iowa, 271, 277, an assessment for local improvements, the court refused to interfere even if the assessments were, as to one of the fronts on the street, unauthorized, unless the party complainant paid or tendered the portion legally due. The court said:

"An elementary principle of equity is applicable to the objections here presented. It is not denied that under the rule of assessment as fixed by the council, if applied as contended for by plaintiffs, certain sums are due from the lot owners which are charges upon their lots. These sums the respective plaintiffs are bound by law and in equity to pay. Before plaintiffs can claim relief as to the sums which they insist are over-assessed upon their property, they must pay or offer

to pay the sums lawfully and justly due according to their own theory of the assessment; for he who seeks equity must do equity; but this plaintiffs have not done."

And on page 278:

"We understand that it is a settled rule in equity that where a party is in conscience bound to pay a certain sum of money which, together with an amount that he is not legally bound to pay, is brought as a legal claim against him, equity will not restrain the collection of the whole, unless he pay or offer to pay, by tender, the sum which he justly and legally owes."

The rule requiring payment of the sum equitably due cannot be too rigorously enforced in cases regarding payment of taxes. This rule does not assume the validity of the assessment for that sum, but it simply says that under the circumstances the taxpayer shall have no right to come into court and enjoin the payment of any tax when the amount which, *equitably, he ought to pay is easily and certainly determinable from the conceded facts in the case.

In the case at bar because certain deductions were not made, although there was a large sum assessable even if the deductions were allowed, the injunction granted has prevented the collection of any part of the assessments, and for twelve years the stockholders in these Lynchburg banks have paid not one dollar of taxes by reason of their ownership of such shares. This is inequitable and unjust, and a court of equity should not be made the instrument by which such injustice is continued.

Although we reach the conclusion above stated on the ground we have discussed, it is not to be inferred that we regard the other grounds untenable. We intimate no opinion in regard to them. To the end that complainant may, if it so elect, pay as provided in this opinion, and then commence further proceedings, the dismissal of the bill will be without prejudice, and as thus *modified the decree of the Circuit Court is affirmed*.

ALICE A. CABLE, Administratrix, etc., *Petitioner,*
v.

UNITED STATES LIFE INSURANCE
COMPANY of the City of New York.

(See S. C. Reporter's ed. 288-310.)

Federal equity jurisdiction—suit to cancel

NOTE.—On the jurisdiction of equity where remedy at law exists—see notes to *Meldrum v. Meldrum*, 11 L. R. A. 65; *Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co.* 6 L. R. A. 855, and *Tyler v. Savage*, 36 L. ed. U. S. 83.

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insurance policy for fraud—remedy at law.

1. Lack of an adequate remedy at law in the same jurisdiction cannot successfully be urged to sustain the equitable jurisdiction of a Federal court of a suit to cancel an insurance policy for fraud, when the insurance company, because of diversity of citizenship, might have removed the action brought on such policy in a state court to a Federal court, where the fraud could have been set up as a defense, although by exercising this right of removal the company might have subjected itself to a revocation of its license to do business in the state, or, at least, to litigation to prevent the state authorities from revoking it.
2. Equitable jurisdiction of a suit to cancel an insurance policy for fraud which the insurance company could set up as a defense to an action on the policy cannot be founded on the theory that the company would not have the same control of the case as a defendant that it would have as plaintiff.
3. The fact that the law is more favorable to insurance companies as administered in the Federal than in the state courts furnishes no reason for the assumption by a Federal court of equitable jurisdiction over a suit by an insurance company to cancel a policy for fraud, although diversity of citizenship exists.

[No. 28.]

Argued October 16, 19, 1903. Decided November 30, 1903.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Illinois decreeing the cancellation of a policy of insurance for the fraud of the agents of the insured. *Reversed* and remanded, with directions to dismiss the bill without prejudice.

See same case below, 49 C. C. A. 216, 111 Fed. 19.

Statement by Mr. Justice **Peckham**:

This case comes here upon certiorari, applied for by the petitioner, who was the administratrix of the estate of Herman D. Cable, deceased. 186 U. S. 482, 47 L. ed. 1185, 23 Sup. Ct. Rep. 855. The suit was brought in the circuit court of the United States for the northern district of Illinois by complainant, the United States Life Insurance Company, of the city of New York and a citizen of that state, against Alice A. Cable, a citizen of the state of Illinois, to have a certain policy of insurance for \$50,000, payable as therein stated, upon the life

On cancellation of a deed or contract in equity for fraud, concealment, or misrepresentation—see note to Neblett v. Macfarland, 23 L. ed. U. S. 471.

of the said Herman D. Cable, delivered up for cancelation, on the ground that the same had been procured by the fraud of the agents of the deceased. The bill averred that the complainant was an insurance company of New York, lawfully engaged in doing business throughout the United States, and particularly in Illinois, under a permit or license duly granted therefor; that it had issued its policy upon the life of Herman D. Cable, and that it was procured by the fraud and fraudulent representations of his agents, such fraud and fraudulent representations being set forth at length; also that defendant had commenced a suit in the state court of Illinois to recover upon the policy, which suit was instituted about one and a half hours prior to the filing of complainant's original bill. A supplemental and amended bill was filed, in which, among other things, it was alleged:

[290] "10. Your orator further avers that the Constitution and laws of the United States of America confer upon your orator the right to remove into this court said action at law so begun against your orator; that, on the other hand, the state of Illinois, by legislative enactment, has sought to prevent the removal to this court by insurance companies of actions similar to said action so begun by said administratrix, and has practically destroyed such right or made its exercise impracticable, by providing, in substance, that an insurance company shall forfeit and lose its right to do business in the state of Illinois upon removing any such action into this court; that by removing said action to this court your orator might lose its right to transact business in the state of Illinois, and would certainly become involved in serious controversy with said state respecting the transaction of any subsequent business by your orator in said state; that the laws of said state upon certain questions of general insurance law, as interpreted by its highest legal tribunal, and applicable to the facts in this case, are somewhat different from the laws of the United States as interpreted by the Federal courts, upon the same questions, and from the standpoint of the laws of the United States are unduly and erroneously adverse to insurance companies; that your orator is entitled to an application of the law according to the decisions of the Federal courts; and that under the facts and circumstances hereinbefore set forth in this bill, your orator is without a due and proper remedy at law in respect to the claim of said administratrix under said policy of insurance, but is without any remedy at law whatever in this court."

To this bill the defendant interposed a demurrer, among other things, for want of equity, and that demurrer was sustained by
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the circuit court, but upon appeal to the circuit court of appeals for the seventh circuit the decree sustaining the demurrer was overruled, and the case remanded to the circuit court. 39 C. C. A. 264, 98 Fed. 761.

An answer was then put in by the administratrix of Cable's estate, denying any[291] fraud, and averring that she had, before the suit in the Federal court was commenced, herself commenced an action upon the policy in a proper state court of Illinois, and that it was her intention and desire to push such action to a speedy conclusion if permitted by the Federal court.

The suit herein was tried and a decree entered that the policy was procured on behalf of the deceased by constructive fraud, and that no actual fraud was intended or practised in the delivery of the same, and it was thereupon decreed that the policy should be delivered up and canceled. The defendant appealed from such decree to the circuit court of appeals, and the complainant took a cross appeal so as to bring up the findings of fact as to the constructive fraud, so that, as counsel said, "the case might be heard and considered in the circuit court of appeals upon the whole evidence, regardless of the findings of the master and of the circuit court." This was done for the reason that, in counsel's belief, the evidence showed a deliberate and intentional concealment on the part of Lord, the agent of the deceased, and therefore a plain fraud perpetrated by such agent. The circuit court of appeals affirmed the judgment [44 C. C. A. 216, 111 Fed. 19], and upon application this court granted the writ of certiorari as stated.

Mr. W. S. Oppenheim argued the cause, and, with Mr. H. H. C. Miller, filed a brief for petitioner:

Where a suit at law is brought against an insurance company for a loss sustained under an insurance policy, a court of chancery has no jurisdiction to cancel the policy, since every ground set forth in the bill of complaint can be set up and tried as a defense in the action at law.

Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501; *Home Ins. Co. v. Stanchfield*, 1 Dill. 424, Fed. Cas. No. 6,660; *Ætna L. Ins. Co. v. Smith*, 73 Fed. 318.

A foreign insurance company has no right to do business in the state without license, and contracts entered into by it are controlled by the statutes of the state.

New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

The statute of the state under which the respondent was licensed does not forbid a removal to the Federal court of suits brought against it in the state court, but simply reserves the right to revoke the li-

cense issued under the written agreement given by respondent to the state if it does not submit its controversies to the judgment of the state courts, and stand upon the same footing as domestic companies. This statute is constitutional, and the agreement made by respondent under which it procured its license is valid and binding.

Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148.

Under the facts, the remedy at law of respondent is complete and adequate.

Southern Development Co. v. Silva, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881; *Farnsworth v. Duffner*, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164; *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112; *Morse Arms Mfg. Co. v. Winchester Repeating Arms Co.* 33 Fed. 184.

The English rule is not the law in this country.

2 Pom. Eq. Jur. § 914.

Mr. **William G. Beale** argued the cause, and, with Messrs. Buell McKeever, Gilbert E. Porter, and Charles E. Patterson, filed a brief for respondent:

What is meant by a "plain, adequate, and complete" remedy at law is a remedy equally effectual with the equitable remedy as to all the rights of the complainant, and as practical and efficient to the ends of justice and its prompt administration.

Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70.

It is a remedy which, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.

Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594.

It is a remedy which may be resorted to without impediment.

Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 26 L. ed. 975.

It is a remedy whose assertion is not liable to be attended by the imposition of heavy penalties and forfeitures.

Pacific Exp. Co. v. Seibert, 44 Fed. 310.

It is a remedy that is not attended with a great and oppressive burden of risk, and whose adequacy does not depend upon the will of the opposing party.

Bank of Kentucky v. Stone, 88 Fed. 383.

It is a remedy which is not doubtful or speculative.

Davis v. Wakelee, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. Rep. 555.

Whether such a remedy exists in any case must be determined by the particular circumstances of that case.

Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580; *Rich v. Braxton*, 158 U. S. 375, 39 L. ed. 1022, 15 Sup. Ct. Rep. 1006. To similar effect are *Boyce v. Grundy*, 3 Pet. 210,

7 L. ed. 655; *Sullivan v. Portland & K. R. Co.* 94 U. S. 306, 24 L. ed. 324; *Drexel v. Berney*, 122 U. S. 241, 30 L. ed. 1219, 7 Sup. Ct. Rep. 1200; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Allen v. Hanks*, 136 U. S. 300, 34 L. ed. 414, 10 Sup. Ct. Rep. 961; *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Smith v. American Nat. Bank*, 32 C. C. A. 368, 60 U. S. App. 431, 89 Fed. 832; *Pacific Exp. Co. v. Seibert*, 44 Fed. 310.

The Illinois statute against removals is doubtless repugnant to the Federal Constitution and void, along with the agreement not to remove, required by it.

Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. 888; *Mutual L. Ins. Co. v. Boyle*, 82 Fed. 705; *Com. v. East Tennessee Coal Co.* 97 Ky. 238, 30 S. W. 608; *Com. v. Jallico Coal Co.* 97 Ky. 246, 30 S. W. 611. See also *Dayton Coal & I. Co. v. Barton*, 183 U. S. 24, 46 L. ed. 64, 22 Sup. Ct. Rep. 5.

The existence of the statute, and the attitude of the state authorities with respect to it, were a menace to respondent, made its right of removal valueless, and deprived it of its plain, adequate, and complete remedy at law.

Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70; *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; *Smith v. American Nat. Bank*, 32 C. C. A. 368, 60 U. S. App. 431, 89 Fed. 832; *Pacific Exp. Co. v. Seibert*, 44 Fed. 310; *Bank of Kentucky v. Stone*, 88 Fed. 383.

As respondent did not have the proper remedy at law in the Federal court, it is immaterial whether he had such a remedy in a state court. The equitable jurisdiction of the Federal courts does not depend, and cannot be made to depend, upon the adequacy of proceedings at law in the state courts.

Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174; *Breeden v. Lec*, 2 Hughes, 484, Fed. Cas. No. 1,828; *Maycr v. Foulkrod*, 4

Wash. C. C. 349, Fed. Cas. No. 9,341; *Coler v. Stanley County*, 89 Fed. 257; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816; *National Surety Co. v. State Bank*, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 593; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. See also *Stanton v. Embry*, 46 Conn. 595.

Otherwise state legislation, by extending legal remedies, might destroy all equitable jurisdiction on the part of Federal courts. The jurisdiction and procedure in the Federal courts of law and of equity depend upon essential principles and distinctions as understood and applied by the Federal courts themselves.

Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174; *Mayer v. Foulkrod*, 4 Wash. C. C. 349, Fed. Cas. No. 9,341; *Robinson v. Campbell*, 3 Wheat. 212, 4 L. ed. 372; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Nor did respondent have a plain, adequate, and complete remedy in the state courts of Illinois, because it could not have its controversy with petitioner properly decided there in accordance with correct principles of general insurance law as understood and applied by this court, and because it might not have been able to interpose in an action at law the defense that the policy had been procured by fraud. This shows the peculiar value of the right to be in the Federal court.

The substantial questions involved are questions of general law upon which the Federal courts exercise their own judgment, independently of state decisions.

Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Gloucester Ins. Co. v. Younger*, 2 Curt. C. C. 338, Fed. Cas. No. 5,487; *Maier v. Fidelity Mut. Life Asso.* 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566; *Washburn & M. Mfg. Co. v. Reliance M. Ins. Co.* 27 C. C. A. 134, 50 U. S. App. 231, 82 Fed. 296.

If the views of the supreme court of Illinois in applying such principles differ from those of this court, any supposed remedy to respondent founded upon such different and erroneous views would not be an adequate remedy, but would in fact be no remedy at all.

See *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174.

It is settled in this court that a mere
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solicitor, or a local agent of a life insurance company, cannot bind his company affirmatively or by waiver, through his agreements or knowledge, when plain and appropriate limitations and restrictions upon his authority are brought to the attention of an applicant for insurance by being embodied in the application.

Davis v. Massachusetts Mut. L. Ins. Co. 13 Blatchf. 462, Fed. Cas. No. 3,642; *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 689; *United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406; *Koken v. Mutual Reserve Fund Life Asso.* 28 Fed. 705; *Misselhorn v. Mutual Reserve Fund Life Asso.* 30 Fed. 545; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

The supreme court of Illinois holds that any person who receives applications for life insurance, collects premiums, and delivers policies is authorized to waive a limitation or restriction upon his own authority contained in a policy or in an application, and to waive other provisions of the contract, and to bind the company by agreement or waiver, in connection with the act of manual delivery, without regard to the expressed limitations or restrictions.

John Hancock Mut. L. Ins. Co. v. Schlink, 175 Ill. 284, 51 N. E. 795; *Royal Neighbors v. Boman*, 177 Ill. 27, 52 N. E. 264.

Under a recent decision of the supreme court of Illinois it is questionable whether the defense of fraud in procuring an insurance policy not affecting its manual execution can be made available in an action at law, or can only be made available in a suit in equity to cancel the policy.

Robinson v. Sharp, 201 Ill. 86, 66 N. E. 299.

The remedy of respondent in a state court of Illinois is, therefore, very far from being "plain" and "adequate" at law.

There had been no final and conclusive election to take the commuted value of the policy; and the possibility of a multiplicity of suits, or number of successive suits, against respondent for separate annual instalments under the policy was additional ground for invoking the jurisdiction of a court of equity.

Washington v. Louisville & N. R. Co. 136 Ill. 49, 26 N. E. 653; *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Buzard v. Houston*, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; *Bank of Kentucky v. Stone*, 88 Fed. 383; *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397.

Resort to equity was further sustainable

on the ground that respondent might lose important evidence, namely, the testimony of the witness McCabe, through lapse of time.

Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655; *Schmidt v. West*, 104 Fed. 272; *Fuller v. Percival*, 126 Mass. 381; 2 Story, Eq. Jur. § 700.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

It is contended upon the part of the administratrix of the estate of the assured, that the court below had no jurisdiction, on the ground that there existed a complete and adequate remedy (or defense) at law when the company was sued upon the policy, and that the effect of allowing this jurisdiction in the circuit court is to improperly deprive the defendant herein of a trial by jury.

It is conceded by the plaintiff in error that no cause of action existed in favor of the complainant herein upon the law side of the Federal court, the contention being that the company could set up, as a defense to any action brought against it in the Federal court, those allegations of fraud which, being proved, would constitute a perfect and complete defense to any action upon the policy.

[303] *The company, however, avers that the administratrix has elected not to bring her action in the Federal court, although she might have done so on the ground of diversity of citizenship, but has, instead of so doing, brought it in the state court, and hence the company would have no opportunity of setting up its defense in a Federal court in an action brought on the policy, and it insists that on that account it has not that complete and adequate remedy or defense at law, in the same jurisdiction, which it contends is necessary in such case.

It is true that the remedy or defense which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to without impediment created otherwise than by the act of the party, and the remedy of defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, arising other than by reason of its own act.

It is also urged, as an answer to the claim of the company as to jurisdiction, that even though the remedy or defense at law must exist in the same (Federal) jurisdiction, yet it is within the power of the company, if it see fit to do so, to remove the action in the state court to the Federal court, and thus

its defense at law, while adequate, would also be within the same jurisdiction in which its suit in equity was commenced.

It is further insisted by the administratrix that it is unnecessary that an action at law should have been commenced in the same jurisdiction, but it is sufficient that the defense would be available and complete if such an action should be commenced in a Federal court of law.

As to the removal of the action from the state to the Federal court, the company avers that, even assuming it had the right so to remove, yet it insists that such removal would be too hazardous to the company by subjecting it to a possible revocation of its license to do business in the state, to be of any adequate avail.

*It is also argued upon the part of the company that the position of a defendant in an action is not so advantageous as that of a plaintiff, as the plaintiff has the conduct of a cause largely within his own control; and it is said that the law as administered in the state court is not so favorable to insurance companies as is the case in the Federal courts, and that the company had the right to an administration of the law by the Federal, instead of the state, court by reason of the diversity of citizenship.

These objections are to be considered.

In Hurd's Revised Statutes of Illinois, chap. 73, title *Insurance*, in relation to foreign insurance companies, it is provided that any such company must first file a written application for a license, in which it shall state that it desires to transact the business of insurance, and that it will accept a license according to the laws of the state, "and that said license shall cease and terminate in case and whenever it shall remove or make application to remove into any United States courts any action or proceeding commenced in any of the state courts of this state, upon any claim or cause of action arising out of any business transaction, in fact, done in this state," etc. The statute also provides that if any company thereafter removes or applies to remove into the United States court any action commenced in a state court of the kind above mentioned, "it is hereby made the imperative duty of the auditor of public accounts at once to revoke, cancel, and annul the license issued to such incorporated company, association, or partnership; and thereafter no such incorporated company, association, or partnership shall transact within this state any of the business for which it was incorporated, until again duly licensed. In case such revocation of license shall be made because of the removal of or the attempt to remove any action from a state court of this state to any United States court, no renewal

of such license shall be made within three years after such revocation." Provision is also made that, if the license is revoked, publication of the fact shall be made in the newspapers.

[305] *This court has held that, although there may be power in a Federal court of equity in a proper case to order the delivery up and cancellation of a policy of insurance obtained upon fraudulent representations and suppression of facts, yet it will not generally do so when those representations and suppressions can be perfectly well established in a defense at law in a suit upon the policy, and it therefore affirmed a decree which dismissed, without prejudice, a bill filed for obtaining the delivery up and cancellation of a policy so issued, although the evidences of the fraud were considerable, and a suit on the policy had been begun in an action at law after the bill in equity was filed. *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501.

That was a suit by the company to obtain the delivery up and cancellation of certain policies of life insurance after the death of the assured, on the ground that the policies had been procured by the defendant, the widow of the deceased, by fraudulent suppression of material facts, and by the misrepresentation of others of the same class. The answer denied the allegations made. It was held that the company would have a perfect defense at law in an action by the holder upon the policy of insurance, and for that reason equity would refuse to take jurisdiction of an action to compel the delivery up and cancellation of the policy. The court said:

"By the death of the *cestui que vie* the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies, and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy more nearly perfect and complete the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury. Where a party, if his theory of the controversy is correct, has a good defense at law to 'a purely legal demand,' he should be left to that means of defense, as he has no [306] occasion to resort 'to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy.'"

To the same effect are *Home Ins. Co. v.* 191 U. S. U. S., Book 48.

Stanchfield, 1 Dill. 424, Fed. Cas. No. 6,660; *Atna L. Ins. Co. v. Smith*, 73 Fed. 318.

Complainant insists that in this case special circumstances are shown that it may suffer irreparable injury if jurisdiction be denied. Those special circumstances have already been mentioned, and the question is whether they are sufficient to furnish ground for a Federal court of equity to take jurisdiction herein.

We start with the proposition that, to any action brought upon the policy in a Federal court, the company would have a complete and adequate defense by proving the fraud as alleged in the bill herein. That shows a defense in the same jurisdiction resorted to by the complainant herein. It is answered, however, that the action has not been commenced in the Federal court, but, on the contrary, the administratrix has commenced her action in the state court, and hence the defense, if made in the state court, is not in the same jurisdiction as that in which the bill in this case was filed. But the company may bring its defense within the same jurisdiction by removing the case from the state to the Federal court, which it has the right to do on account of the diversity of citizenship of the parties thereto. No stipulation or agreement, founded on a state statute or otherwise, which the company may have entered into, could prevent the removal of the case in the exercise of its constitutional right. This has been so held in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; and that case has been repeatedly approved. See *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931.

In *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148, it was held that a state had the right to impose conditions not in conflict with the Constitution nor the laws of the United States, to the transaction of business within its territory by a foreign insurance *company, and to exclude such com-[307] pany from its territory, or, having given a license, to revoke it, with or without cause; and it was further decided that an injunction to restrain a state officer from revoking and canceling a license to a foreign company to do business within the state, because the company has, contrary to the state statute, removed a case from the state to the Federal court, would not be granted, and it was remarked that, as the state had the right to exclude a foreign insurance company, the means by which she caused such exclusion, or the motives of her action, were not the subject of judicial inquiry. Whether this case has been shaken by the subsequent cases of *Barron v. Burnside*, 121 U. S. 186, 199, 30 L. ed. 915, 919, 1 Inters. Com. Rep. 295, 7

Sup. Ct. Rep. 931; *Blake v. McClung*, 172 U. S. 239, 254, 43 L. ed. 432, 437, 19 Sup. Ct. Rep. 165, and *Dayton Coal & I. Co. v. Barton*, 183 U. S. 23, 25, 46 L. ed. 61, 64, 22 Sup. Ct. Rep. 5, it is not material here to discuss. It has from an early day been held that a corporation created by one state could transact business in another state only with the consent, expressed or implied, of the latter state, and that such consent might be accompanied by such conditions as the latter state might think fit to impose, provided they were not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense. *Lafayette Ins. Co. v. French*, 18 How. 407, 15 L. ed. 452; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 401, 44 L. ed. 1116, 1124, 20 Sup. Ct. Rep. 962; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 76, 45 L. ed. 755, 758, 21 Sup. Ct. Rep. 535.

One thing is entirely clear, that the company could have removed this case from the state to the Federal court, notwithstanding the state statute or anything contained in its application for a license to do business within the state. Upon removal the company would have the full and adequate defense, under the law as administered by the Federal courts, that it would have in the equity case. Whether, as a result of such removal, the state would have the right by [308] reason of the statute *to revoke the license given to the company, is not a question which it is necessary for us to here discuss or determine. But, assuming the right of removal, the company says that it may thereby subject itself to a revocation of its license, or at least to litigation to prevent the state authorities from revoking it, and it ought not to be put to any such litigation or possible injury or inconvenience.

The embarrassment attaching to the complainant herein on account of a removal, if any, is one of its own creation. As a condition upon which it was admitted to do business in the state, it voluntarily signed the application, in which it promised to accept a license according to the laws of Illinois, and agreed that the license should terminate in case the company should remove any action commenced in the state court to the United States court, as already stated. We think the existence of these facts furnishes no ground for appealing to a Federal court of equity to take jurisdiction of a suit to cancel the policy, where otherwise the court would have none. The state statute could

not prevent the removal. If, because of a removal, ground was furnished for the revocation of the license, that fact would not justify a resort to a Federal court, and ought not to, because, as we have said already, the contingency is one of the complainant's own creation, and it ought not, therefore, to be able to avail itself of an embarrassment which it has voluntarily created, as a foundation for jurisdiction in a Federal court which would not otherwise exist.

It signed its application to do business, in order to come into the state and reap the profits which it thought it might earn by transacting its business in the state. There was no coercion upon it to make the application or to take the permit on the condition stated. Upon the whole, it chose to make such application and receive the license upon that condition.

If the condition be illegal and no ground for a revocation of the license, any subsequent litigation which the company may have by reason of such removal with the state officials to prevent the revocation of the license on that account is still *matter[309] caused by its own action, and cannot, in our judgment, furnish any ground for jurisdiction in the Federal courts.

Still less do we think that any foundation is laid for that jurisdiction based upon the theory that the company would not have the same control of the case as a defendant that it would as plaintiff. That is not the case in modern practice. The defendant can urge the case to trial against the desires of the plaintiff, and its defense may be shown as well and conveniently by a defendant as the cause of action may be shown by the plaintiff. The right of the plaintiff to discontinue the action does not furnish ground for equitable jurisdiction. If it did, then equity would always have jurisdiction, and the rule would be worthless.

The other ground stated as furnishing a special circumstance to show that complainant may suffer some irreparable injury if equity does not take jurisdiction,—*viz.*, that the law is more favorable to insurance companies as administered in the Federal than in the state court, and therefore equity ought to take jurisdiction in this case, upon the ground of the diversity of citizenship,—cannot be regarded for a moment.

It is immaterial whether the assertion be conceded or denied. It furnishes no ground for equitable jurisdiction in a case like this. Where a plaintiff in a state court which has jurisdiction over the subject-matter brings the defendant properly within such jurisdiction, he is entitled to a trial of his cause in that court, unless the case be removed to a

Federal court upon some constitutional ground. If that ground exist, the removal can be made, but if it do not, equitable jurisdiction does not accrue to a Federal court because it is thought the law as administered by that court more favorable to the party seeking its aid.

[310] We think that, within the rule in *Phœnix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501, the Circuit Court has no jurisdiction in this case. *The judgment of the Circuit Court of Appeals for the Seventh Circuit and of the Circuit Court for the Northern District of Illinois must therefore be reversed*, and the case remanded to the Circuit Court with directions to dismiss the bill, without prejudice.

It is so ordered.

Mr. Justice **Harlan** and Mr. Justice **White** dissented.

SARAH A. HIBBEN, *Plff. in Err.*,

v.

WILLIAM C. SMITH *et al.*

(See S. C. Reporter's ed. 310-326.)

Error to state court—conclusiveness of state court decisions—due process of law in assessments for local improvements.

1. The decision of the highest state court that the owner of property abutting on a local improvement can, by mandamus or injunction, compel a hearing by the body making the assessment, or prevent the approval of the engineer's report until such hearing has been accorded, is conclusive on the Supreme Court of the United States in reviewing a judgment of the state court, foreclosing the lien of such assessment.
2. Due process of law is afforded the owner of property assessed for a local improvement, where there is an opportunity to be heard before the body which is to make the assessment, although the decision of that body after hearing is conclusive.
3. The decision of the highest state court that, because members of the board levying an assessment for a local improvement were owners of property abutting on such improvement, and assessable therefor, would, at most, make the assessment voidable, and would not render it subject to collateral attack, is conclusive on the Supreme Court of the United States in reviewing the decision of the state court, foreclosing a lien on such assessment.
4. Due process of law is not denied an owner of property assessed for a local improvement

because all the members of the board levying the assessment were residents of the town, and taxpayers thereof, and two of such members were owners of lots abutting on the improvement, and assessable therefor.

[No. 59.]

Argued November 5, 6, 1903. Decided November 30, 1903.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment affirming a judgment of the Marion Superior Court of that State, foreclosing the lien of an assessment for a local improvement. *Affirmed.*

See same case below, 158 Ind. 206, 62 N. E. 447.

Statement by Mr. Justice **Peckham**:

The plaintiff in error seeks by this writ to review the judgment of the supreme court of the state of Indiana, affirming a judgment in favor of one of the defendants in error, William C. Smith, foreclosing the lien of an assessment levied upon certain real estate in the town of Irvington, belonging to the plaintiff in error. The plaintiff Smith brought this action to foreclose the lien, and alleged in his complaint that he was the contractor for the doing of the work for a local improvement on Washington street in the town mentioned, and had complied with all the provisions of the statute and with his contract, and had finished the work, and was [311] entitled to payment for the same; that an assessment to provide for such payment had been duly imposed by the board of town trustees upon the property abutting on the portion of the street where the improvement was made, and that the defendant, Sarah A. Hibben, was the owner of lots abutting on that improved portion of the street, and her assessment amounted to over \$5,000, which she had not paid; that the assessment was then due with 6 per centum interest, and the plaintiff prayed that the lien might be foreclosed against her property, and that it might be sold for the satisfaction of the assessment, and for other proper relief in the premises.

The defendant Hibben demurred to the complaint, and the same having been overruled, she filed an answer thereto. She also filed a cross complaint. The answer and cross complaint set up the same facts in sub-

NOTE.—On writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; *Gilman v.*

Tucker, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L. R. A. 657; *Chauvin v. Valiton*, 3 L. R. A. 194, and *Ulman v. Baltimore*, 11 L. R. A. 225.

stance, and they both averred the unconstitutionality of the act of the legislature of Indiana providing for the improvement of streets under which the improvement in question was made, and also it was objected to the validity of the assessment that the alleged improvement was of no benefit to many of her lots, and that, on the contrary, the assessment upon such lots was greater than their value, and resulted in a substantial confiscation of her property in those lots; also that the assessment had been made by the front foot and without reference to the benefits received from the improvement, and that no hearing before the board of trustees was had and no consideration given to the question of whether or not the abutting property or any part thereof was specially benefited in an amount equal to, less than, or in excess of, the amounts fixed by the assessments which were confirmed by such board, but, on the contrary, that the assessments were made and confirmed upon the theory and belief that the statutes of the state established the rule of assessment at the same fixed price per lineal front foot on each side for the whole improvement, and that no change could be made therein by the board of trustees, and that the board refused at

[312] *such hearings to hear or consider any objection to the assessment based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land.

It was also averred in the answer and in the cross complaint that all the members of the board of trustees of the town of Irvington were residents of that town and taxpayers therein, and that two members of the board were owners of lots abutting upon said improvement, and assessed therefor at the same rate per lineal front foot as the others, and it was averred that no assessment could legally be levied by such a board of trustees, and the assessment was, for that reason, wholly void.

These defenses contained in the answer, and which were also set up in the cross complaint, were severally demurred to by the complainant Smith, and the demurrers sustained, and upon the refusal of the defendant Hibben to amend, judgment enforcing the lien was entered, which, upon appeal to the supreme court of Indiana, was affirmed. [158 Ind. 206, 62 N. E. 447.]

Mr. Russell T. MacFall argued the cause, and, with *Messrs. Murat W. Hopkins* and *Merrill Moores*, filed a brief for plaintiff in error:

In Indiana assessments for local street improvement are based upon, and measured by, the actual special benefits accruing to the land or lots assessed.

New Albany v. Cook, 29 Ind. 220; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532; *Defrees v. Ferstl*, 154 Ind. 695, 57 N. E. 266; *Taylor v. Crawfordsville*, 155 Ind. 403, 58 N. E. 490; *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932; *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004; *Marion Bond Co. v. Johnson*, 29 Ind. App. 294, 64 N. E. 626; *Klein v. Nugent Gravel Co.* (Ind. App.) 66 N. E. 486; *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100.

The determination of the actual special benefits is a judicial function.

Black, Judgm. §§ 290, 291; *Cooley*, Const. Linn. 6th ed. 108; *Cooley*, Taxn. 265, 266; *Elliott*, Mun. Corp. 130; *Elliott*, Roads & Streets, 2d ed. §§ 281, 564; *Van Fleet*, Colateral Attack, § 16; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Ft. Wayne v. Cody*, 43 Ind. 197; *Campbell v. Dwiggins*, 83 Ind. 473; *Anderson v. Baker*, 98 Ind. 587; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867; *Harman v. Moore*, 112 Ind. 227, 13 N. E. 718; *Garrin v. Daussman*, 114 Ind. 429, 16 N. E. 826; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Campbell v. Monroe County*, 118 Ind. 119, 20 N. E. 772; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436; *Thompson v. Goldthwait*, 132 Ind. 20, 31 N. E. 451; *Guckien v. Rothrock*, 137 Ind. 355, 37 N. E. 17; *Adams School Twp. v. Irwin*, 150 Ind. 12, 49 N. E. 806; *Kirsch v. Braun*, 153 Ind. 247, 53 N. E. 1082; *Greenwood v. Lawson*, 159 Ind. 267, 64 N. E. 849; *Motz v. Detroit*, 18 Mich. 495; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Whiteford Twp. v. Phinney*, 53 Mich. 130, 18 N. W. 593; *Overing v. Foote*, 65 N. Y. 263; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Philadelphia v. Miller*, 49 Pa. 440; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Meyers v. Shields*, 61 Fed. 713; *Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

Due process of law, as guaranteed by the 14th Amendment to the Constitution of the United States, requires that the property of plaintiff in error be not taken away by an arbitrary act of the board of trustees of Irvington.

Magna Charta; *Petition of Rights*, 1 Car. 1. chap. 1; *Bill of Rights*, 1 W. & M. Sess. 2, chap. 2; *Stamp Act*; 12 *Journal Confederate Congress*, p. 58; 1 *Journal of Con-*

gress, p. 28, ed. Phil. 1800; Ordinance of 1787, art. 4; 4 Bl. Com. 424; Broom, Legal Maxims, 8th Am. ed. 113; 2 Coke, Inst. p. 46; Cooley, Const. Lim. 6th ed. 35, 104, 429, 599; Cooley, Taxn. 2d ed. 674; 2 Kent, Com. 11th ed. 2 note 3, 6; 2 Story, Const. § 1789; *Boswell's Case*, 6 Coke, 52a; *Bagg's Case*, 11 Coke, 93b, 99a; *Prohibition del Roy*, 12 Coke, 63; *King v. Cambridge*, 1 Strange. 557; *King v. Beun*, 6 T. R. 198; *Harper v. Carr*, 7 T. R. 270; *King v. Gaskin*, 8 T. R. 209; *Capel v. Child*, 2 Crompt. & J. 558; *Bonaker v. Evans*, 16 Q. B. 162; *Re Hammersmith Rent Charge*, 4 Exch. 87; *Graham v. Furber*, 14 C. B. 134, 165; *Queen v. Canterbury*, 1 El. & El. 545; *Cooper v. Board of Works*, 14 C. B. N. S. 181; *Re Brook*, 16 C. B. N. S. 403; *Queen v. Saddlers' Co.* 10 H. L. Cas. 404; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Klein v. Nugent Gravel Co.* (Ind. App.) 66 N. E. 486; *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554, 57 N. E. 583; *Campbell v. Dwiggins*, 83 Ind. 473; *Lips v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; *Heiek v. Voight*, 110 Ind. 279, 11 N. E. 306; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 4 L. R. A. 101, 21 N. E. 244; *Langenberg v. Decker*, 131 Ind. 471, 16 L. R. A. 108, 31 N. E. 190; *People ex rel. Kern v. Chase*, 165 Ill. 527, 36 L. R. A. 105, 46 N. E. 454; *Freeland v. Hastings*, 10 Allen, 570; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502; *Paul v. Detroit*, 32 Mich. 108; *Sanborn v. Fellows*, 22 N. H. 473; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Ex parte Logan Branch Bank*, 1 Ohio St. 432; *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 38 L. R. A. 519, 47 N. E. 551; *Harmon v. State*, 66 Ohio St. 249, 58 L. R. A. 618, 64 N. E. 117; *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 722; *Calder v. Bull*, 3 Dall. 388, 1 L. ed. 648; *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Van Ness v. Pacard*, 2 Pet. 137, 7 L. ed. 374; *Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *McVeigh v. United States*, 11 Wall. 259, 20 L. ed. 80; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436; *Davison v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 623.

Due process of law, as guaranteed by the 14th Amendment to the Constitution of the United States, requires that no man shall be judge in his own cause.

Bacon, Abr. *Jury*, M, 3; Bouvier, Law Dict. title *Judge*; 1 Brooke, Abr. 177, title *Connasance*, 27; Broom, Legal Maxims, 8th Am. ed. 116, 120; 3 Burn's Justice of the Peace, 132; Co. Litt. 141a, § 212; Comyns' Digest, 101, 4, *Justices*, I. 3; Cooley Const. Lim. 6th ed. 506; Domat, Public Law, lib. 2, title 1, §§ 2, 14; Elliott, Mun. Corp. § 130; Freeman, Judgm. 4th ed. §§ 144, 145, 147; 4 Inst. 71; Just. Code, lib. 1, title 1, 16; Littleton, § 212; Pandects, pars. 11, lib. 5, 17; Pothier, Proc. Civ. chap. 2, § 5; Rolle, Abr. *Judges*, pl. 11; 14 Vin. Abr. 573, pl. 28; Voet, Pandects, lib. 5, title 1, 43; Jenk. 40, case 76, 90, case 74; *Bonham's Case*, 8 Coke, 112; *Derby's Case*, 12 Coke, 114; *Day v. Savadge*, Hobart, 85; *Anonymous*, 1 Salk. 396; *Great Charte v. Kennington*, 2 Strange, 1173; *Hesketh v. Braddock*, 3 Burr. 1847; *Queen v. Cheltenham*, 1 Q. B. 468; *Queen v. Surrey Justices*, 21 L. J. Mag. Cas. N. S. 195; *Esdaile v. Lund*, 12 Mees. & W. 734; *Queen v. Hertfordshire Justices*, 6 Q. B. 753; *Reg. v. Upton St. Leonard's*, 10 Q. B. 827; *Queen v. Aberdare Canal Co.* 14 Q. B. 853; *Queen v. Suffolk Justices*, 18 Q. B. 416, 14 Eng. L. & Eq. Rep. 93; *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759; *Ranger v. Great Western R. Co.* 5 H. L. Cas. 72; *State v. Castleberry*, 23 Ala. 85; *Heydenfeldt v. Towns*, 27 Ala. 423; *Heilbron v. Campbell* (Cal.) 23 Pac. 122; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Donnelly v. Howard*, 60 Cal. 291; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Oakland v. Oakland Water Front Co.* 118 Cal. 249, 50 Pac. 268; *Meyer v. San Diego*, 121 Cal. 102, 41 L. R. A. 762, 53 Pac. 434; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920; *Hadley v. Daguc*, 130 Cal. 207, 62 Pac. 500; *Hawley v. Baldwin*, 19 Conn. 585; *Nettleton's Appeal*, 28 Conn. 268; *Ochus v. Sheldon*, 12 Fla. 138; *Ex parte Harris*, 26 Fla. 77, 6 L. R. A. 713, 7 So. 1; *State ex rel. Colcord v. Young*, 31 Fla. 594, 19 L. R. A. 636, 12 So. 673; *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144; *Hearn v. Greensburgh*, 51 Ind. 119; *Hudson v. Wood* (Ind. App.) 52 N. E. 612; *Fountain County v. Loeb*, 68 Ind. 29; *Shoemaker v. Smith*, 74 Ind. 71; *Fechheimer v. Washington*, 77 Ind. 366; *Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Bradley v. Frankfort*, 99 Ind. 417; *Block v. State*, 100 Ind. 357; *Pearey v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98; *Chicago & A. R. Co. v. Summers*, 113 Ind. 10, 14 N. E. 733;

Zimmerman v. State, 115 Ind. 129, 17 N. E. 258; *Markley v. Rudy*, 115 Ind. 533, 18 N. E. 50; *Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253, 21 N. E. 977; *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. 259; *Carroll County v. Justice*, 133 Ind. 89, 30 N. E. 1085; *Huntington County v. Heaston*, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651; *Chicago & E. R. Co. v. Huntington*, 149 Ind. 518, 49 N. E. 379; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *Gaff v. State*, 155 Ind. 277, 58 N. E. 74; *Clifford v. York County*, 59 Me. 262; *Buckingham v. Davis*, 9 Md. 324; *Gay v. Minot*, 3 Cush. 352; *Northampton v. Smith*, 11 Met. 390; *Tolland v. Berkshire County*, 13 Gray, 12; *Pearce v. Atwood*, 13 Mass. 324; *Taylor v. Worcester County*, 105 Mass. 225; *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513; *Ames v. Port Huron Log Driving & Boom Co.* 11 Mich. 139, 83 Am. Dec. 731; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Stockwell v. Township Board*, 22 Mich. 341; *Paul v. Detroit*, 32 Mich. 108; *Galbreath v. Newton*, 30 Mo. App. 380; *Russell v. Perry*, 14 N. H. 152; *Sanborn v. Fellows*, 22 N. H. 473; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Stearns v. Wright*, 51 N. H. 600; *State, Tims, Prosecutor, v. Newark*, 25 N. J. L. 399; *Peck v. Essex County*, 21 N. J. L. 656; *Schroder v. Ehlers*, 31 N. J. L. 44; *State, Winans, Prosecutor, v. Crane*, 36 N. J. L. 394; *State, West Jersey Traction Co. Prosecutors, v. Public Works*, 56 N. J. L. 431, 29 Atl. 163; *Foster v. Cape May*, 60 N. J. L. 78, 36 Atl. 1089; *Washington Ins. Co. v. Price*, Hopk. Ch. 1; *Oakley v. Aspinwall*, 3 N. Y. 547; *Converse v. McArthur*, 17 Barb. 410; *Edwards v. Russell*, 21 Wend. 64; *Diveny v. Elmira*, 51 N. Y. 506; *White v. Connelly*, 105 N. C. 65, 11 S. E. 177; *Gregory v. Cleveland, C. & C. R. Co.* 4 Ohio St. 675; *Schroeder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 55 N. E. 158; *Conklin v. Squire*, 29 Ohio L. J. 157; *Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698; *Cleveland v. Tripp*, 13 R. I. 50; *Wetzel v. State*, 5 Tex. Civ. App. 17, 23 S. W. 825; *Templeton v. Giddings* (Tex.) 12 S. W. 851; *Chambers v. Hodges*, 23 Tex. 104; *Taylor v. Williams*, 26 Tex. 583; *State v. Cisco* (Tex. Civ. App.) 33 S. W. 244; *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960; *Barnett v. Ashmore*, 5 Wash. 163, 31 Pac. 466; *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370; *Jefferson County v. Milwaukee County*, 20 Wis. 139; *Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Meyers v. Shields*, 61 Fed. 713; *Aultman & T. Co. v. Brumfield*, 94 Fed. 423; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

Mr. Lawson M. Harvey argued the cause, and, with Messrs. William A. Pickens, Linton A. Cox, and Sylvan W. Kahn, filed a brief for defendants in error:

That this statute of Indiana is not unconstitutional has been repeatedly decided in Indiana.

Adams v. Shelbyville, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932; *Martin v. Willis*, 157 Ind. 153, 60 N. E. 1021; *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149, Affirmed in 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

The decision of the state supreme court will be followed.

French v. Barber Asphalt Paving Co. 181 U. S. 328, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305; *Whitmier & F. Co. v. Buffalo*, 118 Fed. 773; *Gallup v. Schmidt*, 183 U. S. 306, 46 L. ed. 213, 22 Sup. Ct. Rep. 162.

This court will not again consider a question it has directly and specifically decided.

Swope v. Leffingwell, 105 U. S. 3, 26 L. ed. 939; *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97.

The procedure of the trustees cannot render the statute unconstitutional.

Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903.

The decision of a state court rests on a ground of estoppel or waiver of rights which is broad enough to support the decision; hence, a Federal question, if raised, will not be considered.

Schaefer v. Werling, 156 Ind. 704, 60 N. E. 149, Affirmed in 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.* 178 U. S. 280, 44 L. ed. 1068, 20 Sup. Ct. Rep. 931; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64.

The decision of the state court holds that plaintiff in error had a remedy under the laws of the state, and failed to invoke the same.

Smith v. Shank, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932.

In Indiana a remedy by injunction exists to prevent any action by interested trustees.

Carroll County v. Justice, 133 Ind. 95, 30 N. E. 1085.

A petition for injunction before action is an adequate and direct remedy. A defense of the character here made after judgment or assessment is a collateral attack.

Jackson v. Smith, 120 Ind. 521, 22 N. E. 431; *Johnson v. State*, 116 Ind. 375, 19 N.

E. 298; *Jackson v. State*, 104 Ind. 516, 3 N. E. 863; *Kiphart v. Pittsburgh, C. C. & St. L. R. Co.* 7 Ind. App. 124, 34 N. E. 375.

The state court construes such a judgment to be voidable only.

Carroll County v. Justice, 133 Ind. 95, 30 N. E. 1085.

No Federal question is involved in the construction by the state court of a state judgment.

Newport Light Co. v. Newport, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429.

The rule that objection to the competency of an officer to pass on a question of a judicial nature must be made at the earliest opportunity, or is waived, is a matter of state practice and local law, and as such does not infringe any right under the Federal Constitution.

Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28.

This is an established rule of practice in Indiana.

Baldwin v. Runyan, 8 Ind. App. 348, 35 N. E. 569; *Bradley v. Frankfort*, 99 Ind. 417.

If it be found that the state-court opinion does not cover the matter of alleged incompetency of trustees, then the court did not decide this question, and committed no error.

Schaefer v. Werling, 156 Ind. 704, 60 N. E. 149, Affirmed in 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; *Detroit City R. Co. v. Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811.

The Supreme Court of the United States has held that, under the circumstances shown of record here, an injunction is an adequate remedy, and that a constitutional right may be waived by not resorting to a remedy in equity.

Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The supreme court of the state of Indiana has held the statute to be constitutional under which this lien was established and judgment entered for its foreclosure. That court has held that under the state Constitution an assessment arbitrarily by the front foot is unconstitutional, but that the statute in question provides only a rule of prima facie assessment by the front foot, and that such assessments are subject to review and alteration by the common council or board of trustees upon the basis of special benefits received from the improvement, and the common council and board of trustees not only

have the power, but it is their imperative duty, to adjust an assessment to conform to the actual special benefits accruing to each of the abutting property owners. *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114; *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021; *Leeds v. *De Frees*, 157 Ind. 392, 61 N. E. 930; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932.

Schaefer v. Werling, 156 Ind. 704, 60 N. E. 149, has been affirmed upon writ of error by this court, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449, where it was held that the statute in question was not in conflict with the Constitution of the United States, and the principle was reiterated in that case that the construction placed by the highest court of a state upon a statute providing for paving the streets and distributing the assessment therefor was conclusive upon this court. See also *Merchants' & Mfrs.' Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

The amount of benefits resulting from the improvement is a question of fact, and a hearing upon it being assumed, the decision of the board is final. No constitutional question of a Federal nature arises therefrom.

If the board of trustees refuse to hear the owners of property abutting the street improvement, in regard to the subject of benefits, and arbitrarily proceed to levy the assessment solely according to the front foot, the supreme court of Indiana has held that such lot owner was not without remedy, and that he could, by mandamus or injunction, compel a hearing as to the amount of the assessment upon each lot, or prevent the approval of the engineer's report until such hearing had been accorded, and that the lot owner could not waive such a remedy and make the denial of a hearing available as a defense in an action to collect the assessment. *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932. Under the cases above cited this court follows the decision of the supreme court of Indiana upon this question of remedy. The claim set up on the part of the lot owner, that there can be no due process of law under which an assessment can be made which does not provide for a review of such assessment and a hearing by a court, is not tenable. Assuming the necessity of a hearing before an assessment can be made conclusive, the law may provide for that hearing by the body which levies the assessment, and after such hearing may make the decision of that body conclusive. Although in imposing such *assessments[322] the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power, and it is not neces-

sary that in imposing an assessment there shall be a hearing before a court provided by the law, in order to give validity to such assessment. Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned.

In *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 168, 41 L. ed. 369, 392, 17 Sup. Ct. Rep. 56, 67, it was said that—

“Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may subsequently be charged in his property has had a hearing, or an opportunity for one provided by the statute.”

And it was also said in that case that whether a review is or is not given upon any of these questions of fact (that is, as to benefits and the amounts of the assessments) was a mere question of legislative discretion, so long as the tribunal created by the state had power to decide them, and the opportunity for a hearing was given by the act, and that it was not constitutionally necessary in such case to give a rehearing or an appeal.

In *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48, where the law provided for the fixing of water rates by a board of supervisors after a hearing, and without any right of review by any court, it was stated (at page 354, L. ed. p. 176, Sup. Ct. Rep. p. 51) by Mr. Chief Justice Waite, giving the opinion of the court:

[323] “Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. *It is not to be presumed that they will act otherwise than according to this rule.” See *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

The sole remaining question arises upon the allegations contained in the answer and cross complaint, that all the members of the board of trustees were residents of the town and taxpayers therein, and that two members of the board were owners of lots abutting upon the improvement, and assessed therefor at the same rate as the others.

The objection to the tribunal constituted by the legislature of Indiana, which the plaintiff in error makes in this particular instance, is that it results in making a per-

son a judge in his own case, and that hence any judgment of a tribunal thus constituted is absolutely void, and may be attacked, as it is attacked in this case, collaterally. It is said that to impose an assessment, which is the same as a judgment under such circumstances, is to take the lot owner's property without due process of law, and violates thereby the Federal Constitution. We think the first objection, that all of the members of the board of trustees were residents of and taxpayers in the town, is wholly unimportant. We have not the slightest doubt of the power of a legislature of a state, unless hampered by some special constitutional provision, to create a tribunal in a city or town, such as the common council or board of trustees, to make an assessment, and that such assessment would be valid, notwithstanding the fact that every member of the board was a taxpayer of the city or the town. It is a matter of legislative discretion as to how such a board shall be constituted, and we hazard nothing in saying that it is quite common throughout the country for the legislatures of the states to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question. It is not at all analogous, even in principle, to a judge of a court acting in a case in which he was personally interested.

To say that no one who was a taxpayer in a city or town could act in imposing an assessment upon property therein is *to say [324] that the legislature is wholly without power, by reason of the Federal Constitution, to constitute a tribunal to make an assessment where such tribunal is composed of taxpayers in the city or town. This we do not believe. It must frequently happen that a board of assessors for a city, to assess all property for general taxation, will be composed of men who themselves own property in the city and assess the same for purposes of such taxation. Can there be any doubt of the validity of the general assessments under such circumstances? And would not the assessment for taxation of the property of the individual members of the board of assessors, made by the board, be valid if authorized by the statute? See *Brown v. Massachusetts*, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757 (citing 147 Mass. 585, 591, 1 L. R. A. 620, 18 N. E. 587, 150 Mass. 334, 343, 23 N. E. 98.)

Then as to the averment that there was two members of the board who were owners of lots abutting upon the improvement, and were assessed therefor at the same rate as other lot owners. Although it might have been more seemly for those two members, if they recollected the fact of such ownership, to have refused to act in the matter,

yet there is nothing to show that their attention was called to the fact, nor does it appear that any objection was made by plaintiff in error or any one else to their acting, nor that the plaintiff in error was ignorant of their interest at the time when the proceedings were commenced. The state court has held that an assessment for improvements under this statute of Indiana is in the nature of a judgment, and the fact that members of the board who levied the assessment owned property, as stated, would not render the judgment void, but at most, voidable, and that it could not be attacked collaterally. The cases of *Bradley v. Frankfort*, 99 Ind. 417; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431, and *Carroll County v. Justice*, 133 Ind. 89, 30 N. E. 1085, are referred to.

Whether a judgment obtained in a case like this, where two members of a general board created by statute for the purpose of making it had some interest in some of the [325] property subject to the assessment, was a void or voidable judgment, is a proper question for the state court to decide. A state court has the right to place its own construction upon its own judgments, and where, as in a case like this, it holds that the judgment is not void, and that it cannot be attacked collaterally, we ought to follow that determination. *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. ed. 259, 263, 14 Sup. Ct. Rep. 429.

In *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825, which was an assessment case, it was stated by Mr. Justice Harlan, in delivering the opinion of the court (p. 333, L. ed. p. 427, Sup. Ct. Rep. p. 832), as follows

"Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the city of San Francisco, one of the board of commissioners, was himself the owner of a lot on Dupont street, and, for that reason, was incompetent to act as one of the board of street commissioners. . . . In respect to all these and like objections, it is sufficient to say that they do not necessarily involve any question of a Federal nature, and so far as this court is concerned, are concluded by the decision of the supreme court of California."

The provisions of the 14th Amendment do not cover such an objection as is now under consideration. The general system of procedure for the levying and collection of taxes which is established in this country is, within the meaning of the Constitution, due process of law. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658. A provision made by the legislature of a state in relation to the manner of levying an assessment

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for a local improvement is, within this principle, a proceeding for the levying and collection of taxes, and unless it be in violation of some particular provision of the Federal Constitution, it will be upheld in this court. The 14th Amendment, it has been held, legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is offered by the 5th Amendment against similar legislation by Congress; but that the Federal courts ought not to interfere when what *is complained of amounts to the enforcement [326] of the laws of a state applicable to all persons in like circumstances and conditions, and that the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights, such as existed in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

These principles have been reiterated in a series of cases reported in 181 U. S. commencing with *French v. Barber Asphalt Paving Co.* at page 324 (45 L. ed. 879, 21 Sup. Ct. Rep. 625) of that volume.

The facts contained in the objection now under discussion do not, in our judgment, constitute any violation of the Federal Constitution, or result in the taking of the property of the plaintiff in error without due process of law, as that term is understood when used in the Constitution of the United States. We see no error in the record in this case which we can review, and the judgment of the Supreme Court of Indiana is affirmed.

Mr. Justice White concurred in the result.

CHOCTAW, OKLAHOMA, & GULF RAILROAD COMPANY, *Plff. in Err.*,

v.

THOMAS TENNESSEE.

(See S. C. Reporter's ed. 326-334.)

Evidence—sufficiency—error in instructions—when not prejudicial.

1. There was sufficient evidence to demand the submission to the jury of the question of the liability of a railroad company for personal injuries sustained by a head brakeman of a freight train in attempting, at night, to jump upon the pilot of the engine while it was moving very slowly in a newly constructed

NOTE.—On the province of the court and jury in determining the question of negligence—see notes to *Roux v. Blodgett & D. Lumber Co.* 13 L. R. A. 728, and *Emry v. Raleigh & G. R. Co.* 15 L. R. A. 332.

freight yard, and to sustain a verdict in his favor, where there was testimony tending to show that in boarding the pilot the stirrup, which had long been defective, gave way, throwing his foot into one of the unfilled spaces between the ties, from which he could not extricate himself in time to prevent injury; that his action was in the proper discharge of his duties; that the only company rule on the subject warned employees not to jump on or off an engine running at a high rate of speed; and that he was without knowledge of the defect in the stirrup or the condition of the track where he was hurt.

2. Detached and incidental remarks of the court in charging the jury with reference to the obligation of an employer to furnish proper machinery and appliances for his employee, which failed to state that this obligation is satisfied by the exercise of reasonable precaution, are not grounds for reversal, where the true rule on this point was given to the jury in other parts of the charge.

[No. 67.]

Submitted November 10, 1903. Decided November 30, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the District Court of Arkansas in favor of plaintiff in an action to recover damages for personal injuries. *Affirmed.*

See same case below, 53 C. C. A. 497, 116 Fed. 23.

Statement by Mr. Justice **Peckham**:

[327] *The defendant in error commenced this action against the railroad company, plaintiff in error, in the Pulaski circuit court in the state of Arkansas, to recover damages for personal injuries sustained by him by reason of the alleged negligence of the company. He alleged in his complaint that on February 6, 1900, while engaged as head brakeman on a freight train of the defendant company, and while in the discharge of his duty as such, in the town of Argenta, near Little Rock, Arkansas, he attempted to jump upon the pilot of the engine of the train of which he was head brakeman, at a time when the engine was proceeding very slowly (about 4 miles an hour) in the freight yards. That in attempting to jump upon the pilot he stepped on an iron stirrup or step on the pilot or "cow-catcher" of the engine, and where, in the performance of his duty, he was accustomed to step, and by reason of its being in a weak and unstable condition it gave way and precipitated him to the ground, where he became entangled in the ties of the railroad track, and the train ran over his left leg, and bruised and mangled the same so that he was compelled to have it amputated near the knee. He alleged that the defendant was negligent in the construc-

tion of the step, and was negligent in permitting it to stay in a faulty and infirm condition, and the condition of the step was unknown to the plaintiff; that he might have escaped uninjured but for the negligent construction of the track, the ties of which stood up above the ground, so that he was unable to get his foot out in time to prevent the engine from running over his leg and crushing it.

The defendant is a corporation organized and incorporated under an act of Congress, and on that ground removed the case into the United States district court in Arkansas, and thereafter served its answer to the complaint. It denied all negligence, and alleged that the plaintiff was attempting to step upon the front end of the engine, which was unnecessary and which was careless and improper on his part, and that he was not required in the discharge of his duty, nor was it necessary for him to attempt to so ride, and in attempting to do *so he was vio- [328] lating the rules of the company. It denied that the step on the pilot was in a weak and unstable condition or that it gave way and thereby precipitated the plaintiff to the ground, and denied that the condition of the step had anything to do with the precipitation of the plaintiff to the ground, which resulted in his injury, and it denied that the condition of the step was unknown to the plaintiff.

Upon these issues the case came to trial and resulted in a verdict for the plaintiff, which, upon appeal to the circuit court of appeals, was affirmed (53 C. C. A. 497, 116 Fed. 23), and the railroad company then sued out this writ of error.

Mr. Edward B. Peirce submitted the cause for plaintiff in error:

The fact of the accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence.

Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259, 37 C. C. A. 56, 95 Fed. 244.

If the plaintiff was using the step for any other purpose than that for which it was designed, and was injured, he cannot recover, regardless of whether said step was safe or not, or whether the defendant knew, or ought to have known, of the defect or not.

Little Rock & Ft. S. R. Co. v. Townsend, 41 Ark. 382.

Negligence cannot be imputed to the rail-
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road company on account of the construction of the yards for the very obvious reason that it was a clear case of a risk which Tennessee assumed when he entered the employment of the company.

Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 194, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; *Twitcheil v. Grand Trunk R. Co.* 39 Fed. 419; *Mississippi River Logging Co. v. Schneider*, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195; *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50; *St. Louis, I. M. & S. R. Co. v. Robbins*, 57 Ark. 383, 21 S. W. 886; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 128, 7 L. R. A. 283, 13 S. W. 801; *Clark v. Missouri P. R. Co.* 48 Kan. 654, 29 Pac. 1138; *Achison, T. & S. F. R. Co. v. Alsdurf*, 47 Ill. App. 200; *Ragon v. Toledo, A. A. & N. M. R. Co.* 97 Mich. 265, 56 N. W. 612; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Swanson v. Lafayette*, 134 Ind. 625, 33 N. E. 1033; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496, 38 N. E. 52; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 55 N. E. 763; *Seldonridge v. Chesapeake & O. R. Co.* 46 W. Va. 569, 33 S. E. 293; *Baker v. Barber Asphalt Pav. Co.* 92 Fed. 119; *Kohn v. McNulta*, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; *French v. First Ave. R. Co.* 24 Wash. 83, 63 Pac. 1108; *Detroit Crude Oil Co. v. Grable*, 36 C. C. A. 94, 94 Fed. 73; *Little Rock & M. R. Co. v. Moseley*, 6 C. C. A. 225, 12 U. S. App. 514, 56 Fed. 1012; Bailey, Master's Liability for Injuries to Servants, p. 158; *Reed v. Stoekmeyer*, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 189.

Railroad tracks are not ballasted for the purpose of making them safe for the employees of the company to walk thereon, but to make them firm and safe for the passage of trains; and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty to the employees.

Finnell v. Delaware, L. & W. R. Co. 129 N. Y. 669, 29 N. E. 825.

Railway companies have the right to exercise reasonable judgment and discretion in the construction of their roadbeds and safety appliances.

Morris v. Duluth, S. S. & A. R. Co. 47 C. C. A. 661, 108 Fed. 747; *Southern P. R. Co. v. Seley*, 152 U. S. 151, 38 L. ed. 394, 14 Sup. Ct. Rep. 530.

Tennessee was guilty of the grossest and most stupid contributory negligence.

Cunningham v. Chicago, M. & St. P. R. Co. 5 McCrary, 465, 17 Fed. 882; *Chicago & N. W. R. Co. v. Davis*, 3 C. C. A. 429, 10 U. S. App. 422, 53 Fed. 61; *Kresanowski v. Northern P. R. Co.* 5 McCrary, 528, 18 Fed. 229; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *St. Louis & S. F. R.*

Co. v. Schumacher, 152 U. S. 77, 38 L. ed. 361, 14 Sup. Ct. Rep. 479; *St. Louis & S. F. R. Co. v. Marker*, 41 Ark. 542; *Finnell v. Delaware, L. & W. R. Co.* 129 N. Y. 669, 29 N. E. 825; *Morris v. Duluth, S. S. & A. R. Co.* 47 C. C. A. 661, 108 Fed. 747; *Pennsylvania Co. v. Hankey*, 93 Ill. 580; *Andrews v. Birmingham Mineral R. Co.* 99 Ala. 438, 12 So. 432; *Gleason v. Detroit, G. H. & M. R. Co.* 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647; *Kroy v. Chicago, R. I. & P. R. Co.* 32 Iowa, 357; *Thompson v. Boston & M. R. Co.* 153 Mass. 391, 26 N. E. 1070; *Batterson v. Chicago & G. T. R. Co.* 53 Mich. 125, 18 N. W. 584; *Ragon v. Toledo, A. A. & N. M. R. Co.* 97 Mich. 267, 56 N. W. 612; *Chicago & N. W. R. Co. v. Davis*, 3 C. C. A. 429, 10 U. S. App. 422, 53 Fed. 63; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 68; *Lothrop v. Fitchburg R. Co.* 150 Mass. 424, 23 N. E. 227; *Gowen v. Harley*, 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 983; *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 159.

The duty a master owes to its servants is, not to furnish machinery in a reasonably safe condition, etc., but only to exercise ordinary care to furnish machinery, etc., in a reasonably safe condition.

Louisville & N. R. Co. v. Johnson, 27 C. C. A. 367, 53 U. S. App. 381, 81 Fed. 679; *St. Louis, I. M. & S. R. Co. v. Needham*, 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823.

Mr. John W. Blackwood submitted the cause for defendant in error. Messrs. J. E. Williams and J. W. House were with him on the brief:

In viewing the testimony this court will look at the acts of plaintiff in determining whether he was guilty or not from the standpoint of a man of ordinary prudence in the same calling and under the circumstances in which plaintiff was placed.

Kane v. Northern C. R. Co. 128 U. S. 94, 32 L. ed. 341, 9 Sup. Ct. Rep. 16.

The care for a man's personal safety, the love of life, the principle of self-preservation, are enough to keep a person of sane mind from recklessly exposing himself to such danger or peril as would amount to such negligence as would justify the court in declaring, as matter of law, that it was negligence *per se*.

Baltimore & O. R. Co. v. Griffith, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 105.

If the breaking or giving way of the step was not *prima facie* evidence of negligence, it certainly was *prima facie* evidence of a weak or unsafe condition of the step.

Arkansas Teleph. Co. v. Ratteree, 57 Ark. 435, 21 S. W. 1059; *St. Louis, I. M. & S. R. Co. v. Hopkins*, 54 Ark. 209, 12 L. R. A. 189, 15 S. W. 610; *City Electric Street*

R. Co. v. Conery, 61 Ark. 381, 31 L. R. A. 570, 33 S. W. 426; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596, 40 S. W. 108.

Every issue involved in this case was a question for the jury.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; *Washington & G. R. Co. v. McDade*, 135 U. S. 572, 34 L. ed. 242, 10 Sup. Ct. Rep. 1044; *Daley v. American Printing Co.* 150 Mass. 77, 22 N. E. 439; *Myers v. Hudson Iron Co.* 150 Mass. 125, 22 N. E. 631; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; *Kane v. Northern C. R. Co.* 128 U. S. 94, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Dunlap v. Northeastern R. Co.* 130 U. S. 652, 32 L. ed. 1059, 9 Sup. Ct. Rep. 647; *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 105.

Tennessee was not guilty of contributory negligence.

Lockhart v. Little Rock & M. R. Co. 40 Fed. 632; *Donahue v. Boston & M. R. Co.* 178 Mass. 251, 59 N. E. 663; *Missouri P. R. Co. v. McCally*, 41 Kan. 639, 21 Pac. 577; *Northern P. R. Co. v. Nickels*, 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 723.

A person going on the track before a moving train is not, as a matter of law, guilty of contributory negligence.

Warner v. Baltimore & O. R. Co. 168 U. S. 348, 42 L. ed. 497, 18 Sup. Ct. Rep. 68.

It is not negligence *per se* for even a passenger to leave a moving train.

Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423; *St. Louis, I. M. & S. R. Co. v. Cantrell*, 37 Ark. 523, 40 Am. Rep. 105.

Nor is it negligence *per se* for a passenger to board a moving train; but it is a question for the jury.

Baltimore & O. R. Co. v. Kane, 69 Md. 11, 13 Atl. 387; *Johnson v. West Chester & P. R. Co.* 70 Pa. 357; *Swigert v. Hannibal & St. J. R. Co.* 75 Mo. 475; *Stoner v. Pennsylvania Co.* 98 Ind. 384, 49 Am. Rep. 764; *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272; *Jamison v. San José & S. C. R. Co.* 55 Cal. 593; *O'Mellia v. Kansas City, St. J. & C. B. R. Co.* 115 Mo. 205, 21 S. W. 507.

It was for the jury to say whether defendant exercised reasonable care in keeping its tracks in a safe condition for its employees to work upon.

Babcock v. Old Colony R. Co. 150 Mass. 467, 23 N. E. 325; *Donahue v. Boston & M. R. Co.* 178 Mass. 251, 59 N. E. 663; *Harr v. New York C. & H. R. R. Co.* 114 N. Y. 623, 21 N. E. 427.

The servant has the right to assume that the machinery and implements furnished

him by his master are safe and suitable for the business engaged in.

Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Smith v. Peninsular Car Works*, 60 Mich. 508, 27 N. W. 662.

A general opportunity to observe the unsafe machinery, unsuitable rails, or defective roadbeds, is not sufficient to bar recovery, unless the servant actually knows, or by the exercise of reasonable care should know, that the danger was apparent.

Devlin v. Wabash, St. L. & P. R. Co. 87 Mo. 545.

A conductor had passed under an insufficient bridge for three months, and was injured. It was held that he was not chargeable with notice of defect.

St. Louis, Ft. S. & W. R. Co. v. Irwin, 37 Kan. 701, 16 Pac. 146.

The servant stands on a different footing from the master, and, hence, is not bound to the same degree of care in inspecting and investigating the risk to which he is exposed.

Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311.

Nor is the servant bound to investigate for himself a department with which he has nothing to do, and to set up his judgment against that of his master as to the appliances in use.

Devlin v. Wabash, St. L. & P. R. Co. 87 Mo. 545.

The cause of an injury in cases of this kind is for the jury.

Pullman Palace Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601.

Before the court can presume, as a matter of law, that the servant assumed the risk incident to defective machinery, it must appear that he accepted employment with the actual knowledge of such defects, or continued in the service after he knew, or, in the exercise of reasonable care should have known, of same.

Valley R. Co. v. Keegan, 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849; *Highland Ave. & Belt R. Co. v. Miller*, 120 Ala. 535, 24 So. 955; *O'Neill v. Chicago, R. I. & P. R. Co.* 62 Neb. 358, 86 N. W. 1098.

The doctrine of assumed risk has no application when the servant first discovered the defect at the time of the injury.

Missouri, K. & T. R. Co. v. Milam, 20 Tex. Civ. App. 688, 50 S. W. 417; *Saeke-witz v. American Biscuit Mfg. Co.* 78 Mo. App. 144.

The servant's implied assumption of risk is confined to the class of work for which he is employed.

Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187.

Rules habitually disregarded were not binding on the employee, and cannot bar his recovery.

Northern P. R. Co. v. Nickels, 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 721; *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62, 11 S. W. 308; *Smith v. Memphis & L. R. Co.* 18 Fed. 304; *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 348, 3 S. W. 50; *Fay v. Minneapolis & St. L. R. Co.* 30 Minn. 231, 15 N. W. 241.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

This is quite a simple case, although counsel on both sides have exhibited very great industry in presenting in their briefs in the greatest detail the substance of all the evidence that was given upon the trial.

After the evidence was in a motion was made on the part of the defendant company that the jury should be instructed to find a verdict for the defendant, for the reason that there was not sufficient evidence to sustain a verdict for the plaintiff. The denial of this motion brings up the question whether there was sufficient evidence upon which to base a recovery, and it is upon that question that the briefs of counsel have been so full. It is wholly unnecessary to follow counsel in their minute details of this evidence. It is sufficient for us to say that it tended to show the following among other facts:

He was the head brakeman of the train, and as such his particular position, when running into freight yards like the one at Argenta, was on the front of the engine, to [329] enable him *to attend to the switches promptly, as they were encountered, and to prevent the danger of running off the track; that the only rule of the company which was promulgated and which he ever saw in regard to the matter of riding on the pilot of the engine was one warning the employees not to jump on or off an engine when it was running at a "high rate of speed." The plaintiff said that he had never received instructions not to ride on the front end of the engine, but on the contrary had often been commanded by conductors to do so; that on the occasion of the accident the engine was moving very slowly, not more than four miles an hour, and that when the plaintiff attempted to board the pilot of the engine, and received the injury complained of, he was discharging his duty in the proper and customary manner of a head brakeman under like circumstances.

The accident occurred about ten o'clock on a dark night, and the plaintiff carried a lantern to enable him to see to properly dis-

charge his duties in regard to switches; the pilots of freight engines are provided with a step or stirrup on which to place the foot, and where it is customary for the head brakeman to stand when coming into the freight yard under the circumstances detailed, and the engine in question had such a step or stirrup. When the plaintiff attempted on this occasion, after having attended to one of the switches, to get on the engine, then moving about 4 miles an hour, he placed his foot on the step mentioned, and it gave way or went down under him, and his foot came to the ground under one of the ties, the space between the ties not being filled in, and he was unable to get it out in time to prevent being run over. This step or stirrup had been in a defective condition for some time, and it was so loose three or four days prior to the accident that a witness and employee of the defendant had at that time warned a fellow brakeman not to step on it because of the condition it was then in. The plaintiff had no knowledge that the step was out of repair or defective before the accident occurred. This freight yard where the accident occurred had *been [330] constructed a few months before and the company had but just commenced to use it in which to park and make up its trains; that the plaintiff, on account of some physical disability keeping him off the road for a short period before the accident, had run into this yard only once or twice before the accident occurred, and was not very familiar with its condition at the time in question. He had never been on track No. 3, where he was hurt, until the evening of the accident, and he had no information concerning the condition of that track prior to being injured. The plaintiff testified:

"When I stepped on the engine, this step was on the pilot about as wide as my hand. I stepped up on it with the hollow of my foot and leaned over to catch hold of the top of the pilot and my foot went down with the step, and I hallooed as soon as it went down and fell, and I couldn't get my foot out and the pilot run over my leg. My leg got in between the ties and I pulled with all my might to get it out, but I seen I couldn't get it out and just give up and let it go. My foot got hung between the ties, between the bottom of the ties, and held it fast. . . . I hallooed as loud as I could to make the engineer hear me, but he didn't see me. He must have felt that the wheel of the engine hit something because he stopped the engine right where the engineer gets up into the engine. The step of the engine stopped right at me. I hallooed as loud as I could.

When I got my foot caught in there the train ran over me and mashed my leg—mashed it all to pieces; broke the bone, mashed my knee cap all to pieces. I suffered just as near death as any man could suffer and not die. It wouldn't have been as hard to die."

Plaintiff testified that he thought that if the track had been filled in his foot would not have been caught and that he could have extricated himself when the stirrup on the pilot gave way. Other evidence was given on the part of plaintiff of the same general nature.

[331] On the other hand, the defendant gave evidence tending to show that although it was customary to surface up the tracks *in depot yards by filling in between the ties, yet, as this was a new yard, it was in the condition in which newly constructed yards are usually left for some time to permit the water to drain off. Evidence was also given tending to show the impropriety of the plaintiff's attempting to get on the engine while it was in motion, and that it was a violation of the rules of the company.

Taking all the evidence we are of opinion that there was enough to demand its submission to the jury, and if by that body found to be true, it was enough upon which to found a verdict for the plaintiff.

The chief ground upon which the demand for a new trial is founded outside of the above rests upon certain portions of the charge of the court to the jury in speaking of the law relating to the responsibility of an employer to his servant to furnish proper machinery and appliances for his employee. In two or three places, in the course of his charge to the jury upon that subject, the court, in speaking of the testimony in regard to the facts occurring at the time of the accident, said that the company owed to its employees the duty of furnishing machinery in a reasonably safe condition and a reasonably safe place for the servant to work in the discharge of his duties, and a failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts of negligence do not contribute to the accident.

The fault found with this observation is that the court should have added that the company did not absolutely guarantee to furnish its employees a reasonably safe place to work and reasonably safe machinery with which to discharge their duties, but that it fulfilled its obligations if it observed reasonable care to furnish its employees those reasonably safe places to work, etc.

It need not be questioned that the charge of the court, without the limitation pro-

posed, was an erroneous exposition of the law. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 457, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618, and cases cited. A careful reading of the charge, however, shows that upon the particular occasions when these remarks were made the judge was endeavoring to draw the attention of the jury more to the question whether the defendant had in fact furnished machinery in a reasonably safe condition than to the question of its obligation to use due diligence to furnish the same.

An exception was taken to but one of the remarks of the court upon this particular subject, and if the defendant had felt that there was really any danger of any misunderstanding of the rule which should govern the jury, a request to the court to restate the rule, with his attention specially called to the defective portion of the charge, would, without doubt, have received the immediate attention of the court, and obtained a charge upon the subject as requested. We say that, because in looking through this charge it is perfectly plain that the court understood the true rule that it was necessary to show that the company had been negligent in not taking reasonable precautions to furnish proper machinery and appliances in order to become liable for the injury sustained by the employee. The jury were told by the court that, in order to find the defendant liable, it must determine from the evidence whether the step or plate in front of the engine and attached to the pilot, and which plaintiff tried to step on at the time of the accident, was, by reason of the defendant's negligence, insecurely fastened, and that by reason of its being insecurely fastened the plaintiff fell and was injured as alleged.

The court also charged the jury that, unless it was shown by the evidence that the employer or master was guilty of negligence in its failure to provide such a safe place for the servant to perform his duties as, under like conditions, others in similar businesses are in the habit of furnishing, the defendant would not be liable. He further said that it was left to the judgment of the jury to determine from the evidence whether the railroad company was guilty of negligence in allowing at that time and place the track to remain with the *spaces between the cross[333] ties unfilled, and that they were to consider the fact that this yard had but recently been made, and that was a pertinent fact in relation to the question of the negligence of the company.

Again, the court at almost the end of his

charge stated that if this plate had been properly fastened when the train left for its destination, and had been inspected at a proper and suitable time by the defendant, and was found to be in perfect condition, and that within a short time before the accident occurred something unknown or unforeseen had caused it to become loose, "Then, gentlemen of the jury, they would not be guilty of negligence, because then they would have exercised due diligence for the purpose of ascertaining whether everything was in perfect order."

And once more the court said:

"Now then, that you are to consider:

"If you find that it has exercised due diligence, such as any ordinary reasonable man would exercise in matters of that kind, then it would not be liable.

"But, on the other hand, if they had not, and it was loose, or if it was loose at such time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable.

"Of course, so far as the railroad company is concerned, it does not, in any event, become the insurer of its servants' or employees' safety, regardless of its own diligence; all it undertakes to do is to keep the machinery and its right of way and place where they work in good and proper order, and use such diligence as a prudent man and careful man would use. And the company is not liable for any defect of which an employee has knowledge at the time."

These observations were at the very conclusion of the charge.

[334] We think it clearly appears that the right directions were given to the jury in regard to the legal responsibility of the defendant, and that the detached and incidental remarks made *in regard to such liability, where they failed to state the proper limitation of liability, were used under such circumstances as to make it absolutely certain that the jury were not misled thereby.

Many exceptions were taken in regard to the admissibility of evidence during the trial of the cause, and to the refusal of the court to charge as requested by the defendant. We have examined them all and are entirely satisfied that no error was committed by the court in the disposition it made of them. Many of the requests to charge were covered by the charge of the court actually given, and many others were but partially correct, and so mingled with erroneous statements of the law as to warrant the court in rejecting them.

The judgment of the Circuit Court of Appeals for the Eighth Circuit, must, therefore, be affirmed.

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CHOCTAW, OKLAHOMA, & GULF RAILROAD COMPANY, *Plff. in Err.*,

v.

WILL HOLLOWAY.

(See S. C. Reporter's ed. 334-340.)

Negligence—instructions—proximate cause.

1. A charge upon the subject of the knowledge by a fireman of the absence of brakes on the engine on which he had ridden 50 or 60 miles is not erroneous, where it amounts solely to a direction to the jury that the man was bound to use his eyes, and if, by their use, he could see the defect, he was bound thereby, even though he had not observed it; but that he was not bound to make a careful examination of every part of an engine upon which he was fireman, in order to charge the railway company with negligence, or exonerate himself from the charge of contributory negligence.
2. The court need not charge the jury that an employer is bound to exercise reasonable care to furnish its employees reasonably safe machinery where the uncontradicted facts show that it had not furnished such a machine, and there was no evidence that it had exercised ordinary or reasonable care to do so, but, on the contrary, there was unexplained and uncontradicted evidence to show that it had not exercised such care.
3. The absence of a brake from an engine, the presence of which would have prevented a collision with a horse on the track, is the proximate cause of the resulting derailment.

[No. 68.]

Submitted November 10, 1903. Decided November 30, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the District Court of Arkansas in favor of the plaintiff in an action to recover damages for personal injuries. *Affirmed.*

See same case below, 52 C. C. A. 260, 114 Fed. 458.

The facts are stated in the opinion.

Mr. Edward B. Peirce submitted the cause for plaintiff in error:

The fireman was chargeable with knowledge that there were no brakes on the engine.

Fordyce v. Edwards, 60 Ark. 441, 30 S. W. 758, 65 Ark. 98, 44 S. W. 1034.

NOTE.—*On volenti non fit injuria as a defense to actions by injured servants*—see note to *O'Maley v. South Boston Gaslight Co.* 47 L. R. A. 161.

As to contributory negligence in entering or remaining in an employment—see note to *Llmborg v. Glenwood Lumber Co.* 49 L. R. A. 33.

Respecting proximate cause in case of concurring negligence of third person—see note to *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 17 L. R. A. 33.

The alleged defect as to the brakes was not the proximate cause of the injury.

Missouri P. R. Co. v. Moseley, 6 C. C. A. 641, 12 U. S. App. 601, 57 Fed. 926; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 951; *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 158; *Dickson v. Omaha & St. L. R. Co.* 124 Mo. 140, 25 L. R. A. 320, 27 S. W. 476.

The duty the master owes to his servants is not to furnish machinery in a reasonably safe condition, but only to use reasonable or ordinary care to furnish machinery in a reasonably safe condition.

Louisville & N. R. Co. v. Johnson, 27 C. C. A. 367, 53 U. S. App. 381, 81 Fed. 680; *St. Louis, I. M. & S. R. Co. v. Needham*, 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823; Bailey, Master's Liability for Injuries to Servant, pp. 2, 3.

Mr. John W. Blackwood submitted the cause for defendant in error. Messrs. M. House and J. W. House were with him on the brief:

The burden of proof is on the master to show that the servant knew of the defects or want of brakes.

Ford v. Chicago, R. I. & P. R. Co. 106 Iowa. 85, 75 N. W. 650.

When the jury are permitted to view the subject-matter in controversy, their finding must be conclusive.

McReynolds v. Burlington & O. River R. Co. 106 Ill. 152; *Omaha & R. Valley R. Co. v. Walker*, 17 Neb. 432, 23 N. W. 348; *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 323.

The instructions of the court were much more favorable to the defendant than they should have been.

Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645, 25 N. E. 378; *Inter State Consol. Rapid Transit R. Co. v. Fox*, 41 Kan. 715, 21 Pac. 797; *Houston & T. C. R. Co. v. O'Hare*, 64 Tex. 600; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044.

Although the servant may know of the defects, yet, if the danger was not so obviously hazardous that a reasonably prudent man would not have taken the risk, the master is liable if injury occurs by reason of such defects.

Miller v. Union P. R. Co. 4 McCrary, 115, 12 Fed. 600; *McDermott v. Hannibal & St. J. R. Co.* 87 Mo. 285; 12 Am. & Eng. R. Cas. N. S. 672, note; 20 Am. & Eng. R. Cas. N. S. 278, note; *Northern P. R. Co. v. Egeland*, 5 C. C. A. 471, 12 U. S. App. 271, 56 Fed. 200; *Northern P. R. Co. v. Egeland*, 163 U. S. 93, 41 L. ed. 82, 16 Sup. Ct. Rep. 975; *St. Louis, I. M. & S. R. Co. v. Riekman*, 65 Ark. 138, 45 S. W. 56; *Little Rock*

& *M. R. Co. v. Barry*, 58 Ark. 198, 25 L. R. A. 386, 23 S. W. 1097; *Felton v. Harbeson*, 44 C. C. A. 188, 104 Fed. 737.

If the master knowingly furnishes the servant with defective machinery, and the servant uses such machinery under the orders of the master, and is injured, the master is liable, unless the machinery is so obviously dangerous that a reasonably careful man would not undertake the work.

Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 207, 9 S. W. 589; *Northern P. R. Co. v. Everett*, 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474.

The fact that some other cause operates with the negligence of the defendant in producing the injury does not relieve the defendant from liability. The master's wrong combining with some other cause, and both operating proximately at the same time in causing an injury, the master is liable.

16 Am. & Eng. Enc. Law, p. 440; 2 Thomp. Neg. 1085, § 3; Bishop, Noncontract Law, 39, 450, 452; Shearm. & Redf. Neg. 31; *Eaton v. Boston & L. R. Co.* 11 Allen, 500, 87 Am. Dec. 730; *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395; *Carterville v. Cook*, 129 Ill. 152, 4 L. R. A. 721, 22 N. E. 14; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352, 18 N. W. 764; *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456; *Johnson v. Chicago, M. & St. P. R. Co.* 31 Minn. 57, 16 N. W. 488; *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; 1 Thomp. Neg. last ed. § 56; *Magee v. North Pacific Coast R. Co.* 78 Cal. 430, 21 Pac. 114.

When it is shown that the master has knowledge of the defect of the machinery in use by the servant, then he is negligent, and the question of the use of ordinary care in furnishing reasonably safe machinery is no longer one to be considered.

Peirce v. Clavin, 27 C. C. A. 227, 53 U. S. App. 492, 82 Fed. 552; *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 570; *Savannah & S. R. Co. v. Pughsley*, 113 Ga. 1012, 39 S. E. 473; *Bussey v. Charleston & W. C. R. Co.* 52 S. C. 438, 30 S. E. 477; *Portland Gold Min. Co. v. Flaherty*, 49 C. C. A. 361, 111 Fed. 317; *St. Louis, I. M. & S. R. Co. v. Needham*, 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 825; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 84, 39 L. ed. 629, 15 Sup. Ct. Rep. 491; *Rogers v. Marshal*, 1 Wall. 644, 17 L. ed. 714; *Evanston v. Gunn*, 99 U. S. 660; 25 L. ed. 306; *Tweed's Case*, 16 Wall. 504, 21 L. ed. 389; *Hemmingway v. Chicago, M. & St. P. R. Co.* 72 Wis. 42, 37 N. W. 804; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 293.

Mr. Justice **Peckham** delivered the opinion of the court:

Holloway, the plaintiff below, brought this action in a state court of Arkansas, against the railroad company, to recover damages for personal injuries alleged by him to have been sustained through the negligence of the company while he was in its employ and acting as fireman on one of its engines. The action was removed into the United States district court in Arkansas, on account of the company being incorporated under an act of Congress.

Upon the trial the jury found a verdict for the plaintiff, and upon writ of error from the circuit court of appeals the judgment entered upon the verdict was affirmed (52 C. C. A. 260, 114 Fed. 458) and the company has brought the case here for review.

The amended complaint alleged that the plaintiff was, on October 27, 1900, in the employ of the defendant company as a fireman, and that on the night of October 31, 1900, while he was so engaged, the engineer of the engine on which he was employed received orders from his superior officer, directing him to back up his engine (consisting of an engine and tank or tender) from Brinkley east to Hulbert, a distance of about 60 miles, and that upon receiving the orders the engineer and the plaintiff requested that they be permitted to reverse or turn the engine so that the headlight would be in front [336] and *the tender or tank in the rear, and they would thereby be enabled to run the same with greater safety; but this request was refused, and they were directed as stated; that, in obedience to the orders, they left Brinkley about 11 o'clock at night, and continued to run the engine backward until it reached a trestle about 13 miles east of Brinkley, when they ran upon and collided with a horse upon the said trestle, without fault upon their part, and the switch engine was derailed, and plaintiff caught between the tank or tender and the engine, and seriously and permanently injured.

One ground upon which negligence of the defendant was founded was, as alleged in the complaint, the bad condition of the brakes on the engine, which it was alleged were not in a condition to work; that the same were out of repair, and that there were no brake shoes on the brakes of the engine, and as a consequence the engine brakes could not be worked, and therefore when the engineer discovered the horse on the track, and applied the air brakes, those on the wheels of the tank or tender were successfully applied, while, on account of the absence of shoe brakes on the engine, the brakes could not be worked, and the effect of applying the air brakes was to stop the tank or tender without having any effect on the engine, and

the engine was therefore forced with all its weight and momentum against the tank or tender, thereby breaking the cast-iron connection between the engine and tank or tender, and bringing the ends of the engine and tank close together; and as the plaintiff was attempting to escape by going out between the ends of the engine and tank, he was caught between the same and thereby injured; that he had only been on the engine for a few hours and knew nothing of the dangerous condition of the engine brakes.

These various allegations of the ignorance of the plaintiff, and of orders given to back the engine, were denied by the defendant. The company averred that the engine had no brakes whatever on it, and that the brakes on the tender or tank were in good working condition, and it denied that it was *in any-[337] wise guilty of negligence which caused the injury. It also averred that if the plaintiff sustained any injury it was due to his own carelessness or negligence, and was the result of a risk assumed by him for which the defendant was not liable.

The chief defense was founded on the allegation that the plaintiff assumed whatever risk there was in his occupation of fireman on the engine in question, and that he in fact knew perfectly well that the engine had no brakes, and that he could not but have observed that fact on a ride of 50 or 60 miles, which he had taken on the engine prior to going out on it the evening in question.

The plaintiff, however, swore distinctly that he did not know of the absence of brakes on the engine. By the consent of the parties, the jury viewed the locomotive, and the court gave the jury instructions in relation to that matter, and told them that in examining the engine—

"You will go inside and try to put yourselves only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed for several hours doing work on the engine as a fireman,—that is, whether he could easily see them by just keeping his eyes open."

And the court also stated:

"A man cannot shut his eyes and say he don't want to see anything which a reasonable man could not help but see if he keeps his eyes open.

"Now, if for that reason—that is, if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that plaintiff did for six hours, from Hulbert to

Brinkley, before he went back again before the accident happened—that is perfectly obvious to a man who is fireman and traveling [338] for six hours (without hunting for it), *then the court will tell you that he had knowledge of, and ought to have known it, and he is chargeable with it as if he had known it.’

Taking the whole charge together upon the subject of the knowledge by the plaintiff of the absence of brakes on the engine, we think there was no error in the judge’s charge. It amounted simply to a direction to the jury that the man was bound to use his eyes, and if by their use he could see that the machinery was defective, he was bound by that fact, even though in truth he had not observed it; but that he was not bound to make a careful examination of every particle of an engine upon which he was fireman in order to charge the defendant with negligence or to exonerate himself from the charge of contributory negligence.

Upon the subject of the duty of the defendant to furnish safe machinery, the court said:

“By the laws of the country the defendant was bound to furnish its employees working tools which were reasonably safe, and a place to work in which was reasonably safe. If it does that, then it has discharged its duty, and in case of accident to one of its employees it is not liable for the injuries sustained by him.”

Freed from the surrounding facts, and viewed simply as an abstract proposition, it might be maintained that the court erred in its charge that the company was bound to furnish its employees working tools which were reasonably safe and a place to work in which was reasonably safe, and when it has done that it has discharged its duty. The charge left out the condition that an employer is only bound to take ordinary and reasonable care, as applied to the circumstances under which the liability arises, to furnish reasonably safe appliances and machinery. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 218, 25 L. ed. 612, 615; *Union P. R. Co. v. O’Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618. But the fact that the company had failed to supply such a machine because of the absence of brakes had [339] been fully proved by uncontradicted *evidence, and, indeed, was conceded by the company. The circumstances, unexplained, were such as to make the omission to furnish a brake for the engine prima facie negligence on the part of the company. It was unexplained by any evidence, and remained as a fact proving negligence. There was no occasion, therefore, to call attention to the fact that the company was only bound to exercise reasonable care to supply a reasonably safe engine, because the uncontradicted facts

showed it had not furnished such an one, and there was no evidence that it had exercised ordinary or reasonable care to furnish it, but on the contrary there was evidence to show that it had not, and it was unexplained and uncontradicted. The failure of the court to call the attention of the jury to this limitation of liability was unimportant because of the evidence already given, which showed the defendant had not complied with the limitation.

It is insisted, however, on the part of the defendant, that the court erred in not holding that the absence of brakes on the engine was not the proximate cause of the injury; that the presence of the horse on the trestle was the proximate cause of derailing the tender and engine, and that the company was not guilty of any negligence by reason of which the horse came upon the trestle.

We think this claim is unfounded, and that the proximate cause of the injury within the meaning of the law was the absence of the brakes on the engine. At any rate, there was evidence which made it a question for the jury to say whether the accident would have happened if there had been brakes on the engine in good order and fit for use.

It may be assumed that there was no negligence on the part of the defendant by reason of which the horse came upon the trestle, and that it was not, therefore, responsible for any damage of which the horse was the sole and proximate cause. We think one proximate cause of the accident was the absence of the engine brakes. The purpose of a brake is to stop the engine more promptly than can be done without it, and *if there [340] had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident, was, therefore, a proximate cause thereof. If an obstacle on the track which necessitates the using of the brake is to be regarded as the sole proximate cause of an accident which occurs only because there was no brake on the engine, the result would be that the company would never be liable, no matter what its negligence in not providing effective brakes, so long as its own negligence did not cause the presence of the obstacle on the track. This cannot be true.

The obstacle is one of the things which caused the necessity to use the brake, and it is the neglect of the company in not furnishing the brake which constitutes an immediate and proximate cause of the injury.

The finding of the jury under the instructions of the judge must be regarded as finding that the accident would not have oc-

curred if there had been a brake on the engine.

These are the principal objections to the judgment under review. The other matters appearing in the record we have examined, but do not find that they are of sufficient importance to require any further notice. *The judgment of the Circuit Court of Appeals for the Eighth Circuit is, therefore, affirmed.*

ment of the District Court for the District of New Jersey, entered upon an award of the jury in condemnation proceedings. *Affirmed.*

See same case below, 57 L. R. A. 932, 50 C. C. A. 597, 112 Fed. 893.

Statement by Mr. Justice **Peckham**:

The plaintiff in error has sued out this writ for the purpose of reviewing a judgment of the United States circuit court of appeals for the third circuit, which affirmed a judgment of the district court of New Jersey, awarding damages to plaintiff in error for the taking of certain property of his on the Delaware river, near Fort Mott, in that state. The award of the jury was, in the opinion of the plaintiff in error, entirely inadequate as just compensation to him as the owner of the land for its taking by the government.

Pursuant to an act of Congress, approved August 18, 1890 (26 Stat. at L. 315, chap. 797, U. S. Comp. Stat. 1901, p. 2518), making appropriations for fortifications and *other works of defense, and, also, under [342] other acts of Congress and an enabling act of the state of New Jersey, the United States district attorney for that state commenced these condemnation proceedings. At the time of their commencement the plaintiff in error was the owner of three separate and independent, although adjoining, farms or tracts of land, known respectively as the "Dunham," the "Gibbons" and the "White" farms. It is the Gibbons farm which is taken by these proceedings.

Under the New Jersey practice in condemnation matters, the United States district court for the district of New Jersey duly appointed three commissioners to appraise the value of the land in question, which they did, and made their report July 16, 1900, in which they reported that they had appraised the value of 41.75 acres of land to be taken at the sum of \$500 per acre, or a total sum of \$20,875, and they fixed the damages sustained by reason of the taking of that land for the purposes stated, to the remaining tracts of land, at the sum of \$12,953. An appeal from the award of the commissioners was duly taken in behalf of the United States to the United States court for the district of New Jersey, and in accordance with the practice an issue was framed to be tried before the court and jury as a proceeding *de novo*. The issue as presented for trial was "Whether the sum of \$500 per acre—in all, the sum of \$20,875—is a just and equitable estimate or appraisal of the value of the said 41.75 acres of land required to be taken for the purposes aforesaid, and whether the damages sustained by reason of the taking of the said 41.75 acres, by the United

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[341] *EDWARD S. SHARP, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 341-357.)

Eminent domain—evidence of value—offers to purchase—record on appeal—damages to adjacent property—instructions.

1. The testimony of an owner of real property of offers to purchase the same for hotel, residential, or amusement purposes, or for a ferry, or a railroad terminal, or to lease the property for hotel purposes, is inadmissible on the issue in condemnation proceedings as to the value of such property.
2. Statements by the court in his charge which refer to evidence which does not appear in a bill of exceptions not purporting to contain all the evidence, when not excepted to nor corrected by counsel, will be taken as supplementing the evidence in the record.
3. Just compensation to the owner of three absolutely separate and independent, though adjoining, farms, one of which only was taken in condemnation proceedings, does not demand an award of the damage to the two remaining farms, arising from the proposed use of the condemned property for military purposes.
4. The jury on a trial *de novo* upon an appeal from an award of commissioners in condemnation proceedings are properly instructed that they must be satisfied as to the value and damage by the testimony produced before them, without reference to any testimony produced before the commissioners, and that they must not be influenced by the commissioners' report.

[No. 208.]

Argued October 29, 30, 1903. Decided November 30, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judg-

NOTE.—On evidence of the value of land taken in condemnation proceedings—see notes to San Diego Land & Town Co. v. Neale, 3 L. R. A. 83, and 11 L. R. A. 604.

On damages to remaining property as an element of compensation in condemnation proceedings—see notes to Leroy & W. R. Co. v. Ross, 2 L. R. A. 217, and Gainesville, H. & W. R. Co. v. Hall, 9 L. R. A. 298.

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States for the purpose aforesaid, to the remainder of the tracts of land from which the above-mentioned tract is taken, and its issues, and which the parties in interest will sustain by reason of the premises, amount to the sum of \$12,953, and if not, what is a just and equitable estimate or appraisal of the value of same, and an assessment of damages to be paid by the said the United States of America, for such lands or materials and damages aforesaid?"

[343] *It was also ordered that a jury should be struck, and a view of the premises and property described in the report of the commissioners and in the petition should be had by the jury. This was done and a trial subsequently had. Testimony was taken upon the trial, and by consent of counsel it was agreed that the jury might bring in a verdict stating such a lump sum for the value of the lands and the damages to the adjacent property as they thought was fairly proven from the testimony produced before them.

The jury found and assessed the value of the lands and the damages sustained at the sum of \$12,000, to be paid the plaintiff in error by the United States. Judgment having been duly entered upon the award of the jury, an appeal was taken to the circuit court of appeals, where the judgment was affirmed (57 L. R. A. 932, 50 C. C. A. 597, 112 Fed. 893), and the case is now before us on writ of error sued out by the owner of the land.

Mr. David J. Pancoast argued the case and filed a brief for plaintiff in error:

Every inquisition of damages is made with the use in view to which the land is to be devoted. One use may bring with it important compensations in benefits, while another may be specially injurious far beyond the value of the land taken, and a new use may entirely reverse these conditions.

Cooley, Const. Law, p. 372.

The equivalent to be rendered for the property taken shall be real, substantial, full, and ample.

2 Lewis, Em. Dom. 462.

Where a part of a tract is taken by condemnation, damages to the remaining land shall be given.

Currie v. Waverly & N. Y. Bay R. Co. 52 N. J. L. 392, 20 Atl. 56; 2 Lewis, Em. Dom. p. 464; *Walker v. Old Colony & N. R. Co.* 103 Mass. 14, 4 Am. Rep. 509; 11 Am. & Eng. Enc. Law, 2d ed. p. 1171; *Lincoln v. Com.* 164 Mass. 378, 41 N. E. 489; *Pasadena v. Stimson*, 91 Cal. 259, 27 Pac. 604; *Dodge v. Essex County*, 3 Met. 382; *Comstock v. Clearfield & M. R. Co.* 169 Pa. 582, 32 Atl. 431; *Shano v. Fifth Ave. & H. Street Bridge Co.* 189 Pa. 245, 42 Atl. 128; *Laflin v. Chi-*

cago, W. & N. R. Co. 34 Fed. 860; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 576; *Re Utica, C. & S. Valley R. Co.* 56 Barb. 464; *Newman v. Metropolitan Elev. R. Co.* 118 N. Y. 623, 7 L. R. A. 289, 23 N. E. 901; *Van Schoick v. Delaware & R. Canal Co.* 20 N. J. L. 249; *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495; *Western Pennsylvania R. Co. v. Hill*, 56 Pa. 464; *Gilmorc v. Pittsburgh, V. & C. R. Co.* 104 Pa. 279; *Omaha Southern R. Co. v. Becson*, 36 Neb. 365, 54 N. W. 557; *Oregon & C. R. Co. v. Barlow*, 3 Or. 315; *Snyder v. Western Union R. Co.* 25 Wis. 68; *Little Rock, M. R. & T. R. Co. v. Allen*, 41 Ark. 435.

The price at which a purchaser is willing to buy and the owner is willing to sell is evidence of value.

Five Tracts of Land v. United States, 41 C. C. A. 580, 101 Fed. 661.

The price current and the statement of dealers as to the current prices can be proved to show the value of the articles in question.

Cliquot's Champagne, 3 Wall. 141, 18 L. ed. 120.

Offers in open market are admissible.

Whitney v. Thacher, 117 Mass. 523.

An unaccepted offer to purchase is competent evidence to show marketable value.

Muller v. Southern Pacific Branch R. Co. 83 Cal. 240, 23 Pac. 265; *Harrison v. Glover*, 72 N. Y. 455.

Assistant Attorney General **Purdy** argued the cause and filed a brief for defendant in error:

Offers to purchase lands proved merely by the testimony of the owner are not competent, and should not be received in evidence for the purpose of establishing the market value of such lands.

Fowler v. Middlesex County, 6 Allen, 92; *Wood v. Firemen's F. Ins. Co.* 126 Mass. 316; *Winnisimmet Co. v. Grueby*, 111 Mass. 543; *Davis v. Charles River Branch R. Co.* 11 Cush. 506; *Thompson v. Boston*, 148 Mass. 387, 19 N. E. 406; *Anthony v. New York, P. & B. R. Co.* 162 Mass. 60, 37 N. E. 780; *Cochrane v. Com.* 175 Mass. 299, 56 N. E. 610; *Hine v. Manhattan R. Co.* 132 N. Y. 477, 15 L. R. A. 591, 30 N. E. 985; *Keller v. Paine*, 34 Hun, 167; *Lawrence v. Metropolitan Elev. R. Co.* 15 Daly, 502, 8 N. Y. Supp. 326; *Young v. Atwood*, 5 Hun, 234; *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594; *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *St. Joseph & D. City R. Co. v. Orr*, 8 Kan. 419; *Minnesota Belt Line R. & Transfer Co. v. Gluck*, 45 Minn. 463, 48 N. W. 194; *Louisville, N. O. & T. R. Co. v. Ryan*, 64 Miss. 399, 8 So. 173.

To entitle an owner to recover for damages to the whole tract when a part of his lands have been taken, there must have been

a unity of contiguous parcels. The land must have been used together. All of it must have been used as a single tract.

10 Am. & Eng. Enc. Law, p. 1116; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Ham v. Wisconsin*, 1. & N. R. Co. 61 Iowa, 716, 17 N. W. 157; *Hartshorn v. Burlington, C. R. & N. R. Co.* 52 Iowa, 613, 3 N. W. 648; *Kansas City, E. & S. R. Co. v. Merrill*, 25 Kan. 421; *Cedar Rapids, I. F. & N. W. R. Co. v. Ryan*, 36 Minn. 546, 33 N. W. 35; *Peck v. Superior Short Linc R. Co.* 36 Minn. 343, 31 N. W. 217; *Minnesota Valley R. Co. v. Doran*, 15 Minn. 230, Gil. 179; *Wyandotte, K. C. & N. W. R. Co. v. Waldo*, 70 Mo. 629; *Parks v. Wisconsin C. R. Co.* 33 Wis. 413; *Bigelow v. West Wisconsin R. Co.* 27 Wis. 478; *Lincoln v. Com.* 164 Mass. 368, 41 N. E. 489; *Wilmes v. Minneapolis & N. W. R. Co.* 29 Minn. 242, 13 N. W. 39.

The rule for measuring damages in the state of New Jersey is that, when the whole property is taken, it is its market value, and, when a part only is taken, it is the difference in the value before and after such taking, to be ascertained by the use to which such untaken part can be put.

Henderson v. Orange, 9 N. J. L. J. 71; *Butler Hard Rubber Co. v. Newark*, 61 N. J. L. 32, 40 Atl. 224; *Currie v. Waverly*, & N. Y. Bay R. Co. 52 N. J. L. 381, 20 Atl. 56.

The proceeding before the district court was a trial *de novo*, upon which the findings and award of the commissioners could not properly be considered by the jury in determining the amount of damages.

Metler v. Easton & A. R. Co. 37 N. J. L. 223; *Henderson v. Orange*, 9 N. J. L. J. 71; *Browning v. Camden & W. R. & Transp. Co.* 4 N. J. Eq. 47; *Johnson v. Baltimore & N. Y. R. Co.* 45 N. J. Eq. 454, 17 Atl. 574; *Waite v. Port Reading R. Co.* 48 N. J. Eq. 346, 22 Atl. 261; *Ringle v. Hudson County*, 56 N. J. L. 661, 29 Atl. 483; *Coyner v. Boyd*, 55 Ind. 166; *McKinsey v. Bowman*, 58 Ind. 88; *Bohr v. Neuenschwander*, 120 Ind. 449, 22 N. E. 416; *Corcy v. Swagger*, 74 Ind. 211; *Winklemans v. Des Moines N. W. R. Co.* 62 Iowa, 11, 17 N. W. 82; *Seefeld v. Chicago, M. & St. P. R. Co.* 67 Wis. 96, 29 N. W. 904; *Chicago, K. & N. R. Co. v. Broquet*, 47 Kan. 571, 28 Pac. 717; *Daigneault v. Woonsocket*, 18 R. I. 378, 28 Atl. 346.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The questions to be reviewed by this court arise upon exception appearing in the record taken upon the decisions of the court in relation to the admissibility of evidence, and also to the charge of the court as to the proper items to be considered by the jury in arriving at their verdict.

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The errors assigned and upon which the argument was had in the circuit court of appeals were twelve in number. They are in substance the same here. The first seven refer to the rejection of evidence in regard to offers to purchase the lands from the plaintiff in error. It was held by the trial court, in response to the proposal to give such evidence, that the plaintiff in error could not testify to different offers he had received to purchase the property for hotel, residential, or amusement purposes, or for a ferry, or a railroad terminal, or to lease the property for hotel purposes.

Upon principle, we think the trial court was right in rejecting the evidence. It is, at most, a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his opinion of no value, and inadmissible for that reason. He may have wanted the land for some particular purpose disconnected from its value. Pure speculation may have induced it, a willingness to take chances that some new use of the land might, in the end, prove profitable. There is no opportunity to cross-examine the person making the offer, to show these various facts. Again, it is of a nature entirely too uncertain, shadowy, and speculative to form any solid *foundation for determining the value[349] of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it almost impossible to prove (if it exist) the lack of good faith in the person making the offer, but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not almost impossible, to show. To be of the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. Whether the owner himself, while declining the offer, really believed in the good faith of the party making it, and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark, not intended for acceptance, would also be material upon the question of the bona fides of the refusal. (Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do

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not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject. Especially is this the case when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them. There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc. Evidence of this character is entirely different from evidence as to the price offered and accepted or rejected for articles which have a known and ready sale in the market. The price at the stock exchange of shares of stock in corporations which are there offered for sale or dealt in is some evidence of the value of such shares.

[350] So *evidence of prices current among dealers in those commodities which are the subject of frequent sales by them would also be proper to show value. This evidence is unlike that of offers to purchase real estate, and affords no ground for the admissibility of the latter.

A reference to the authorities shows them to be almost unanimous against receiving evidence of this kind. Counsel have cited many cases on this subject and they are contained in the margin.† Most of them are clearly against the admissibility of the evidence, while some, which at first sight might be regarded as exceptional, will be found upon closer examination to recognize the general rule as already stated.

The next four assignments of error relate to the proper items of damage to be included in the award.

The owner offered to prove the probable use the government would make of the land for military purposes for which it was taken; also, that the use of the land for such military purposes would damage and depreciate the remaining and adjoining land; also, that if the land to be taken was used by the government for military purposes it would endanger the adjoining land of the owner for a long distance and make the removal of his buildings necessary. These offers were rejected, and the court held that the jury should not take into account prospective damages to the remaining and adjoining land of the owner, arising from the

future use of the land sought to be *taken[351] from him for military purposes, although at the same time the court charged, if the evidence showed that by reason of the severance of the farms those which remained were made so small that it would be unprofitable to work them, whatever damage resulted therefrom should be given the owner.

The question in this case arises in a somewhat peculiar way. Under the procedure provided for in the statute of New Jersey upon appeal to the court from the award made by the commissioners, there is to be a new trial of the question as to the amount of damages to which the land owner shall be entitled, and that trial is to be had before a jury under the direction of the judge. For this purpose an issue is to be prepared by the judge in the presence of counsel for trial before the jury. Pursuant to that practice the court did present to the jury an issue for it to decide, which is set forth in the foregoing statement of facts. Counsel for the owner, therefore, contend that, under that issue, the court should have received all evidence offered by the land owner tending to show the damages sustained by him not only by the taking of the land in question, but also damages to the remaining tracts of land by reason of the use which the government would probably make of the land taken.

We are of opinion that the court was not bound to receive evidence upon any subject which it held to be not a proper item to make up the award to the owner. Evidence of some damage to the remaining farms was permitted, as already seen, which might arise by reason of those farms being made so small that they might not be profitably worked, but what particular items of damage were proper to be considered in relation to the remaining tracts were questions primarily for the trial judge, subject to review in due course of procedure.

The important question is as to the admissibility of evidence of damages to the remaining lands of the owner which would probably flow from any particular and probable use by the government of the land to be taken. It is said by the plaintiff in error that just compensation consists not only in an award of the value of the lands which

†Fowler v. Middlesex County, 6 Allen, 92, 96; Wood v. Firemen's F. Ins. Co. 126 Mass. 316, 319; Thompson v. Boston, 148 Mass. 387, 19 N. E. 406; Anthony v. New York, P. & B. R. Co. 162 Mass. 60, 37 N. E. 780; Cochrane v. Com. 175 Mass. 299, 56 N. E. 610; Hine v. Manhattan R. Co. 132 N. Y. 477, 15 L. R. A. 591, 30 N. E. 985; Keller v. Palne, 34 Hun, 167; Lawrence v. Metropolitan Elev. R. Co. 15 Daly, 502; Young v. Atwood, 5 Hun, 234; Parke v. Seattle, 8 Wash. 78, 35 Pac. 594; Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224; St. Joseph & D. C. R. Co. v. Orr, 8 Kan. 419, 424; Minnesota Belt

Line R. & Transfer Co. v. Gluck, 45 Minn. 463, 48 N. W. 194; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399, 8 So. 173.

As distinguished from the general rule, see Whitney v. Thacher, 117 Mass. 523; Cluquot's Champagne, 3 Wall. 114, 141, *sub nom.* 125 Baskets of Champagne v. United States, 18 L. ed. 116, 120; Chaffee v. United States, 18 Wall. 516, 542, 21 L. ed. 908, 912, explaining Cluquot's Champagne; Muller v. Southern Pacific Branch R. Co. 83 Cal. 240, 23 Pac. 265, overruled by Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224; Harrison v. Glover, 72 N. Y. 451.

[352]are taken, but also of any *damage that may result to the portion of the tract which remains, on account of such taking and on account of the use to which the land taken may, or probably will, be put, and he cites many cases to show the correctness of the rule which he asserts.

Its correctness may be conceded, but what we have to decide is whether the facts in this case bring it within the rule itself. We must see, therefore, what those facts are in order to intelligently determine the applicability of the rule asserted by the plaintiff in error.

It appears that long before the commencement of these proceedings there was a government reservation at this point on the Delaware river, upon which Fort Mott had been erected. This reservation had a frontage on that river, and ran back quite a number of feet, in some places nearly two thousand. Permanent fortifications had already been erected, and placements for heavy ordnance already built on this reservation, together with magazines and other appurtenances for the firing of large guns. The particular tract to be taken, namely, all of the Gibbons farm of 41.75 acres, lies on parts of three sides of the government reservation, and a portion of it fronts on the Delaware river, the same as the reservation itself. It was purchased in 1891 for \$6,000. The Dunham farm, of 80 acres, was purchased in 1880 for \$5,800, by the wife of, and subsequently conveyed by her to, the plaintiff in error; the White farm, also of 80 acres, was purchased in 1899, a little over a month before the commencement of these proceedings, for \$5,200. These three tracts of adjoining land, one of which only was taken, thus appear to have come to the present owner by three separate titles at three distinct times, running over a period of about twenty years. The evidence returned in the bill of exceptions, which does not purport to contain all the evidence given on the trial, does not show very clearly the exact condition of these various tracts at the time of their purchase by the plaintiff in error, but the judge, in his charge to the jury, evidently referred to evi-

[353]dence on this subject *which does not appear in the bill, and was not corrected by counsel, and no exception was taken to the statement. We may, therefore, properly regard his references to the testimony actually given, but part of which does not appear, as correct recitals of the same. The judge stated that the Dunham farm, which adjoins the one taken, has 80 acres in it and 600 feet front on the river. The farm had on it a dwelling house and barns and such buildings as ordinarily and, perhaps, necessarily go with a farm of that size and character in that neighborhood. The land that was pur-

chased in 1891 (the farm to be taken) then had a dwelling house, a barn, a carriage house, and such outbuildings as ordinarily go with a farm of that size and character. Then the White farm consisted of 80 acres, and had a farm house on it and buildings but no water front, and one had to go through a lane of some kind to get to it. The testimony was, as stated in the judge's charge, that these farms, including the White farm up to 1899, when it was purchased by the plaintiff in error, were always worked separately, each having its separate dwelling house and outbuildings. It must be assumed that the statements of the court were correct statements of the testimony. If not, the bill of exceptions should have shown it, and some question made at the time in regard to the erroneous character of the charge upon the facts. Error must appear in the record, and cannot be presumed.

The map contained in the record shows a highway between these tracts. From all the evidence which can be gathered from the record it plainly appears to us that these tracts of land were absolutely separate and independent farms, having no necessary relation with each other, and the farming on each had been conducted separately, and each farm had its own house and outbuildings. It is these facts which form the foundation of the charge of the court to the jury.

We are, therefore, not only permitted but bound to regard the evidence in the record as supplemented by the statement of the evidence by the court.

Upon the facts which we have detailed, we think the plaintiff *in error was not entitled [354] to recover damages to the land not taken because of the probable use to which the government would put the land it proposed to take. If the remaining land had been part of the same tract which the government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the government, would be a proper subject of award in these condemnation proceedings. But the government takes the whole of one tract. If the evidence were such as to leave it a matter of some doubt whether the land owned by the plaintiff in error were one tract or separated into three separate and distinct tracts, it would be proper to leave that question to the jury, with the instruction that if they found that it was one tract, then damages might be awarded, and refused if they were separate and independent tracts. Upon this subject it was well stated by Judge Gray, delivering the opinion of the circuit court of appeals, as follows:

"Depreciation in the value of the residue of such a tract may properly be considered as allowable damages, in adjusting the com-

pensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between the residue of a tract whose integrity is destroyed by the taking, and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case, and the sound discretion of the court. All the testimony in this case tends to show the separateness of this tract, which was the subject of the condemnation proceedings. It had never been farmed or used in connection with either of the other farms owned by the plaintiff in error. It was in no way reasonably or substantially necessary to the enjoyment of the other two tracts. Separated from it by a public road, the White farm, so called, had only been purchased by plain-[355]tiff *in error ten days before the proceedings for condemnation were begun. The authorities cited by the defendant in error fully support their contention in this respect. In *Currie v. Waverly & N. Y. Bay R. Co.* 52 N. J. L. 392, 20 Atl. 56, cited by counsel for plaintiff in error, for the proposition that where a part of the tract is taken for condemnation, damages to the remaining land shall be given, the court also says: 'It is an established rule in law, in proceedings for condemnation of land, that the just compensation which the land owner is entitled to receive for his lands, and damages thereto, must be limited to the tract, a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance.' It is enough to say that, in our opinion, the two other farms or tracts of land owned by plaintiff in error constituted such separate and independent parcels, as regards the land in question, that they cannot properly be spoken of as the residue of a tract of land from which the land in question was taken."

If A own a single house in a block in a city and the government proposes to take it, is it liable to the owner of the house adjoining for a depreciation in its value by reason of the taking of the house of A for the purposes proposed? In other words, would the government be liable to the owner of land not taken for damages which were incidental because of the use intended by the government of the property it took? In such case no property of the owner of the other land is taken, and although very great dam-

age might be inflicted upon him by the use of the property taken, has he a constitutional right of recompense? It would be within the discretion of Congress to provide that this damage should be paid to the owner of the land not taken, yet still, in proceedings to condemn a property for public use on payment of "just compensation," under the Constitution, we cannot think (in the absence of Congressional action to that effect) that the government would be liable for consequential damages sustained by a party, no portion of *whose property was taken. Al-[356] though the present is not exactly such a case, yet the illustration serves to somewhat bring out the principle under review.

If again, the government seek to take the property of A, consisting of a single house in a city, and he has also acquired, through a separate title and at a different time, houses adjoining, would the government be liable to A for the damage sustained by that other property on account of the use the government proposes to make of the property taken? Or again, if A purchase a block of vacant lots in a city from one source and at one time and erect a row of buildings thereon, and one building the government seeks to take, would the government be liable for the damages sustained by the other houses by reason of the uses to which it would put the building taken? These are questions involving different facts which may possibly show the various difficulties inhering in the subject under some circumstances (see *Lincoln v. Com.* 164 Mass. 368, 41 N. E. 489, and *Wellington v. Boston & M. R. Co.* 164 Mass. 380, 41 N. E. 652); but in the case before us those difficulties do not, in our judgment, exist. There are here separate and distinct farms conducted under the circumstances detailed, and we cannot see that the owner of those separate farms not taken established any right of payment for damages to them arising from the use which the government intended to make of the land it took.

Although denying the right to recover certain alleged damages to the land remaining, the court was not illiberal in the rules it adopted for ascertaining the compensation due for the taking of the land. It permitted the jury to consider not only the purposes to which the land taken had been put, but also, as bearing upon its value, the jury was directed to consider evidence as to the adaptability of the land for other than merely agricultural purposes; that while no merely speculative value was to be placed on the land, this possible adaptability was to be considered, and if, in the judgment of the jury, it was probable that the improvements which had been spoken of in the *testimony[357] would, within some reasonable time, be

made, that was an element which might enter into their calculation in forming their estimate of the value of the land.

Therefore the jury was permitted to take into consideration the future possible building of a railroad in the neighborhood which would pass within a mile or so of Fort Mott, although no steps had yet been taken to build it; still, as there had been some talk of building it, and the railroad might thereafter be built, the jury were instructed that if they thought from the evidence it would be built within a reasonable time, and that if built it would enhance the value of the property, they might take that fact into consideration as giving the then present actual value beyond that of an ordinary farm.

The same instructions were given in relation to a trolley road which it was supposed might be built to run near this land.

The jury was also permitted to consider the adaptability of the land for a hotel or cottage sites, and in addition, as already stated, the court charged that if the evidence showed that by reason of the severance of these farms they were made so small that it would be unprofitable to work them, the jury ought to give the damages arising therefrom.

The last assignment of error arose from the charge of the judge that the jury must be satisfied as to the value and damage by the testimony that was produced before it, without reference to any testimony that was produced before the commissioners, or influenced by the commissioners' report. This instruction we think was clearly correct. The case was tried *de novo* upon the appeal before the court and a jury, and the only testimony to be considered was that which was received on that trial, supplemented by the knowledge obtained by the jury from a personal view of the premises.

Upon a consideration of the whole record, we think, there was no error committed upon the trial of the case before the jury, and *the judgment of the Circuit Court of Appeals for the third circuit, affirming the judgment of the District Court for the district of New Jersey, is, therefore, affirmed.*

[358] *CITY OF OWENSBORO, *Appt.*,
v.
OWENSBORO WATERWORKS COMPANY.

(See S. C. Reporter's ed. 358-372.)

Municipal power to regulate water rates—contract exemption.

1. The power to regulate the rates at which

water shall be furnished to consumers in a municipality, whether furnished by private persons or by the municipality itself, was included in the authority conferred by Ky. act of June 14, 1893, § 3290, on a city of the third class, to provide the city and its inhabitants with water service by contract or by works of its own, and to make regulations for the management thereof, and to fix and regulate the prices to consumers.

2. A municipality is not precluded from exercising the power to fix and regulate water rates, conferred upon it as a city of the third class by Ky. act of June 14, 1893, § 3290, by the provisions of a prior municipal ordinance granting the right to construct waterworks, which gave the grantee "power and authority to make and enforce, as a part of the condition upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law, or provisions of this ordinance."

[No. 58.]

Argued November 4, 5, 1903. Decided November 30, 1903.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree perpetually enjoining a municipality from regulating water rates. *Reversed* and remanded.

Statement by Mr. Justice McKenna:

This is a bill in equity to enjoin the city of Owensboro, Kentucky, from regulating the rates of the appellee, the Owensboro Waterworks Company.

Lawson Reno, police judge of the city, was made a party. The circuit court granted a temporary injunction. Before final hearing, a motion was made before Circuit Judge Lurton to dissolve the injunction, the motion was denied on the ground of the seriousness of the questions involved, and the propriety of following the previous ruling. On final hearing, the injunction was made perpetual against the city, and the bill dismissed as to Lawson Reno. The city then took an appeal to circuit court of appeals. The appeal was dismissed on the ground that the jurisdiction of the circuit court having been invoked *on a constitutional question, the ap-[359] peal should have been taken directly to this court. 53 C. C. A. 146, 115 Fed. 318. The city then brought the case here from the circuit court.

The city asserts the right to regulate the rates of the appellee under a statute of the state. The construction of the statute is contested by the appellee. The appellee urges, besides, that the statute so interpreted violates its contract with the city,

NOTE.—On the legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L. R. A. 177.

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to fix tolls, rates, or prices—see note to Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592.

and that the rates as fixed deprive it (the appellee) of its property without due process of law. These contentions make the issues between the parties. The bill is voluminous. The allegations with which we are concerned are the following: The appellant was created a city by the general assembly of Kentucky in 1866. Its charter was amended in 1882, and it continued under this charter until June, 1893, when it was made a city of the third class under the general laws of the state. These laws provided that "the repeal of any law by the provisions of this law [the charter] shall not in anywise be so construed as to affect any right or liability acquired or accrued thereunder by or on the part of the city, or any persons or body corporate. This law shall not in any manner affect any right, lien, or liability accrued, established, or subsisting under and by virtue of previous charters or amendments thereto, or ordinances passed thereunder; but such right, lien, or liability shall be enforced, and such action or proceeding shall be carried on in all respects as if this law [defendant city's present charter] had not taken effect; nor shall this law be in anywise so construed as to affect the right or liability acquired or accrued under previous charters or amendments thereto, or ordinances passed thereunder on the part of the city or any persons or body corporate." [Ky. Stat. 1899, § 3258.]

The Owensboro Water Company was incorporated in 1876, and its general business was to construct and operate a waterworks plant for the purpose of supplying the city and its inhabitants with water, and it constructed and operated such works under the privilege and authority of an ordinance of the city, passed September 10, 1889. The [360] ordinance had the usual *provision for the use of the streets, and made the duration of the grant identical with the duration of the company. It was provided that the ordinance should be binding upon the city "as a contract in the event" of its written acceptance within ten days after its passage, and "be the measure of the rights and liabilities of the said city and of the water company."

Section 9 of the ordinance was as follows:

"Sec. 9. The said company shall have the power and authority to make and enforce, as part of the condition upon which it will supply water to its consumers, all needful rules and regulations, not inconsistent with the law or provisions of this ordinance."

In June, 1889, the appellee began negotiations with the Owensboro Water Company for the purchase of its franchise and plant, and of all of its contracts with the city, but did not and would not consummate said purchase until the city agreed to grant it (appellee) a franchise and license to maintain

a system of waterworks in the city for a period of twenty-five years, and issue and grant to it in its own right all of the rights and privileges which had theretofore been granted to the water company by the ordinance and contracts of September 10, 1878. On the 3d of June, 1889, the city passed an ordinance approving such purchase, and granted a franchise and license to the appellee to maintain and operate a waterworks plant for supplying the city and its inhabitants with water, and accepted the appellee as the successor of the water company to the contracts between the latter and the city. The ordinance was expressed to be in consideration "of the purchase, by the Owensboro Waterworks Company of Owensboro, Kentucky, of the waterworks of the Owensboro Water Company."

On the 10th of June, 1889, relying upon the ordinance of the 3d, the appellee consummated the purchase from the water company of its works, franchises, and contracts, and received them from that company, and it "has ever since then under the orders and directions" of the city, maintained and extended its system, on account of which it has expended large *sums of money, and its [361] plant is now reasonably worth not less than \$250,000, and could not be constructed for less than that sum.

On the 19th of March, 1900, the city passed an ordinance providing "that hereafter every person, firm, company, and corporation, engaged in the business of furnishing water to consumers thereof in the city of Owensboro, shall furnish the same to consumers thereof for domestic and manufacturing purposes and uses, and for all other purposes and uses, at rates and prices not exceeding the rates and prices herein named fixed, which rates and prices are deemed reasonable and just; that is to say, water shall be furnished to all mills, laundries, saloons, distilleries, breweries, livery stables, ice factories, and manufacturing establishments, hotels, street railway companies, and all factories of every kind at the following named rates."

Then followed a statement of the rates fixed, graduated according to the amount of water consumed or kind or purpose of use. And it was provided (§ 8), "that if any person, firm, company, or corporation engaged in the business of furnishing water to consumers thereof in said city of Owensboro shall demand, charge, exact, or receive, directly or indirectly, of or from any consumer or consumers of water in said city, as consideration or compensation for water furnished or supplied to such consumer, any money, property, or other thing of value over and above or in excess of the rates and

prices for water herein named and prescribed, or shall fail or refuse for ten days, without reasonable excuse, to supply water as prescribed and required in and by section seven (7) of this ordinance; or shall fail or refuse to keep the accounts or the books required to be kept at Owensboro, or make the reports in writing to the common council, as required by section sixth (6th) of this ordinance, such person, firm, company, or corporation so offending shall be fined, upon conviction, in a sum not less than ten, and not exceeding fifty, dollars for each offense."

[362] *The ordinance in full is inserted in the margin.†

†An Ordinance to Fix and Regulate Rates, Prices, and Charges for Water Furnished Consumers in the City of Owensboro, and for Other Purposes.

Be it ordained by the common council of the city of Owensboro :

Sec. 1. That hereafter every person, firm, company, and corporation engaged in the business of furnishing water to consumers thereof in the city of Owensboro, shall furnish the same to such consumers thereof for domestic and manufacturing purposes and uses, and for all other purposes and uses, at rates and prices not exceeding the rates and prices herein named and fixed, which rates and prices are deemed reasonable and just; that is to say, water shall be furnished to all mills, laundries, saloons, distilleries, breweries, livery stables, ice factories, hotels, street railway companies, and all factories and manufacturing establishments of every kind, at the following-named rates, subject to the exceptions contained in section two (2) of this ordinance, to wit :

(1) In all cases where the amount of water consumed averages 2,000 gallons per day, or less, estimated by the month, \$.10 per thousand gallons; (2) where the daily consumption of water averages 2,000 gallons, or more, and less than 4,000 gallons, estimated by the month, \$.09 per thousand gallons; (3) where the daily consumption of water averages 4,000 gallons, or more, and less than 10,000 gallons, estimated by the month, \$.08 per thousand gallons; (4) where the daily consumption of water averages 10,000 gallons, or more, and less than 15,000 gallons, estimated by the month, \$.07 per thousand gallons; (5) where the daily consumption of water averages 15,000 gallons, or more, and less than 25,000 gallons, estimated by the month, \$.05 per thousand gallons; (6) where the daily consumption of water averages 25,000 gallons, or more, and less than 40,000 gallons, estimated by the month, \$.04 per thousand gallons; (7) where the daily consumption of water averages 40,000 gallons, or more, estimated by the month, \$.03½ per thousand gallons.

That for the purpose of ascertaining and estimating accurately the quantity of water consumed by consumers in the classification of this section, and the compensation to be paid therefor, it is hereby made the duty of the persons, firms, companies, and corporations, and they shall, on request made in writing, and within thirty days after such request is made, place a water meter, in good condition and repair, in connection with the pipe or main leading into and supplying water to such consumers, and the

It is alleged that the enforcement of the ordinance will cause appellee irreparable injury, and in what manner that will be *done[363] is detailed, and that, appellee "could not, under the most prudent management, earn any per cent upon its investment, but would be compelled to operate its plant at an actual loss."

*For the reasons alleged the ordinance of[361] March, 19 violates the Constitution of the state of Kentucky, and the 5th and 14th Amendments of the Constitution of the United *States. It is also alleged, with much[365] amplification, that the passage of the ordinance was "*ex parte* and partisan," without

said meter shall be kept in good repair by the person, firms, company, and corporation furnishing or supplying the water to such consumers, and the said meters shall be examined and read monthly, for the purpose of ascertaining its condition and the quantity of water consumed.

Provided, that the minimum annual rate to be paid by all consumers of water described in the classifications thereof in this section, per annum, shall be twenty-four (24) dollars; and in no case shall the consumer of water who uses or consumes, annually, 240,000 gallons of water, or less, be charged or pay more or less than twenty-four (24) dollars per annum.

Sec. 2. That water furnished by said persons, firms, companies, and corporations to consumers thereof for domestic purposes and uses where no meter has been put in or attached for ascertaining the quantity of water used, shall be furnished at rates and charges not exceeding or above the following-named rates and charges, per year, to wit :

(1) For each wash stand, wherein warm and cold water, or either, is used, \$2; (2) for each kitchen sink, wherein warm and cold water, or either, is used, \$2; (3) for each bath tub, wherein warm and cold water, or either, is used, \$2; (4) for each water closet and urinal, \$2; for sprinkling premises, lawn, pavement, and street in front of or adjacent to the premises, per annum, \$2.50 for the first 200 square yards or less, \$.01 for each additional square yard; (6) for private dwelling per annum where only one tap or faucet is used, containing four rooms or less, excluding hallways, garrets, bath rooms, water closets, \$2, and for each additional room, \$.50; (7) for each cow, \$1, for each horse, \$1; and for each carriage, buggy, and spring wagon, \$1; (8) for filling cisterns, \$.20 each thousand gallons.

Sub. Sec. 2. And for furnishing water for offices, banks, stores, and other places than residences (above specified in this section), the rates and charges therefor shall be at rates not exceeding or above the following rates and charges, per year, to wit :

For each wash stand, wherein warm and cold water, or either, is used, \$3; (2) for each water closet and urinal, \$3; (3) for hydrant, \$3; (4) for barber shops, for first chair, \$3, for each additional chair, \$1; (5) for blacksmiths, for first forge, \$2, and for each additional forge, \$1; (6) for plasterers, ¼ of 1 cent per square yard; (7) for bricklayers, \$.06 per one thousand brick, sprinkling and laying.

Provided, that any of the consumers embraced in the classification of this section may, in lieu

[366]deliberation or investigation or knowledge, and, besides, the *city had no power to pass the ordinance, and that the latter violates the contract existing between appellee and the city. It is also alleged that financial injury will result to appellee from the enforcement of the ordinance in regard to meters (§ 2), and from the prohibition to collect rates in advance, "except by voluntary consent of the consumer." (§ 3.) Prosecutions are threatened under the ordinance, which will result, it is alleged, in irreparable injury to appellee, and an injunction is hence prayed against the city.

A demurrer to the bill was overruled. An answer was then filed, which denied the allegations of the bill, and justified the action of the city.

Mr. George W. Jolly argued the cause and filed a brief for appellant:

The power of the legislature to delegate to the municipal legislature a sufficient part of the legislative power of the state to enact the ordinance and all other needful local laws cannot be doubted.

Dill. Mun. Corp. 4th ed. § 308; *Hopkins v. Swansea*, 4 Mces. & W. 621; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 758; *Taylor v. Carondelet*, 22 Mo. 105, 17 Am. & Eng. Enc. Law, 230; *Horr*

& B. Mun. Pol. Ord. § 2; *Milne v. Davidson*, 5 Mart. N. S. 409, 16 Am. Dec. 189; *Murphy v. Louisville*, 9 Bush, 196.

There was no surrender of the right to prescribe rates, and no contract to that effect was made.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L. R. A. 177, 34 S. W. 518; *Danville v. Danville Water Co.* 178 Ill. 309, 69 Am. St. Rep. 304, 53 N. E. 118, Affirmed in 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505.

The alleged assignment by the Owensboro Water Company of its franchises, and the transfer of its property to the appellee, are contrary to public policy, *ultra vires*, and void.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 692, 40 L. ed. 856, 16 Sup. Ct. Rep. 714; *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.* 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Noyes*, Intercorporate Relations, §§ 135-139.

If there had been such contract it would not have been transferable.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 656, 39 L. ed. 570, 15 Sup. Ct. Rep. 484.

of the above rates, require the person, firm, company, or corporation furnishing the water to the consumer to attach to the pipe leading into the premises of the consumer a water meter, and it shall be the duty of the person, firm, company, or corporation furnishing the water to attach the said meter within thirty days after said request is made therefor in writing, and thereafter the said consumer shall be charged, and shall pay for the water furnished at the minimum rate of \$12 per annum, and for all water consumed in excess of 120,000 gallons per annum there shall be paid \$.10 for each thousand gallons; but such meters shall not be attached except by the written request of the consumer.

And, provided further, that before meters are attached to or connected with the pipes or mains leading into the premises of any consumer described in the classification of this section, by the person, firm, company, or corporation supplying the water, consent of such consumer shall be first obtained, and if objection shall be made by the consumer, the mayor of the city, upon complaint by the person, firm, company, or corporation furnishing the water, shall summon the consumer to appear before him, and shall hear and determine the matter, and decide whether the meter shall be attached, and his decision shall be final.

If said persons, firms, companies, or corporations furnishing water shall attach a meter in any case to the pipe leading into any consumer's premises, without his consent, or against his objection, and the water annually consumed shall not be as much as 120 gallons, the consumer shall pay for the water actually consumed at the rate of \$.10 per thousand gallons, and no more.

Sec. 3. That water rates may be collected by

said persons, firms, companies, and corporations from all consumers falling within the provisions of §§ 1 and 2 of this ordinance who have water meters attached, monthly, quarterly, or semi-annually, at the election of said persons, firms, companies, or corporations furnishing the water, but water rates shall not be collected in advance except by voluntary consent of the consumer.

Water may be shut off from any consumer for nonpayment of water rates, or other sufficient reason, only after ten days' written notice served upon said consumer or his wife, in his absence from home, or in case of absence from premises of both husband and wife, then the said notice shall be delivered by depositing same in the Owensboro postoffice, addressed to said water consumer.

Sec. 4. That if any person, firm, company, or corporation shall be or become a consumer of water, and shall not be included in the classification made and contained in the 2d section of this ordinance, the quantity of water used or consumed by such consumer shall be ascertained by meter, and compensation made therefor at the rates and charges specified in the 1st section of this ordinance.

Sec. 5. That all persons, firms, companies, or corporations furnishing water to consumers in the city of Owensboro, that shall have mains, pipes, and conduits in the streets, alleys, and public ways of the city, shall hereinafter, during the months of April, May, June, July, August, September, October, November in each year, cause all water mains of said persons, firms, companies, and corporations to be washed and cleaned, and for this purpose shall cause all fire hydrants to be open to their full capacity and water discharged from each for at least five minutes once in every two weeks; and during

Mr. Robert W. Bingham argued the cause, and, with *Messrs. W. W. Davies and Sweeney, Ellis, & Sweeney*, filed a brief for appellee:

A municipal ordinance passed under supposed legislative authority is regarded as a law of the state, within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts and otherwise violating rights under the Constitution of the United States.

Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 262, 36 L. ed. 967, 13 Sup. Ct. Rep. 90; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 9, 43 L. ed. 345, 19 Sup. Ct. Rep. 77; *Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 126; *Capital City Gas Co. v. Des Moines*, 72 Fed. 818; *Owensboro v. Owensboro Waterworks Co.* 53 C. C. A. 146, 115 Fed. 318.

A thing which is within the letter of a law is not within the law, unless it is also within the meaning of the law; and the words of a statute, if sufficiently flexible, must be construed in the sense which is most in harmony with that meaning.

Pikes Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 9; 23 Am. & Eng. Enc. Law, 305, notes.

Courts, in construing or interpreting a

statute, give much weight to the interpretation put upon it at the time of its enactment, and since such time, by those whose duty it has been to construe, execute, and apply.

23 Am. & Eng. Enc. Law, 339, note.

The presumption is that the legislature does not intend to change or modify the law beyond what it explicitly declares, either in express terms or by unmistakable implications, for it is not to be supposed that the legislature will overturn an established principle of law without expressing such intention with irresistible clearness.

23 Am. & Eng. Enc. Law, 357, note; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 9.

In order to arrive at the true legislative intent in construing doubtful statutes, that construction should be adopted which is most conformable to reason and justice, and the legislature will not be presumed to have intended that which is against reason.

23 Am. & Eng. Enc. Law, 358, note; *Samuels v. Com.* 10 Bush, 491; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 9.

A statute is not to be construed to interfere with or injure rights of persons without

the months of December, January, February, and March shall, for said purpose, cause all fire hydrants to be open to their full capacity for at least five minutes once in each and every of said months last mentioned.

Sec. 6. That hereafter all persons, firms, companies, and corporations engaged in the business of furnishing water to consumers shall keep an exact, complete, and true account of all its incomes, gains, and receipts from all and every source whatever, in detail, giving all the items thereof, and date of receipt of the same, and an exact, complete, and true account of all expenditures, showing date and amount of each and every item of expense, costs and expenditure and the whole thereof; and the books containing said accounts shall be kept at Owensboro, and shall be open at any time to inspection and examination by the common council or a committee thereof appointed for that purpose, and shall make and return to the common council, at the end of each six months hereafter, on the first day of January and July of each year, a true and complete summary of the same, which shall be verified by the oath of the president, secretary, or treasurer of said persons, firms, companies, or corporations furnishing water, and the said report shall be spread on the journal and filed and preserved by the city clerk in his office.

Sec. 7. That it shall be the duty of any person, firm, company, or corporation engaged in the business of furnishing water to consumers thereof, in the city of Owensboro, through pipes, mains, or conduits laid in the streets, alleys, and ways of said city, to furnish water to all persons who may make application therefor in writing, and within ten days after the date fixed in such written application, and who desire the same furnished in houses or places situated on

any of the streets, alleys, or ways or places in the city, wherein any of the said mains, pipes, or conduits are located or laid, and the said person, firm, company, or corporation shall put down all necessary pipes therefor, at the expense of the person, firm, company, or corporation furnishing the water to the boundary line of the lot or premises of the applicant for water or consumer, and the remainder of the pipes, machinery, or appliances necessary for conveying the water into the houses or upon the premises shall be borne by the said applicant or consumer of water.

Sec. 8. That if any person, firm, company, or corporation engaged in the business of furnishing water to consumers thereof in said city of Owensboro shall demand, charge, exact, or receive, directly or indirectly, of or from any consumer or consumers of water in said city, as consideration or compensation for water furnished or supplied to such consumer, any money, property, or other thing of value over and above, or in excess of the rates and prices for water herein named and prescribed; or shall fail or refuse for ten days, without reasonable excuse, to supply water as prescribed and required, in and by section seven (7) of this ordinance, or shall fail or refuse to keep the accounts, or the books required to be kept at Owensboro, or make the reports in writing to the common council, as required by section six (6) of this ordinance, such person, firm, company, or corporation so offending shall be fined, upon conviction, in a sum not less than \$10 and not exceeding \$50, for each offense.

Sec. 9. This ordinance shall go into full force and effect on and after the 1st day of April, in the year of our Lord nineteen hundred.

Approved, March 21st, 1900.

compensation, unless there is no escape from such construction.

Endlich, *Interpretation of Statutes*, § 25; *State ex rel. Atty. Gen. v. Cincinnati Gas-light & Coke Co.* 18 Ohio St. 301.

The common law will be held to be no further abrogated than is expressly declared, or the clear import of the language used absolutely requires. The law rather presumes that the legislature did not intend to make any change other than what is specified and plainly pronounced. And even the liberal construction of remedial statutes may be modified by this rule.

23 Am. & Eng. Enc. Law, 387, 388; *Smith v. Moffat*, 1 Barb. 65; *Webb v. Mullins*, 78 Ala. 111.

It is a policy of the law to require of municipal corporations a strict observance of their powers. Any doubt or ambiguity arising out of the terms used by the legislature in making a grant of power must be resolved in favor of the public. A power cannot be exercised where it is not clearly comprehended within the words of the chartering or empowering act, or derived therefrom by necessary implication.

Pikes Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 9; *Thomas v. Richmond*, 12 Wall. 349, 20 L. ed. 453; *Commercial Nat. Bank v. Iola*, 2 Dill. 353, Fed. Cas. No. 3,061; *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361; *Daviess County v. Dickinson*, 117 U. S. 657, 29 L. ed. 1026, 6 Sup. Ct. Rep. 897; *Savannah v. Kelly*, 108 U. S. 184, 27 L. ed. 696, 2 Sup. Ct. Rep. 468; *Lewis v. Shreveport*, 3 Woods, 205, Fed. Cas. No. 8,331; *Kelley v. Milan*, 127 U. S. 139, 32 L. ed. 77, 8 Sup. Ct. Rep. 1101; *Norton v. Dyersburg*, 127 U. S. 160, 32 L. ed. 85, 8 Sup. Ct. Rep. 1111; *Wells v. Pontotoc County*, 102 U. S. 625, 26 L. ed. 122; *Concord v. Robinson*, 121 U. S. 165, 30 L. ed. 885, 7 Sup. Ct. Rep. 937; *Katzenberger v. Aberdeen*, 16 Fed. 745; *Wheatly v. Covington*, 11 Bush, 18; *Henderson v. Covington*, 14 Bush, 312; *Kniper v. Louisville*, 7 Bush, 599; *Barnett v. Denison*, 145 U. S. 139, 36 L. ed. 653, 12 Sup. Ct. Rep. 819; *Hill v. Memphis*, 134 U. S. 205, 33 L. ed. 890, 10 Sup. Ct. Rep. 562; *Newport v. Newport Light Co.* 84 Ky. 166, 89 Ky. 454, 12 S. W. 1040.

The police power is inherent in the state (the natural and original sovereign), but in a city (an artificial and restricted sovereign) it exists only so far as the state has clearly granted it by charter or statute, or as it is clearly necessary to, or connected with, the governmental nature of the city in protecting the public health, comfort, morals, convenience, and welfare.

Wheatly v. Covington, 11 Bush, 18; *Henderson v. Covington*, 14 Bush, 312.

The limited, but clear, grant of powers of control over certain kinds of water works excludes control by statutory or police power over the other and separate kind.

Smith, *Modern Law of Mun. Corp.* § 1320; *Horr & B. Mun. Pol. Ord.* § 211.

Mr. **William T. Ellis** also argued the cause, and, with *Messrs. Bingham & Davies* and *Sweeney, Ellis, & Sweeney*, filed a brief for appellee:

The city of Owensboro, at the time it made the contract with the old water company, and at the time it made the contract with appellee, having only the power to establish public wells, cisterns, reservoirs, and pumps, and to provide for the furnishing of the city and the inhabitants thereof with gas and water, had no power or authority whatever to fix the rates at which any corporation, though a public-service corporation, should charge private consumers for water.

Dill. Mun. Corp. 2d ed. § 89; *White v. Meadville*, 177 Pa. 645, 34 L. R. A. 567, 35 Atl. 693; *Re Long Island Water Co.* 30 Abb. N. C. 36, 24 N. Y. Supp. 807; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278, 10 S. W. 197; *Lewisville Natural Gas Co. v. State ex rel. Reynolds*, 135 Ind. 49, 21 L. R. A. 734, 34 N. E. 702; *Henderson v. Covington*, 14 Bush, 312; *Newport v. Newport & C. Bridge Co.* 90 Ky. 194, 8 L. R. A. 484, 13 S. W. 720; *Mayher v. Lexington*, 1 Ky. L. Rep. 68.

Laws which exist at the time and place of making a contract, and at the place where it is to be performed, affecting its validity and construction, enter into and form a part of it.

Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; 1 Beach, *Modern Law of Contracts*, § 734.

No subsequent council could repeal, modify, or impair the terms of the contract made by a previous council, although the general assembly may subsequently have conferred on the city such power, and although the city may, at the time it passed the ordinance, have acted under a power conferred.

Little Falls Electric & Water Co. v. Little Falls, 102 Fed. 663.

No matter how broad the power of appellant under its charter may be with respect to fixing rates to be charged private consumers, if the city had contracted that right away prior to the adoption of its present charter, then the ordinance is void.

Los Angeles v. Los Angeles City Water Co. 177 U. S. 559, 44 L. ed. 887, 20 Sup. Ct. Rep. 736.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

By the act of the general assembly of Kentucky, approved June 14, 1893, the appellant was made a city of the third class, and was given, as a city of that class, the following powers expressed in § 3290: "The common council of each of said cities shall, within the limitations of the Constitution of the state and this act, have power by ordinance; [367]. . . 5th, to provide *the city and the inhabitants thereof with water, light, power, heat, and telephone service by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the prices to private consumers and customers."

Under this section the city passed the ordinance which prescribes the rates and regulations complained of. The circuit court decided that the city was not given the power to pass the ordinance, and considered it unnecessary to pass on the other issues. The court said:

"If the city of Owensboro had no lawful power or authority to pass the ordinance at all, then the enforcement of it would clearly be a taking from the complainant of its right to certain property. First, without compensation; second, without due process of law; third, without giving to it the equal protection of the law.

"This makes it necessary to inquire whether the city had the statutory power and authority to pass the ordinance complained of. It does not seem to be needful to inquire whether the state Constitution gives the general assembly power to delegate authority in the premises to the city. The initial proposition is, Has the legislature done so in fact, whether it had the power or not? This must depend upon the proper interpretation and construction of § 3290 of the Kentucky statutes, . . ."

Interpreting the section, the court held that the word "thereof" in the last sentence of the section had for its antecedent the words "works of its own." Substituting these words for the word "thereof," the sentence would read, and the city's power would be, "to make regulations for the management of *its own works*, and to fix and regulate the prices to consumers and customers." But another ambiguity appears, *viz.*, Of what is the city to fix and regulate the prices? Certainly of something, and it would seem from the context, the same thing, of which it was to regulate the management. But this leads to an absurdity, and we must find a purpose [368] (antecedent) to which *both powers can refer. The city might, indeed, make regulations for the management of its works, but

it could not fix and regulate the prices of them to consumers and customers. Besides, we cannot conceive that an explicit grant of power was necessary to enable the city to manage its own works. The power to construct would have implied the power to manage and operate. It must not be overlooked that the section was intended to apply to not only to the appellant city but to all cities of the third class, and confer power not only to provide water, but other services, and it might have seemed necessary by the legislature, or at any rate prudent, to reserve to the cities the power over the management of works constructed by private persons, and as prudent to reserve a power to fix and regulate the prices to consumers of the services afforded. It is certainly not difficult to conceive the necessity of the exercise of those powers, and if attempted to be exercised without a reservation, the cities might be met (and there are examples of this) with the contention that the power had been bartered away and was precluded by the obligation of a contract. The construction urged by appellee must, therefore, be rejected. There is a more natural one. The purpose of § 3290 was to provide the inhabitants of cities of the third class with the services mentioned,—water, light, power, heat, and telephone. They could be provided by the cities directly or they could be provided by private persons; but whatever way provided, the power was given to regulate the management and fix the rates of the services, and this was but the endowment of a common governmental power.

It is, however, contended that the ordinance is in violation of the contracts between the city and appellee, constituted by the resolutions and ordinance of the 3d of June, 1889. The argument is that the city had entered into contracts with the Owensboro Water Company, the predecessor of appellee, to which contracts and their obligations and rights, it is contended, the appellee succeeded by assignment from the water company, with the consent and approval of the city, as expressed *in the resolutions and [369] ordinance of June 3, 1889. To determine their legal effect, however, it will be necessary to consider the law which authorized them.

At the time of the passage of the ordinance granting the Owensboro Water Company the right to construct waterworks the city existed and was exercising its powers under the charter of 1878, and the provision in that for supplying water to the inhabitants of the city was as follows: "To make, establish, and regulate wells, cisterns, reservoirs, and pumps, and to provide for the furnishing of the city and the inhabitants thereof with water and gas."

The same provision was carried into the charter of 1882, and constituted the authority of the city when the ordinance and resolutions of June, 1889, were passed. It is contended that this provision gave the city no power to fix the rates. And counsel say: "In such case, and in the absence of an express contract, the individual or corporation furnishing water for domestic purposes may charge whatever seems right and reasonable."

But counsel go farther. They deny the right of the city to fix rates, and yet assert its power to enter into an irrevocable contract with the water company giving it such power, that is, giving it power to fix rates free from any regulation by the city, not only under any authority the city then possessed, but under any authority the city might be given by the legislature.

In this contention there are several elements, but we pass their consideration, and determine what contract, if any, the city entered into with the water company. Of course, it is implied in the grant to the company that it might charge some rates to consumers, but the question is, Were those rates exempt from regulation by the city under any power it then had or might be given? An affirmative answer is contended for by the appellee under §§ 9, 10, and 14 of the granting ordinance. Section 9 is the pivotal section. The others are complementary. By it the company was given "power and authority to make and enforce as a part of the condition (italics ours) *upon which it will supply water to its consumers, all needful rules and regulations (italics ours), not inconsistent with the law or provisions of this ordinance." The section is concerned with the rules between the company and consumers alone. The company may enforce all needful rules and regulations as part of the condition upon which it will supply water. What is the other part of the condition? It must be the payment of rates, but to that part of the condition the power to make regulations does not apply. It would ignore the distinctions made by the section, and give, besides, the words "rules and regulations" too large a meaning to make them include the power of fixing rates to consumers. They have adequate and useful signification without that. There were many things in the supply of water to consumers and in the orderly and prudent conduct of the business of the company which might need rules and regulations.

And even so construed, the power conferred is not without limitation. The rules and regulations must not be inconsistent "with the law," and this means not only as the law was when the ordinance was passed,

but as the law might become. *Ruggles v. Illinois*, 108 U. S. 527, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636; 6 Sup. Ct. Rep. 334, 388, 1191. In the latter cases a grant of power to the railroad company was to make and prescribe such by-laws, rules, and regulations which the directors might deem needful and proper touching all matters whatsoever which might pertain to the concern of the company. The company was also given the power "from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad." From this grant of power it was claimed that the company had "the right of managing its own affairs and regulating its charges for the transportation of persons and property, free of all legislative control." Mr. Chief Justice Waite, speaking for the court, replied: "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something *which is in law equivalent. If [371] there is reasonable doubt, it must be resolved in favor of the existence of the power."

This doctrine has been affirmed numbers of times since. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; *Joplin v. Southwest Missouri Light Co.* 191 U. S. 150, ante, 127, 24 Sup. Ct. Rep. 43. And the same doctrine prevails in Kentucky. *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 73S, 33 L. R. A. 177, 34 S. W. 518.

From these views it follows that if the city had no power under the charters of 1836 and 1882 to fix rates, and we only assume this, not decide it, such power was conferred by § 3290 of the act of June 14, 1893, and the city is not precluded from the exercise of that power by §§ 9, 10, and 14 of the original ordinance granting the Owensboro Water Company the right to construct waterworks, nor by the ordinance of June 3, 1889, approving the transfer of the rights and contracts of that company to the Owensboro Water Works Company, the appellee herein. Nor is the city, by said ordinance, precluded from regulating the business of the appellee in the manner provided in the ordinance of March 19, 1900, which is the subject of the present controversy. It is true that it is contended that § 3 of the ordinance forbids the appellee from collecting rates in advance from all consumers. But the city does not contend for that construc-

tion. It claims only that the provision in regard to the collection of rates in advance applies only to consumers using meters, and even as to those consumers appellee can make reasonable regulations to secure the payment of rates. The ordinance is not absolutely clear, and we may resolve its ambiguities in accordance with the concession of the city. It may be presumed that there was no intention to enact unreasonable and oppressive regulations.

Two other contentions remain to be considered,—one made by appellant, and the other made by the appellee. It is difficult to assign a place or purpose in the discussion of the issues to that made by the appellant. The contention is that the Owensboro Water Company had no power to transfer its prop-
[372]erty *and rights and franchises to the appellee. To what consequence is the contention directed? Surely the city wants an object for its regulation. The appellee is in possession of the waterworks, and is supplying the inhabitants of the city with water. It is that service which the city desires to regulate, and it is to "every person, firm, company, and corporation" engaged in that service the ordinance of March 21, 1900, is addressed. No other person, firm, or corporation than the appellee is so engaged in Owensboro, or has been so engaged for some years. We do not think that the legality of the ordinance can be questioned or measured by either the company or the city by the defects or perfections of the title of the company to its franchises or property. It may be, however, that it is not intended to press the contention so far, but to confine it to the denial of the exemption claimed by appellee as successor of the Owensboro Water Company. But, as we hold that the Owensboro Water Company had no such exemption, the contention becomes unimportant.

The other contention made by appellee is that the rates fixed by the city are unreasonable. Upon this contention we shall not pass. It depends upon many questions of fact and of values to which the circuit court gave no attention, and on which it expressed no judgment. It is better for a trial court to determine such questions in the first instance. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 179, 44 L. ed. 417, 422, 20 Sup. Ct. Rep. 336.

Decree of the Circuit Court is reversed, and the case remanded for further proceedings in accordance with this opinion.

191 U. S. U. S., Book 48.

*ANGLO-AMERICAN PROVISION COM-[373]
PANY, *Plff. in Err.*,

v.

DAVIS PROVISION COMPANY.

(See S. C. Reporter's ed. 373-376.)

Full faith and credit—action on foreign judgment.

Full faith and credit are not denied an Illinois judgment by N. Y. Code Civ. Proc. § 1780, which, as construed by the New York courts, precludes the maintenance of an action on such judgment by one foreign corporation against another, because it is not upon a cause of action which arose within the state.

[No. 64.]

Argued November 6, 9, 1903. Decided November 30, 1903.

IN ERROR to the Court of Appeals of the State of New York to review a judgment which affirmed a judgment of the Supreme Court of New York County dismissing on demurrer a suit brought by one foreign corporation against another upon a foreign judgment, which had been affirmed by the Appellate Division of the Supreme Court for the First Judicial Department. *Affirmed.*

See same case below, 169 N. Y. 506, 62 N. E. 587.

The facts are stated in the opinion.

Mr. Henry Wilson Bridges argued the cause and filed a brief for plaintiff in error:

It was the express intention of the Constitution to give the most ubiquitous effect to the public acts, records, and judicial proceedings of the various states.

42 Federalist; *Mills v. Duryee*, 7 Cranch, 484, 3 L. ed. 413.

There is only one exception, apparently, and that is that the states are not compelled to give force and effect, within their jurisdiction, to judgments obtained in another state on the ground of penalty.

The Antelope, 10 Wheat. 66, 6 L. ed. 268.

Corporations have been expressly held to be entitled to invoke the protection of the clause against the inviolability of contract, and have also been held to be included in the term "persons" under the 14th Amendment.

Pembina Consol. Silver Min. & Mill. Co.

NOTE.—As to full faith and credit to be given to state records and judicial proceedings—see *Lindley v. O'Reilly* (N. J.) 1 L. R. A. 79, and note; *Cumington v. Belchertown* (Mass.) 4 L. R. A. 131, and note; *Rand v. Hanson* (Mass.) 12 L. R. A. 574, and note. And see notes to *Wiese v. San Francisco Musical Fund Soc.* 7 L. R. A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; *Mills v. Duryee*, 3 L. ed. U. S. 411.

v. Pennsylvania, 125 U. S. 189, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 757.

Corporations are to be deemed and considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in such statute.

Beaston v. Farmers' Bank, 12 Pet. 134, 9 L. ed. 1029.

The commercial clause of the Constitution applies to corporations.

Paul v. Virginia, 8 Wall. 182, 19 L. ed. 361.

There can be no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it was rendered would pronounce the same decision.

Mills v. Duryee, 7 Cranch, 485, 3 L. ed. 413; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Mutual L. Ins. Co. v. Harris*, 97 U. S. 331, 24 L. ed. 959.

There may be some rights under the Constitution of the United States which a corporation might claim under peculiar circumstances in a state other than that in which it was chartered.

Bank of Augusta v. Earle, 13 Pet. 597, 10 L. ed. 312.

It has been held by this court that a statute of the state of Mississippi, which provided that no action should be maintained in that state on a foreign judgment against a resident in any case where the cause of action would have been barred by any act of limitation of that state (Mississippi) if such suit had been brought therein, was unconstitutional.

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475.

The decision in the case at bar also violates the commercial clause of the Constitution.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 734, 28 L. ed. 1139, 5 Sup. Ct. Rep. 739.

Mr. Frank E. Smith argued the cause, and, with *Mr. Thomas F. Conway*, filed a brief for defendant in error:

The clause of the Constitution in question relates only to the effect of the judgment as evidence.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

The present plaintiff, being an Illinois corporation, is not within the jurisdiction of New York, and so is not entitled to the equal protection of its laws.

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

International comity no doubt accords to

foreign corporations the privilege of suing in the local courts.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274.

The state of New York has recognized this principle, and in express terms opened its courts to foreign corporations, and placed them on the same footing as those of its own creation as regards claims against its own residents, or affecting property within its jurisdiction. This would seem to be all that courtesy requires of it. It has also declared its public policy to be that its courts shall not be vexed with the controversies of strangers originating without its limits.

Robinson v. Oceanic Steam Nav. Co. 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Hocs v. New York, N. H. & H. R. Co.* 173 N. Y. 435, 66 N. E. 119.

So, also, the courts of New York decline jurisdiction of transitory actions between nonresidents based upon personal wrongs done without the state, even when the parties are both natural persons, and, of course, citizens of another state.

Collard v. Beach, 81 App. Div. 582, 81 N. Y. Supp. 619.

There can be no question of the right of a state absolutely to exclude from its territory foreign corporations, excepting, perhaps, those engaged in interstate commerce and those used as instrumentalities of Federal government.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

The right to sue is a franchise conferred upon a corporation by its charter and the law of its creation. How far the law of the state which created it and gave it that right shall be recognized and enforced in another state is for that other state to determine.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274.

Courts being the creation of the state in which they exist, what power they shall possess is, of course, for that state to say.

Missouri v. Lewis, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to the court of appeals of New York. The parties are both Illinois corporations, and the plaintiff in error brought suit in the New York supreme court upon an Illinois judgment. By the New York Code of Civil Procedure, § 1780, it is provided that "an action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in one of the following cases only:

. . . 3. Where the cause of action arose within the state, etc." The other cases are

immaterial. The complaint does not allege that the original cause of action arose within the state, if that would make any difference in the result. The complaint was dismissed by the Supreme Court on a demurrer setting up the above section, and the judgment was affirmed by the appellate division and by the court of appeals. 169 N. Y. 506, 62 N. E. 587. It was argued below that, under article [374] IV., § 1, of the Constitution *of the United States, the state could not thus exclude foreign corporations from suing upon judgments obtained in another state, because to do so was to deny full faith and credit to those judgments. The decision to the contrary is the error assigned.

The state court decides that the cause of action did not arise within the state in the sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States. See *Northern C. R. Co. v. Maryland*, 187 U. S. 258, 267, 47 L. ed. 167, 172, 23 Sup. Ct. Rep. 62. The court also decides that the language quoted goes to the jurisdiction of the court.

We are of opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the Constitution establishes a rule of evidence rather than of jurisdiction. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 291, 32 L. ed. 239, 243, 8 Sup. Ct. Rep. 1370; *Andrews v. Andrews*, 188 U. S. 14, 36, 47 L. ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the state of New York to give jurisdiction to the supreme court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. § 905 (U. S. Comp. Stat. 1901, p. 677). But the Constitution does not require the state to provide such a court. See *Missouri v. Lewis*, 101 U. S. 22, 30, *sub nom. Bowman v. Lewis*, 25 L. ed. 989, 992. If the state does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other states of the Union also would have a right to resort to it in cases of the same class. *Blake v. McClung*, 172 U. S. 239, 256, 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165. But that right, even when the suit was upon a judgment of another state, would not rest on the 1st section of article IV., on which alone the plaintiff relies or can rely, but would depend on the 2d section, entitling the citizens of each state to all privileges and immunities of citizens in the

several states. The plaintiff is not a citizen within this section (*Paul v. Virginia*, *8 [375] Wall. 168, 19 L. ed. 357; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 45, 44 L. ed. 657, 664, 20 Sup. Ct. Rep. 518), and did not set it up. The general power of a state to restrict the right of a foreign corporation to sue in its courts is assumed in *Bank of Augusta v. Earle*, 13 Pet. 519, 589-591, 10 L. ed. 274, 308, 309. As to discrimination against nonresidents, see *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806.

The plaintiff lays great stress upon *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475. In that case suit was brought in Mississippi on a Kentucky judgment against a citizen of Mississippi upon a promissory note made in Mississippi, and payable in New Orleans. A suit upon the note would have been barred by the Mississippi statute of limitations when the suit in Kentucky was begun, and the defendant set up a statute of Mississippi providing that no action should be maintained upon a judgment rendered in such circumstances without the state against a resident of the state. It was held that the statute was void, and that, as the judgment was valid in Kentucky, it could not be treated as invalid in Mississippi. It will be observed that this was a suit by a citizen. There was no suggestion that the statute went to the jurisdiction of the court. Obviously it did not. Indeed, the suit was brought in the United States circuit court. The statute made no discrimination in the right to come into court, according to the character of the plaintiff or of the cause of action, but attempted to create a defense against a plaintiff assumed to have a right to come into court and to invoke the jurisdiction. But when the plaintiff was in court, and exhibited his judgment, it was too late for the state to interfere. In the case at bar the plaintiff had no right to come into the New York supreme court.

What, if any, limits there may be to state restrictions upon the jurisdiction of state courts, when such restrictions do not encounter article IV., § 2, of the Constitution, it is unnecessary to discuss. But we think it too plain for further argument that the New York restriction upon suits by foreign corporations against foreign corporations is not affected by either § 1 or § 2 of article IV. It will be time enough to consider the [376] suggestion that the law is an interference with interstate commerce, within *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 734, 28 L. ed. 1137, 1139, 5 Sup. Ct. Rep. 739, when the record presents it. The question is one of degree, and it is obvious that the supposed interference is very remote. See *Dia-*

mond Glue Co. v. United States Glue Co.
187 U. S. 611, 616, 47 L. ed. 328, 332, 23
Sup. Ct. Rep. 206.

Judgment affirmed.

ANGLO-AMERICAN PROVISION COM-
PANY, *Appt.*,

v.

DAVIS PROVISION COMPANY, Smith M.
Weed, Frank E. Smith, *et al.*

(See S. C. Reporter's ed. 376-378.)

Direct appeal from circuit court.

1. A plaintiff cannot maintain a direct appeal from the Federal circuit court to the Supreme Court under the act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549), because the jurisdiction of the lower court was in issue, where that jurisdiction was sustained and a decree rendered in favor of defendants on the merits.
2. The mere fact that the defeated party in a suit in the Federal circuit court set up the repugnancy of a state law to the Federal Constitution does not authorize him to maintain a direct appeal to the Supreme Court under the act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549), where his contention on that point was sustained.

[No. 63.]

Argued November 9, 1903. Decided November 30, 1903.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree dismissing a bill in a suit on a foreign judgment. *Dismissed.*

See same case below, 112 Fed. 574.

The facts are stated in the opinion.

Mr. Henry Wilson Bridges argued the cause, and filed a brief for appellant.

Mr. Frank E. Smith argued the cause, and with **Mr. Thomas F. Conway**, filed a brief for appellees.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree of the circuit court dismissing the plaintiff's bill. The bill is founded on the matters stated in the preceding case. It alleges that the Davis Provision Company recovered a judgment against the plaintiff, in New York, about a year and a half after the judgment recovered by the plaintiff against the Davis Provision Company in Illinois. It shows the effort of

Illinois judgment, and the action of the New York courts which we have reviewed. It alleges that the two judgments arose out of the same transaction, and that, by reason of the New York decision, the plaintiff is unable to set off the judgment against that obtained in New York by the defendant. It sets up the unconstitutionality of the New York statute, alleges the insolvency of the Davis Provision Company, and prays for a set-off of judgments. A demurrer to the bill was overruled (105 Fed. 536), but on final hearing the bill was dismissed on the ground that the judgment in favor of the Davis Provision Company had been assigned to the defendant Weed, for value, and under such circumstances that it was not subject to the set-off claimed. The plaintiff appealed to this court.

It was admitted by the appellant, at the argument, that the plaintiff would fail on the merits if the preceding case should be decided as it has been. But we are precluded from an inquiry into the merits, or even into the jurisdiction, taken by the circuit court under Rev. Stat. §§ 1977, 1979 (U. S. Comp. Stat. 1901, pp. 1259, 1262), until the jurisdiction of this court to entertain the appeal is established. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510.

Under the act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549), this must be maintained either as a case in which the jurisdiction of the circuit court is in issue, or as a case in which the "law of a state is claimed to be in contravention of the Constitution of the United States." With regard to the former ground, the circuit court sustained the jurisdiction, and the case is disposed of by *United States v. Jahn*, 155 U. S. 109, 114, 115, 39 L. ed. 87, 90, 15 Sup. Ct. Rep. 39, 41. "If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if this question of jurisdiction arises, the circuit court of appeals may certify it." With regard to the latter ground, the decision of the circuit court again was in favor of the plaintiff, *and [378] it has nothing of which to complain. "As a general rule the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage." Cited from *Mr. Justice Curtis' dissent in the Dred Scott Case*, 19 How. 393, 566, 15 L. ed. 691, 767, in *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510. This remark, to be sure, is not strictly in point, as the plaintiff would not ask to have the

NOTE.—On direct review by the Supreme Court of the United States of circuit or district court judgments or decrees—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

judgment reversed on the ground that this New York law was constitutional. But it, with the quotation from *United States v. Jahn*, helps to indicate a principle to be applied to the construction of the words "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." Those words are general in form, but they do not mean that whenever a party makes a case of that sort he may appeal directly to this court whenever the decision is against him, no matter on what grounds, although his contention about the state law is sustained. If a party comes into the circuit court alleging that a state law is unconstitutional, and the circuit court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this court on grounds that otherwise would not support an appeal. See *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368. The present case illustrates the principle. The argument for the appellant is devoted not to any constitutional or jurisdictional point, but to an attempt to upset the decision of the circuit court upon the question, mainly of fact, as to the good faith, etc., of Weed in taking the assignment of the judgment. The provisions of § 5 of the act of 1891 were not intended to be made an instrument for such attempts.

Appeal dismissed.

[379]*WISCONSIN & MICHIGAN RAILWAY
COMPANY, *Appt.*,
v.

PERRY F. POWERS, Auditor General of
the State of Michigan.

(See S. C. Reporter's ed. 379-388.)

*Taxation of railroad—contract exemption—
interference with interstate commerce.*

1. No contract exemption from taxation was made by Mich. act May 27, 1893, § 3, in favor of a railroad company coming within its provision that the rate of taxation fixed by that act or any other law of the state should not apply to any railway company thereafter building and operating a line of railroad within the state north of the 44th parallel of latitude until the same had been operated for ten years, unless the gross earnings should equal a specified sum per mile.
2. No unconstitutional interference with interstate commerce is made by Mich. act of June

NOTE.—On corporate taxation as affected by the contract clause in the Federal Constitution—see note to *Adams v. Yazoo & M. Valley R. Co.* 60 L. R. A. 33.

On corporate taxation and the commerce clause—see note to *Sandford v. Poe*, 60 L. R. A. 641.
191 U. S.

4, 1897, levying a specific tax upon the property and business of any railroad corporation operated within the state and providing that "when the railroad lies partly within and partly without this state, prima facie the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried."

[No. 77.]

Submitted November 13, 1903. Decided November 30, 1903.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan to review a decree dismissing, on demurrer, a bill to enjoin the collection of a tax on a railway company. *Affirmed.*

The facts are stated in the opinion.

Mr. **Jesse B. Barton** submitted the cause for appellant:

The act of 1897, if it repeals the act of 1893 so as to take away the right of exemption provided in the act of 1893, is in violation of the Federal and state Constitutions prohibiting the impairment of the obligation of contracts.

Binghamton Bridge, 3 Wall. 51, 18 L. ed. 137; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 377, 20 L. ed. 614, 19 Mich. 259, 2 Am. Rep. 82; *Grand Lodge, F. & A. M. v. New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523; *Morawetz, Priv. Corp.* 2d ed. § 318; *Humphrey v. Pegues*, 16 Wall. 249, 21 L. ed. 328; *East Tennessee, V. & G. R. Co. v. Pickerd*, 24 Fed. 614; *Bergman v. St. Paul Mut. Bldg. Asso. No. 1*, 29 Minn. 275, 13 N. W. 120; *Piqua Branch of State Bank v. Knoop*, 16 How. 376, 14 L. ed. 980; *Corbin v. Washington County*, 1 McCrary, 521, 3 Fed. 356; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Wellman v. Chicago & G. T. R. Co.* 83 Mich. 600, 47 N. W. 489; *Traverse County v. St. Paul, M. & M. R. Co.* 73 Minn. 417, 76 N. W. 217.

The law of 1897 did not repeal the law of 1893 so as to take away from railroad corporations which had constructed their lines north of the 44th parallel subsequent to the passage of the act of 1893 the right of exemption from taxation of the same for the period of ten years after construction when the gross earnings did not exceed \$4,000 per mile.

Com. v. Philadelphia & E. R. Co. 164 Pa.

252, 30 Atl. 145; *Detroit City Street R. Co. v. Guthard*, 51 Mich. 180, 16 N. W. 328; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Traverse County v. St. Paul, M. & M. R. Co.* 73 Minn. 417, 76 N. W. 217; *Colton v. Montpelier*, 71 Vt. 413, 45 Atl. 1039; *Binghamton Bridge*, 3 Wall. 51, 18 L. ed. 137; *Sutherland*, Stat. Constr. § 481; *Endlich*, Interpretation of Statutes, §§ 271 *et seq.*

Messrs. **Charles A. Blair** and **Roger Irving Wykes** submitted the cause for appellee:

In considering whether a state has contracted away its sovereign powers nothing is to be taken against the state by intentment.

Providence Bank v. Billings, 4 Pet. 561, 7 L. ed. 955; *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 435, 14 L. ed. 1005; *Jefferson Branch Bank v. Skelly*, 1 Black, 447, 17 L. ed. 179; *Philadelphia, W. & B. R. Co. v. Maryland*, 10 How. 393, 13 L. ed. 468; *Delaware Railroad Tax*, 18 Wall. 225, 21 L. ed. 894; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222; *Newton v. Mahoning County*, 100 U. S. 561, 25 L. ed. 712; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626, 6 Sup. Ct. Rep. 375; *Eric R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595; *Memphis Gaslight Co. v. Shelby County Taxing Dist.* 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68.

The grant of exemption claimed was a mere gratuity which has not the elements of, and cannot be construed into, a contract.

Manistee & N. E. R. Co. v. Railroad Comrs. 118 Mich. 349, 76 N. W. 683; *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. ed. 602; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 377, 20 L. ed. 614, 19 Mich. 259, 2 Am. Rep. 82.

If the tax is not on the interstate receipts, the mode of determining the amount of such tax is immaterial, and the validity of the law fixing them is a matter of legislative policy and discretion, and is not open to criticism by the courts.

Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 230.

14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

*Mr. Justice **Holmes** delivered the opinion of the court: [384]

This is an appeal from a decree of the United States circuit court, dismissing the plaintiff's bill on demurrer. The bill seeks to enjoin the auditor general of the state of Michigan from collecting a tax, on the ground that the law imposing the tax is contrary to the Constitution of the United States as impairing the obligation of contracts, and interfering with interstate commerce.

The alleged contract is contained in a law of May 27, 1893, § 3, which, after levying a specific tax on railroads, provided "that the rate of taxation fixed by this act or any other law of this state shall not apply to any railway company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal \$4,000 per mile, except," etc. Afterwards, on October 23, 1893, the Menominee & Northern Railroad Company was incorporated under the laws of the state, and forthwith conveyed all its property, rights, and franchises to the plaintiff, a Wisconsin corporation, which is assumed to stand in the shoes of the Michigan company. The plaintiff thereupon constructed the road. This road is north of parallel forty-four, its gross earnings never have been equal to \$4,000 per mile, and it would be entitled to the exemptions just stated if the law of 1893 still were in force. But on June 4, 1897, the state passed a law amending the act of 1893, and levying a "specific tax upon the property and business of [every] railroad corporation operated within the state," and enacted that "when the railroad lies partly within and partly without this state, prima facie, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state, such proportion of the income of said company arising from the "interstate business as the [385] length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried." This is the law which the plaintiff says is unconstitutional for the reasons above set forth.

The demurrer to the bill was sustained on the ground that the act of 1893 made no

valid contract of exemption from taxation, and that the act of 1897, repealing the exemption granted in 1893, was a constitutional law.

The plaintiff makes a supplemental alternative argument that the later statute should not be construed to repeal the act of 1893 with regard to roads in the plaintiff's position. If that were so the plaintiff would have no standing in this court. But the repeal is plain from the express words at the end of the section quoted from the act of 1897, repealing all acts or parts of acts contravening the provisions of that section, from the fact that it is an amendment of the section quoted from the act of 1893, and from the case of *Manistee & N. E. R. Co. v. Commissioner of Railroads*, 118 Mich. 349, 350, 76 N. W. 683. See also *Welch v. Cook*, 97 U. S. 541, 24 L. ed. 1112. On that question we follow the state court. *Northern C. R. Co. v. Maryland*, 187 U. S. 258, 267, 47 L. ed. 167, 172, 23 Sup. Ct. Rep. 62.

The first and main question, then, is whether the act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms. The question is pretty well answered by a series of decisions in this court. A distinction between an exemption from taxation contained in a special charter, and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373, 20 L. ed. 611, S. C. 19 Mich. 259, 2 Am. Rep. 82. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred that properly could be regarded as a consideration for the supposed contract. *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. ed. 602; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805; *Grand Lodge, F. [386] & A. M. *v. New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523. See *Tomlinson v. Jessup*, 15 Wall. 454, 459, 21 L. ed. 204, 206. But whatever the ground, thus far attempts like the present to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties have failed. See further, *Welch v. Cook*, 97 U. S. 541, 24 L. ed. 1112, and *Manistee & N. E. R. Co. v. Commissioner of Railroads*, 118 Mich. 349, 76 N. W. 683, in which the state court deals with this very act.

It may be that a state, by sufficient words, might bind itself without consideration, as a private individual may bind himself by recognizance or by affixing a seal. A state might abolish the requirement of consideration altogether for simple contracts by private persons, and, it may be that it equally might dispense with the requirement for it-

self. But the presence or absence of consideration is an aid to construction in doubtful cases,—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement, or bounty, holding out a hope but not amounting to a covenant.

In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while, no doubt, in some cases between private persons the above distinctions have not been kept very sharply in mind (*Martin v. Meles*, 179 Mass. 114, 117, 60 N. E. 397), it is clear that we should require an adequate expression *of an actual intent on the part of the [387] state to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change. See *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 668, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625. Looking at the case in this way, then, we find no such adequate expression. No doubt the state expected to encourage railroad building, and the railroad builders expected the encouragement; but the two things are not set against each other in terms of bargain. See *Covington v. Kentucky*, 173 U. S. 231, 238, 239, 43 L. ed. 679, 682, 19 Sup. Ct. Rep. 383.

But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject-matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefor, it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on the faith

of, a statute, merely because their interest was obvious and their action likely, on the face of the law. What we have said is enough to show that in our opinion the plaintiff never had a contract, and therefore makes it unnecessary to consider the usual power to alter, amend, or repeal charters, etc., contained in the Constitution of Michigan (*Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530), or a similar power in the general railroad law of 1873, of which the above acts of 1893 and 1897 were amendments through intervening amending acts.

We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on "the property and [388] business *of such railroad corporation operated within the state," computed upon certain percentages of gross income. The prima facie measure of the plaintiff's gross income is substantially that which was approved in *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 228, 35 L. ed. 994, 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. See also *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054.

Decree affirmed.

Mr. Justice **White**, not having heard the arguments, took no part in the decision.

STATE BOARD OF ASSESSORS OF THE
PARISH OF ORLEANS, The City of Or-
leans, *et al.*, *Appts.*,
v.
COMPTOIR NATIONAL D'ESCOMPTE DE
PARIS.

(See S. C. Reporter's ed. 388-405.)

Taxation—of credits owned by nonresident.

1. The taxation of credits arising out of loans on collateral security made by the local agent of a foreign corporation, who retains the collateral, and, as evidence of the indebtedness, takes the customer's so-called check, which is regarded as an overdraft, upon which the customer is charged interest, and which is finally sent to the home office, to which the

NOTE.—As to the situs, for purposes of taxation, of debts evidenced by notes and mortgages—see note to *Boyd v. Selma*, 16 L. R. A. 729.

Respecting the situs, for purposes of taxation, of debts evidenced by notes and mortgages held by agent residing in different state from principal—see note to *New Orleans v. Stempel*, 44 L. ed. U. S. 174.

money, when repaid, is remitted by an exchange transaction unless reloaned by the local agent to other parties,—is authorized by the provision of La. acts 1898, No. 170, § 7, for the taxation of credits arising from business done in the state at the business domicile of a nonresident owner, his agent or representative.

2. A state is not forbidden by the Federal Constitution to tax credits arising out of loans, on collateral security made by the local agent of a foreign corporation, who retains the collateral, and, as evidence of the indebtedness, takes the customer's so-called check, which is regarded as an overdraft, upon which the customer is charged interest, and which is finally sent to the home office, to which the money, when repaid, is remitted by an exchange transaction unless reloaned by the local agent to other parties.

[No. 157.]

Argued October 28, 29, 1903. Decided November 30, 1903.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree perpetually enjoining the collection of certain taxes. *Reversed* and remanded with instructions to dismiss the bill.

Statement by Mr. Justice **Day**:

The Comptoir Nationale d'Escompte de Paris, a corporation organized under the laws of the Republic of France, filed its bill in the circuit court of the United States for the eastern district of Louisiana, seeking to enjoin collection of certain taxes, and to cancel the assessment thereof. These taxes were undertaken to be collected under an assessment upon office furniture, \$1,000; money in possession, \$20,000; "money loaned on interest, all credits, and all bills receivable for money loaned on interest or advanced for goods sold, \$175,000." There is no contest as to the taxes assessed upon the furniture or money in possession, but it is sought to enjoin the collection of the tax assessed upon the \$175,000, which for the year 1891 is the sum of \$4,550.

Complainant avers that it has no money loaned on interest, credits or bills receivable for money loaned on interest or advanced, or for goods sold within the state of Louisiana, subject to taxation; that its credits in said state are debts due to it, of which it has no legal evidence of indebtedness within the state, and that these debts have no legal situs in Louisiana, and can only be taxed at the domicile of the Comptoir in Paris. That the taxes assessed were in violation of the Constitution and jurisprudence of Louisiana, and were also in violation of the 14th Amendment to the Federal Constitution, inasmuch as the action complained of denied to the

complainant the equal protection of the laws, and deprived it of its property without due process of law.

The respondent took issue upon these allegations, and avers that complainant has credits within the state, amenable to the taxing power, and the assessment upon the \$175,000 was legal and valid.

Testimony was taken by a special examiner under an order of court, and the case partially heard, and was then referred to a master, who made separate findings of fact and conclusions of law.

[390] *From the testimony adduced and the findings of the fact of the master, it appears that the complainant has had an average of \$20,000 on deposit in money in the banks of New Orleans, upon which it has paid taxes annually. It has also paid an annual license tax upon business done. The assessment upon the \$175,000 arises from moneys advanced by the local agent of the Comptoir in New Orleans upon transactions wherein customers draw checks, in the ordinary form, upon the Comptoir, and at the same time deposit collateral sufficient to secure the amount of money advanced, accompanying the check and collateral with a power of attorney, reciting, among other things, that, whenever the customer shall become indebted to the Comptoir for money lent or for any overdraft upon any check, the Comptoir is to have a lien upon the securities deposited, and upon failure to reimburse any overdraft, or to pay any indebtedness when due, the Comptoir to have the right to sell the collateral, and apply the proceeds upon such liabilities.

The agent of the Comptoir testified that when the money was paid it was remitted back to Paris by an exchange transaction. It also appeared that the agent had authority to make loans as above without consulting the office in Paris, and that the transactions were continuing and large, and amounting to more than a million of dollars a year.

The Comptoir also did a large business in the sale of exchange directly to customers, and relied largely for its gain upon the profits in exchange transactions between this country and Europe. The collateral deposited as security by customers is kept in New Orleans, and is not remitted to the home office in Paris. The money needed for the transactions of the Comptoir arises from foreign exchange drawn from London, Paris, Berlin, etc. Speaking of the transactions from which the present controversy arises, the agent testifies:

Q. Did you charge interest on your overdrafts?—A. Yes, sir.

Q. Well, what evidence of indebtedness, 191 U. S.

besides the account on your books with your customers, have you that these *people owe[391] you anything at all?—A. We have a regular settlement which we make every month.

Q. When you put \$50,000, we will say, to the credit of one of your customers on your books, does he give you any receipt for your money previous to your crediting him with that on your books?—A. I do not credit him; I pay him.

Q. You pay him———A. Yes, sir; I pay him the money.

Q. What evidence have you that he owes you anything?—A. I have got a check from him; he is overdrawn on my books.

Q. For the amount you have loaned him?—A. Yes, sir.

By Mr. Zacharie:

Q. Suppose a man comes to you and says, Here, I have got certain securities, certain warehouse receipts or bills of lading, I want to borrow \$50,000. You say to him, We will let you have it. Now he deposits with you these bills of lading or these warehouse receipts or these bonds, whatever you choose to accept as security for the loan. Do you give him a receipt for those?—A. No. I am going to explain the business. Well, a client comes to me and says to me, and says I want \$50,000, and I propose to give you such collateral, bills of lading for cotton or for grain or warehouse receipts or bonded warehouse receipts for cotton or for cake or cotton seed meal—any kind of those products. If I approve, ready to do the business, I say, Yes. Well, there are two ways of letting him—that money; very often I open a credit in his favor on the Comptoir National d'Escompte de Paris in Paris or in London, then he draws against that credit—I mean to say, he sells his draft to the Comptoir to anybody he pleases, either in New Orleans or New York, if the loan is for a short period. Instead of asking him to draw I will draw it myself and hand him the money.

Q. You sell your own exchange?—A. Then he is overdrawn on my books, and to show that he is overdrawn I tell him, You draw a check on me, and he gives me that check. And then I make him sign a general letter of hypothecation (which will *be[392] shown to the attorney). Outside of that we have nothing of importance—I don't see anything else.

Q. These securities and checks remain in your office here in New Orleans?—A. Yes, sir: the checks are cash vouchers for the cashier, who has them to show that he paid the money.

Q. Suppose that the amount drawn by him does not come up to the amount of the value of this hypothecation, this hypothe-

cated stuff, what is done there, at the close of the transaction?—A. The general letter of hypothecation does not state any amount. It states simply it is a power of attorney.

Q. I say, what is done when the transaction is concluded? He has got all of the money that you agreed to give him, and the collaterals in your hands are worth more than that. What do you do there?—A. We have a margin. You mean to say if the collateral is worth more than the money we give him?

Q. Yes.—A. Then we have a margin; then we are protected if there is a fall in the price of the securities he gives us.

By Mr. Dupre:

Q. Does he take back the check he has given.—A. No, sir.

Q. When the transaction is concluded what becomes of that check that he has drawn against your bank?—A. The check is a cash voucher; it stays among the cash vouchers of the day on which it is paid and remains perpetually in the custody of the Comptoir National d'Escompte de Paris for the cashier to show that he has paid that check.

Q. In other words, it is not returned to the man when he pays his debt?—A. Because we keep an account current which varies each day.

Q. The agent of the Comptoir National d'Escompte de Paris in New Orleans has full authority to act for the Comptoir National d'Escompte de Paris in this city?—A. Yes, sir.

Q. He does not have to confer by cable or otherwise with his principals in Paris or France as to whether he will make one loan or another, a particular loan?—A. He has authority to loan certain amounts, or make certain transactions by exchange according to instructions he has from the other side.

[393] *Q. I mean, if I went in there he would not have to cable to ask about me?—A. No, sir.

Q. When in answer to the 5th interrogatory you say the money was obtained by drawing foreign exchange on Europe, you mean to say that the cash which you lent in the city of New Orleans was obtained by drawing this foreign exchange on Europe and getting it cashed here in the banks?—A. Getting it in New York.

Q. And the cash was forwarded to you from New York?—A. Yes, sir.

Q. And that was the money that you lent?—A. Yes, sir.

Q. Do you know, or can you state approximately, the amount of loans that you made during the year 1900?—A. No, I cannot.

Q. About?—A. Well, I made so many loans, you know, for a short period, and I can't state the total amount; it would be too far away, the exact amount.

Q. Was it over a million dollars?—A. Taken it altogether, yes.

Q. How much over a million?—A. I do not know.

Q. Was it ever two millions?—A. No, sir.

Q. As I understand you, a great many of these loans were for short periods, so that you turned the money over and over again during the year?—A. Yes, sir.

The master summarized his conclusion of fact as follows:

"To sum up the facts: It is found that the complainant has paid its annual license tax on its exchange business, as provided by law, and has paid, or offered to pay, its annual tax on the average amount of \$20,000 of money on deposit in Louisiana; and that the assessment complained of, of \$175,000 for the year 1901, is on the credits accruing to it from the advances made by it in New Orleans, through its agents here, on bills of lading and similar documents by way of collateral. These credits were either in the form of credits on Paris or London, giving *the right to the Louisiana debtors to draw [394] on the complainant in Paris or London, or they were transactions at short time by which the debtors were overdrawn on the books. In both cases, they amounted to overdrafts secured by collateral. In the previous year, which is not now in question, the complainant took non-negotiable notes to represent these credits, and these were considered in the case in the 52 Annual, which will be hereafter referred to again; but in the instant case, for the year 1901, the question is of these overdrafts."

Messrs. H. Garland Dupre and F. C. Zacharie argued the cause, and, with Mr. E. K. Skinner, filed a brief for appellants:

Over and over again has the right of the state to tax personal property within its limits been upheld, even where the owner was neither a citizen nor a resident of the state imposing the tax.

Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585;

Blackstone v. Miller, 188 U. S. 205, 47 L. ed. 445, 23 Sup. Ct. Rep. 277; *Adams v. Colonial & U. S. Mortg. Co.* (Miss.) 34 So. 482.

This taxation is not in violation of the Louisiana Constitution, laws, or jurisprudence.

Comptoir National D'Escompte de Paris v. Board of Assessors, 52 La. Ann. 1319, 27 So. 801; *Bluefields Banana Co. v. New Orleans*, 49 La. Ann. 43, 21 So. 627.

When the question is whether property is exempt from taxation, and that exemption depends alone on the true construction of a statute of a state, the Federal courts should be slow to declare an exemption in advance of any decision by the courts of the state.

New Orleans v. Stempel, 175 U. S. 316, 44 L. ed. 179, 20 Sup. Ct. Rep. 110.

The change on the part of this company in taking checks, instead of promissory notes, in order to avoid and evade taxation, will not be recognized and given effect by the courts.

Cooley, Taxn. 2d ed. pp. 415, 433, note 3; *Welty*, Assessments, p. 317, § 174; *Greenhood Pub. Pol.* pp. 152, 153; *Mitchell v. Leavenworth County*, 9 Kan. 344, 91 U. S. 208, 23 L. ed. 302; *Shotwell v. Moore*, 45 Ohio St. 632, 16 N. E. 470, Affirmed in 129 U. S. 590, 32 L. ed. 827, 9 Sup. Ct. Rep. 362; *Jones v. Seward County*, 10 Neb. 154, 4 N. W. 946; *Dixon County v. Halstead*, 23 Neb. 697, 37 N. W. 621; *Drexler v. Tyrell*, 15 Nev. 115; *Holly Springs Sav. & Ins. Co. v. Marshall County*, 52 Miss. 281, 24 Am. Rep. 668; *Sheldon v. Pruessner*, 52 Kan. 579, 22 L. R. A. 709, 35 Pac. 201; *Ogden v. Walker*, 59 Ind. 460; *Poppleton v. Yamhill County*, 8 Or. 340; *Waller v. Jagger*, 39 Iowa, 228; *Bellinger v. White*, 5 Neb. 401; *Ransom v. Burlington*, 111 Iowa, 77, 82 N. W. 427; *Delaware & H. Canal Co. v. Com.* 1 Monaghan (Pa.) 36, 1 L. R. A. 232, 2 Inters. Com. Rep. 222, 17 Atl. 175; *H. M. Loud & Sons Lumber Co. v. Elmer Twp.* 123 Mich. 61, 81 N. W. 965; *Bristol v. Washington County*, 177 U. S. 144, 44 L. ed. 707, 20 Sup. Ct. Rep. 585.

Mr. Harry H. Hall argued the cause and filed a brief for appellee:

It is not within the power of a state to tax property, unless the same is actually, or by contemplation of law, within its jurisdiction.

St. Louis v. Wiggins Ferry Co. 11 Wall. 429, 20 L. ed. 194; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *M'ulloch v. Maryland*, 4 Wheat. 428, 4 L. ed. 606; *United States v. Erie R. Co.* 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup.

Ct. Rep. 952; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Railey v. Board of Assessors*, 44 La. Ann. 765, 11 So. 93.

While tangible personal property by a fiction of law has been said to follow the domicile of its owner, it may be taxed at its actual situs; but it has never been held that an incorporeal thing, a mere abstraction, such as the naked obligation to pay a debt, could be so taxed, for an incorporeal thing, being an abstraction, can have no situs.

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *Dundee Mortg. Trust Invest. Co. v. School Dist. No. 1*, 10 Sawy. 52, 21 Fed. 151; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Meyer v. Pleasant*, 41 La. Ann. 645, 6 So. 258; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L. R. A. 56, 11 So. 91; *Railey v. Board of Assessors*, 44 La. Ann. 765, 11 So. 93; *Olason v. New Orleans*, 46 La. Ann. 1, 14 So. 306; *Parker v. Strauss*, 49 La. Ann. 1173, 22 So. 329; *State ex rel. Mechanics' & T. Ins. Co. v. Board of Assessors*, 47 La. Ann. 1544, 18 So. 519; *Comptoir Nat. D'Escompte de Paris v. Board of Assessors*, 52 La. Ann. 1319, 27 So. 801.

A mortgage, so far as taxation is concerned, is a mere security. Hence, the question of the situs of notes and bonds is generally held not to be affected by the fact that the paper was or was not secured by mortgage, or, if so secured, by the location of the mortgaged premises.

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; *State, Darcy, Prosecutrix, v. Darcy*, 51 N. J. L. 140, 2 L. R. A. 350, 16 Atl. 160; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, 42 Conn. 426, 19 Am. Rep. 546; *Davenport v. Mississippi & M. R. Co.* 12 Iowa, 539; *State, Van Winkle, Prosecutor, v. Massaker*, 26 N. J. L. 564; *Foresman v. Byrns*, 68 Ind. 247; *Arapahoe County v. Cutter*, 3 Colo. 349.

Some courts, however, proceeding on the theory that a mortgage is an interest in land, have held it taxable in the state where the land lies, although held by a nonresident.

Mumford v. Sewall, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; *Detroit v. Detroit*, 91 Mich. 78, 16 L. R. A. 59, 51 N. W. 787; *Redfield v. Genesee County*, Clarke Ch. 42; *Maltby v. Reading & C. R. Co.* 52 Pa. 140; *Susquehanna Canal Co. v. Com.* 72 Pa. 72; *Pittsburg, Ft. W. & C. R. Co. v. Com.* 66

Pa. 73, 5 Am. Rep. 344; *Com. v. Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584.

The general rule is that debts follow the person of the creditor, and are to be taxed at his domicile.

De Vignier v. New Orleans, 4 Woods, 206, 16 Fed. 11; *People v. Whartenby*, 38 Cal. 461; *Kirtland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546; *Collins v. Miller*, 43 Ga. 336; *Sivwright v. Pierce*, 108 Ill. 133; *Boyer v. Jones*, 14 Ind. 354; *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87; *Foresman v. Byrns*, 68 Ind. 247; *Barber v. Farr*, 54 Iowa, 57, 6 N. W. 134; *Babeock v. Board of Equalization*, 65 Iowa, 110, 21 N. W. 207; *Thomas v. Mason County*, 4 Bush, 135; *Com. v. Hays*, 8 B. Mon. 1; *Meyer v. Pleasant*, 41 La. Ann. 645, 6 So. 258; *Augusta v. Dunbar*, 50 Ga. 387; *Barber Asphalt Pav. Co. v. New Orleans*, 41 La. Ann. 1015, 6 So. 794; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L. R. A. 56, 11 So. 91; *Appeal Tax. Ct. v. Patterson*, 50 Md. 354; *Worthington v. Sebastian*, 25 Ohio St. 10; *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 354; *People v. Eastman*, 25 Cal. 601; *Bridges v. Griffin*, 33 Ga. 113; *Johnson v. Oregon City*, 2 Or. 327; *Connor v. Waxahachie (Tex.)* 13 S. W. 30; *Ferris v. Kimble*, 75 Tex. 476, 12 S. W. 689.

In the taxation of personal property, two inconsistent doctrines often come into conflict: the one, *Mobilia sequuntur personam*, commanding that the property shall be taxed at the owner's domicile, on the theory that the personality has no other situs; the other, that it shall be taxed, like real property, where it is situated. Ordinarily the first rule will prevail; and, as a general rule, personal property is taxable at the domicile of its owner.

Cooley, Taxn. 2d ed. pp. 56, 372; *Burroughs*, Taxn. ¶ 40; *Sangamon & M. R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; *Hooper v. Baltimore*, 12 Md. 464; *Phelps v. Thurston*, 47 Conn. 477; *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370; *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514; *Amesbury Woolen & Cotton Mfg. Co. v. Amesbury*, 17 Mass. 461; *Wilson v. New York*, 4 E. D. Smith, 675; *State, Perkins, Prosecutor, v. Bishop*, 34 N. J. L. 45; *State, Vail, Prosecutor, v. Bentley*, 23 N. J. L. 532; *State v. Rahway*, 24 N. J. L. 56; *Newark City Bank v. Fourth Ward Assessor*, 30 N. J. L. 13; *People ex rel. Mygatt v. Chenango County*, 11 N. Y. 565; *Mygatt v. Washburn*, 15 N. Y. 316; *Com. v. American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 15 Atl. 443; *Bemis v. Boston*, 14 Allen, 366; *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa, 407,

15 L. R. A. 296, 51 N. W. 18; *Blood v. Sayre*, 17 Vt. 609.

In regard to assets evidenced by negotiable bills, notes, and bonds, there are two lines of decisions. The view which is probably more logical is that the paper is mere evidence of indebtedness, and that the debt itself can have no actual situs, wherever the paper may be. Hence, the situs, in the eye of the law, is, as in the case of ordinary debts, at the residence of the creditor.

Lanesborough v. Berkshire County, 131 Mass. 424; *Sommers v. Boyd*, 48 Ohio St. 648, 29 N. E. 497; *Hunter v. Board of Supers.* 33 Iowa, 376, 11 Am. Rep. 132; *De Vignier v. New Orleans*, 4 Woods, 206, 16 Fed. 11; *Cooley*, Taxn. 2d ed. p. 15; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *New Orleans v. Mechanics' & T. Ins. Co.* 30 La. Ann. 876, 31 Am. Rep. 232; *Goldgart v. People*, 106 Ill. 25; *Territory v. Delinquent Tax-List (Ariz.)* 24 Pac. 182; *Boyd v. Selma*, 96 Ala. 144, 16 L. R. A. 729, 11 So. 393.

Money, while a mere medium of exchange is, so far as taxation questions are concerned, a form of tangible personal property. It may be taxed at the owner's domicile, but is generally taxed where it is actually situated.

State v. Earl, 1 Nev. 397; *McCutchen v. Rice County*, 2 McCrary, 337, 7 Fed. 558; *Smith v. Board of Assessors*, 44 La. Ann. 91, 10 So. 387; *Re McMahon*, 66 How. Pr. 190; *Duer v. Small*, 4 Blatchf. 263, Fed. Cas. No. 4,116; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *People ex rel. Westbrook v. Ogdensburgh*, 48 N. Y. 390.

In paying the tax upon the average balance in New Orleans, the Comptoir recognizes the correctness of the decisions that money sent by a foreign creditor to its local agent in another state, to be there employed in business and retained there for investment, under the protection of its laws, is liable to be taxed. Under such conditions the rule *Mobilia sequuntur personam* does not apply.

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Bluefields Banana Co. v. New Orleans*, 49 La. Ann. 43, 21 So. 627; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 580.

A foreign corporation stands upon the same footing as an individual in respect to its credits arising from obligations incurred in another jurisdiction; nor does it by such loans bring its entire capital into that jurisdiction.

Liverpool & L. & G. Ins. Co. v. Board of Assessors, 44 La. Ann. 760, 16 L. R. A. 56, 11 So. 91; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Tangible personal property is assessed sometimes at the domicile of the owner, sometimes at the place where it is situated.

Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; *Oakland v. Whipple*, 39 Cal. 112; *Powell v. Madison*, 21 Ind. 335; *Rieman v. Shepard*, 27 Ind. 288; *Eversole v. Cook*, 92 Ind. 222; *Mills v. Thornton*, 26 Ill. 300, 79 Am. Dec. 377; *Dunleith v. Reynolds*, 53 Ill. 45; *Com. v. Gaines*, 80 Ky. 489; *Chauvenet v. Anne Arundel County*, 3 Md. 259; *Leonard v. New Bedford*, 16 Gray, 292; *Colbert v. Leake County*, 60 Miss. 142; *State v. Falkinburge*, 15 N. J. L. 320; *State, Potter, Prosecutor, v. Ross*, 23 N. J. L. 517; *Barnes v. Woodbury*, 17 Nev. 383, 30 Pac. 1068; *Steere v. Walling*, 7 R. I. 317; *Charleston v. State*, 2 Speers L. 719; *Johnson v. Lexington*, 14 B. Mon. 648; *Trammell v. Connor*, 91 Ala. 398, 8 So. 495; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

The state may, however, and often does, make it taxable at its actual situs.

Dill. Mun. Corp. 4th ed. par. 786; *Welty, Assessments*, ¶ 34; *Mills v. Thornton*, 26 Ill. 300, 79 Am. Dec. 377; *State, Potter, Prosecutor, v. Ross*, 23 N. J. L. 517; *People ex rel. Hoyt v. Tax & A. Comrs.* 23 N. Y. 224; *People ex rel. Jefferson v. Gardner*, 51 Barb. 352; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *De Vignier v. New Orleans*, 4 Woods, 206, 16 Fed. 12; *United States v. Bank of United States*, 8 Rob. (La.) 262.

The legislature of Louisiana has never attempted to localize mere debts due to foreign creditors, for the purpose of taxation; and such attempt, if made, would be in violation of the Constitution of the state.

Liverpool & L. & G. Ins. Co. v. Board of Assessors, 44 La. Ann. 760, 16 L. R. A. 56, 11 So. 91; *Railey v. Board of Assessors*, 44 La. Ann. 766, 11 So. 93; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028, 45 L. R. A. 524, 25 So. 970.

Mr. Justice Day delivered the opinion of the court:

The Constitution of the state of Louisiana of 1898, article 225, declares that all property shall be assessed in proportion to its value. Section 1 of the act of 1898, passed by the general assembly of the state, defines "property" to include "all personal property, all rights, credits, bonds, and securities, promissory notes, open accounts, and other obligations, all cash, all money loaned at in-

terest, and all movable and immovable, corporeal and incorporeal articles or things of value owned and held and controlled within the state of Louisiana by any person in any capacity whatsoever." Section 7 of the act provides that it shall be the duty of the assessor to place upon the tax roll all property subject to taxation. "This shall apply with equal force to any person or persons representing, in this state, business interests that may claim a domicile elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising *from busi-[400]ness done in this state, are hereby declared assessable within this state, and at the business domicile of said nonresident, his agent, or representative." This act undertakes to give to the state the right and authority to assess and collect taxes upon all bills receivable, obligations, and credits within the state.

This legislation was before this court in the case of *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, in which it was sought to tax certain notes secured by mortgage on real estate in the city of New Orleans. The notes were owned in New York, but were in the hands of an agent of the owner in New Orleans, who collected the proceeds thereof and the interest as it became due, and deposited the same in a bank at New Orleans. In that case, the decisions of the supreme court of Louisiana, construing its Constitution and laws, particularly the act in question, were exhaustively reviewed by Mr. Justice Brewer, and the conclusion reached that the act, as interpreted by the supreme court of the state, permitted the taxing of the notes in the hands of the agent, and that such action did not impair any right secured by the Federal Constitution. Since the decisions which were in review in the *Stempel Case*, the supreme court of Louisiana, in a suit brought by the present complainant against the board of assessors, has had before it a case involving the right to tax credits and moneys of the complainant under a state of facts in most respects identical with that now before the court, the difference being that when the Comptoir loaned money upon bills of lading or other collateral security, it took the non-negotiable note of its customer, which note was canceled either by the payment of the amount due or the exhaustion of the collateral. *Comptoir National D'Escompte de Paris v. Board of Assessors*, 52 La. Ann. 1319, 27 So. 801. In the method of doing business shown in the present case, instead of giving a non-nego-

liable note, the customer gives to the Comptoir his check, which check is not returned, but held as an evidence of the indebtedness, and is later sent to the office of the Comptoir at Paris. While called "checks," and so [401] referred to in the "record and by the parties in their dealings, the instrument delivered to the Comptoir, in form an ordinary check, as though drawn for payment on presentation from moneys deposited, had no such function. The money was paid to the customer upon the security of the collateral, and the so-called check taken and held as a memorandum of the indebtedness to the Comptoir.

The exact question is whether these checks, secured by collateral held by the agent, are evidence of credits for money loaned upon interest, having a local situs in New Orleans, and constitutionally taxable within the meaning of the Louisiana statutes.

In this case we are not dealing with that branch of the business of the Comptoir which relates to bills of exchange sold to its customers, but the assessment is sought to be made upon those credits which arise when money is loaned and advanced or paid in the state to the customer upon collateral security, and the latter's check is taken therefor. The transaction from which the alleged credits arise is briefly this: The customer applies for a loan of money, and offers as security a bill of lading or other collateral, and the money is paid to him. Instead of a note the Comptoir takes the check of the customer, which is regarded as an overdraft, upon which the customer can make payment from time to time and upon which he is charged interest, and, upon the nonpayment of the check, the collateral is subject to sale.

Is this a credit, for money lent on interest, taxable under the laws of Louisiana as interpreted by the supreme court of that state?

The real transaction between the parties was intended to create and did create a debt held for the Comptoir by its agent in the state of Louisiana, and evidenced by the check, and secured by the collateral, which debt, when paid, created a fund in the hands of the agent subject to loan and reinvestment by him without consultation with the principal, in such sense as to localize the credit for the purpose of taxation as effectively [402] "as it would if a non-negotiable note had been taken, as was done in the case decided in 52 Louisiana, *supra*. It is true that the agent testifies that the money when repaid was remitted by an exchange transaction to Paris, and the average balance in money in New Orleans banks was \$20,000, which has been assessed without objection; but it is equally clear that the transactions of this kind were large and the funds sub-

ject to the control of the agent, who could lend them at will to customers.

Whether this change, from notes to checks, was purposely made with a view to escaping taxation, as is argued by the respondents, or is a different method of evidencing the debt for the convenience of the customer, as is argued by the complainant, it is, in our judgment, equally a credit for money lent, localized in Louisiana, within the scope of the taxing laws of that state as construed by its supreme court.

Was the attempted taxation in violation of the Federal Constitution?

Speaking to this subject, in *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, Mr. Justice Brewer said:

"When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the state, the Federal courts should be slow to declare an exemption in advance of any decision by the courts of the state. The rule in such a case is that the Federal courts follow the construction placed upon the statute by the state courts, and in advance of such construction they should not declare property beyond the scope of the statute, and exempt from taxation, unless it is clear that such is the fact. In other words, they should not release any property within the state from its liability to state taxation unless it is obvious that the statutes of the state warrant such exemption, or unless the mandates of the Federal Constitution compel it."

It may be taken as a general rule of the law of taxation of personal property that such property can only be taxed at the residence of the owner, or at such place as it has acquired a situs, which will subject it to the taxing power of the state "where found." [403] In its application to tangible property, there is little difficulty in applying this principle. The difficulty arises in determining whether a credit or chose in action has acquired a local situs in contemplation of law at a place other than the domicile of the owner in such sense as will permit the state to tax it in the place of its localization. The cases are numerous, both state and Federal, which recognize the right of the state, in view of the protection and remedial rights which its laws give to the owner of intangible property, such as notes and bills, to require from such property a contribution to the funds of the state, to be collected by taxation, for the purpose of maintaining and enforcing the laws which give force and effect to such obligations. This right has been the subject of such recent adjudication in this court that we will only notice some of the later decisions. We have already referred to *New Orleans v. Stempel*. The question came be-

fore the court in *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, in which case it was held that the personal property of a nonresident of the state of Minnesota, in the shape of notes payable at the office of the agent in Minnesota, where the mortgages securing the notes were retained by the agents, and the notes were returned from time to time when required for renewal, collection, or foreclosure, the agents collecting the money and making loans in the name of the principal, generally on their own judgment, remitting to the principal the collections when required, or investing them in new loans, was properly taxable in Minnesota. Still later the subject was under consideration in *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, in which it was held that a deposit by a citizen of Illinois in a trust company in New York was within the taxing power of the latter state, even though the depositor intended to withdraw the money for further investment, and although the deposit had been subjected to taxation in Illinois as a part of an estate to which it belonged.

[404] From these cases it may be taken as the settled law of this court that there is no inhibition in the Federal Constitution against the right of the state to tax property in the shape of *credits, where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business.

The maxim, *Mobilia sequuntur personam*, which was applied in the court below as forbidding taxation of the checks in the hands of the agent in New Orleans, has been frequently held to be but a fiction of law, having its origin in considerations of general convenience and public policy, and not to be applied to limit and control the right of the state to tax property within the jurisdiction, it being intended to permit the owner to deal with his personalty according to the law of his domicile, and to make testamentary disposition of it according to the law where he is rather than that of the situs of the property. It was intended for convenience, and not to be controlling where justice does not demand it.

Applying these principles to the facts in the case, we have no doubt that these checks, secured in the manner stated, and given for the purpose of evidencing an interest-bearing debt, were the evidences of credits for money loaned, localized in Louisiana, protected by its laws, and properly taxable there.

The Comptoir was a foreign corporation; its business in Louisiana was in the hands

of an agent; it furnished to the customer a sum of money and took from him a collateral security; for reasons satisfactory to the parties, instead of taking the ordinary evidence of indebtedness, the customer drew a check, never intended to be paid in the ordinary way, but intended by the parties to be held as evidence of the amount of money actually loaned; this loan could be satisfied by partial payments from time to time, interest being charged upon the outstanding amounts, and if not paid at maturity the collateral was subject to sale; when paid, the money might be again loaned by the agent to other parties, or remitted to the home office, and the business was continuing in its character.

It is true the money to be paid to the customer was generally *obtained by the Comptoir drawing its draft upon New York or upon its home office, and a large part of the business of the Comptoir was in selling foreign exchange, but we cannot perceive that the transaction between the parties was any the less a loan because of the source from which the money was obtained.

We find nothing in the requirements of the Federal Constitution or the statutes of the state of Louisiana, as construed by its supreme court, which should exempt such property from bearing its burden of taxation for the public benefit. It follows that the circuit court erred in holding otherwise, and in granting a perpetual injunction.

Decree reversed and cause remanded with instructions to dismiss the bill.

JOHN ARBUCKLE, William V. R. Smith,
James N. Jarvie, and William A. Jamison,
Appts.,

v.

JOSEPH E. BLACKBURN, Dairy and Food
Commissioner of the State of Ohio.

(See S. C. Reporter's ed. 405-415.)

Appeal—review of judgment of circuit court of appeals—suit arising under Federal Constitution.

A bill to enjoin a state official from charging that coffee coated with a glaze of sugar and eggs comes within the prohibition of the Ohio pure food law (2 Bates's Ohio Stat. 1897, p. 2229, tit. 5, chap. a), against coating an article to conceal damage or inferiority, or to make it appear better or of greater value than it really is, and to restrain him from instituting proceedings to prevent its sale, does not present a case arising under

NOTE.—As to Federal question as conferring jurisdiction on United States Courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308; and *Re Buchanan*, 39 L. ed. U. S. 884.

the Federal Constitution so as to deprive the decree of the circuit court of appeals therein of that finality which exists, under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, § 6, U. S. Comp. Stat. 1901, p. 550), when the case is one in which the jurisdiction of the lower court depends entirely upon diverse citizenship, although it contains averments that the construction which such official places upon the statute will render it repugnant to the Federal Constitution.

[No. 66.]

Argued November 10, 1903. Decided December 7, 1903.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree of the Circuit Court for the Southern District of Ohio, dismissing a bill to restrain the state dairy and food commissioner from charging that a certain article came within the prohibition of the Ohio pure food law, and from threatening or instituting prosecutions for the violation of such law. *Dismissed.*

See same case below, 51 C. C. A. 122, 113 Fed. 616.

Statement by Mr. Chief Justice **Fuller**:

[406] *This was a bill filed by Arbuckle Brothers against Joseph E. Blackburn, as dairy and food commissioner of the state of Ohio, to restrain him from certain action on his part as such officer, including prosecutions for violation of pure food laws of the state.

After a jurisdictional clause setting forth diversity of citizenship, the bill averred that by an act of the general assembly of the state of Ohio, passed in the year 1884, entitled "An Act to Provide Against the Adulteration of Food and Drugs," as amended by an act passed in the year 1890, entitled "An Act to Amend Section 3 of an Act Entitled 'An Act to Provide Against the Adulteration of Food and Drugs,' Passed March 20, 1884," which act was still in full force and virtue, it was provided that no person should, within the state of Ohio, manufacture for sale, offer for sale, or sell, any article of food which was adulterated within the meaning of said act, and that the term "food" used therein should include all articles used for food or drink by man, whether simple, mixed, or compound. That it was further provided that food should be deemed adulterated "(1) If any substance or substances had been mixed with it, so as to lower or depreciate, or injuriously affect its quality, strength, or purity; (2) If any inferior or cheaper substance or substances have been substituted wholly or in part for it; (3) If any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it; (4) If it is an imitation of, or is

sold under the name of, another article; (5) If it consists wholly, or in part, of a diseased, decomposed, putrid, infected, tainted, or rotten animal or vegetable substance or article, whether manufactured or not; or, in the case of milk, if it is the product of a diseased animal; (6) If it is colored, coated, polished, or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; (7) If it contains any added substance or ingredient which is poisonous or injurious to health; provided, that the provisions of this act shall not apply to mixtures or compounds recognized *as ordi- [407] nary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, with the name and per cent of each ingredient therein, and are not injurious to health."

The bill alleged that for more than thirty years complainants and their predecessors had been engaged, and still were, in the manufacture and sale throughout the United States, including the state of Ohio, of a certain compound or mixture known as Ariosa, —composed of roasted coffee, compounded and mixed with eggs and sugar, whereby the separate beans were coated, and to a large extent hermetically sealed after roasting with a compound of sugar and eggs, the original strength and aroma of the coffee being thus preserved, and deterioration prevented; that the coffee, eggs, and sugar were each "a common, healthy, and unobjectionable article of food;" that Ariosa had acquired great reputation, and the good will of the business of its manufacture and sale had become very valuable; that it was sold in Ohio in packages, each of which, in compliance with the laws of Ohio in respect to the adulteration of food, was distinctly labeled with a printed statement of the precise composition and the proportion of each of the ingredients of the article.

And it was charged that, notwithstanding these facts, defendant, as dairy and food commissioner of Ohio, had notified complainants that he considered Ariosa, as put up by them, an adulteration; that he had issued a circular letter to dealers and vendors, wrongfully asserting that complainants, in the manufacture and sale thereof, refused to abide by the laws of Ohio in that behalf; and that he proposed to institute prosecutions to prevent and punish its sale or offer for sale in Ohio.

By the 16th paragraph of the bill it was averred that "said statute, construed as respondent claims it should be, is in conflict with the 14th Amendment to the Constitution of the United States, and void, in that it would deprive complainants of their afore-

said property," and would deny them "equal protection of the law."

[408] And by the 17th paragraph it was averred that Ariosa *was shipped to and sold in Ohio in original packages, "and said statute, if construed as the respondent herein claims it should be, is a regulation by the said state of Ohio of interstate commerce, and is repugnant to, and in violation of, the 3d clause of § 8 of article 1 of the Constitution of the United States, and void."

That if "respondent be permitted to commit the threatened wrongs, the same will, as complainants are informed and believe, damage complainants to the extent of more than \$100,000,—an amount largely in excess of respondent's ability to respond in judgment."

The prayer was that the commissioner be restrained from charging that Ariosa was an article of food adulterated within the meaning of the statute, and that the use of the process of coating and glazing the coffee with the preparation of sugar and eggs, and the importation and sale constituted violations of the statute; from threatening dealers with prosecution; and from instituting or commencing prosecutions.

The case came on to be heard on complainants' application for a preliminary injunction, and was submitted on pleadings and evidence, whereupon the circuit court entered a decree denying the injunction, and dismissing the bill, which decree was affirmed by the circuit court of appeals, 51 C. C. A. 122, 113 Fed. 616, and the case then brought here by appeal.

Messrs. John DeWitt Warner and Clarence Brown argued the cause and filed a brief for appellants.

Mr. Edmond B. Dillon argued the cause, and, with *Mr. Roscoe J. Mauck*, filed a brief for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

[413] We are of opinion that this appeal must be dismissed, because *the jurisdiction of the circuit court was "dependent entirely upon the opposite parties to the suit or controversy being citizens of different states," and the decree of the circuit court of appeals was final. Act of March 3, 1891, 26 Stat. at L. 826, chap. 517, § 6, U. S. Comp. Stat. 1901, p. 550.

The circuit courts have "original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or

laws of the United States, or treaties made, or which shall be made, under their authority, . . . or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, . . ." Act of March 3, 1887, 24 Stat. at L. 552, chap. 373; act of August 13, 1888, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508.

In the present case the circuit court had jurisdiction on the ground of diverse citizenship; but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.

The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as is required in good pleading. *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63, and cases cited.

The averments of this bill did not bring the case within that rule, for they put forward no existing controversy as to the effect or construction of the Constitution, on which the relief depended, and set up no right which might be defeated or sustained according to such construction.

By the laws of Ohio the office of dairy and food commissioner was created, and it was made the duty of that officer to attend to the enforcement of all the laws against fraud and *adulteration or impurities in food,[414] drink, or drugs; to appoint assistant commissioners; and to employ such experts, chemists, agents, inspectors, and counsel as he might deem necessary for the proper enforcement of the laws; and that it was also made his duty to inspect any articles made or offered for sale as articles of food or drink, and to prosecute, or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations engaged in the manufacture or sale of any article of food or drink adulterated in violation of any laws of the state. 1 Bates' Anno. Stat. (Ohio) 1897, p. 262, title III., chap. 18.

By the act of 1884, as amended in 1890, and set out in the bill, it was provided, among other things, that food should be deemed adulterated "if it is colored, coated, polished, or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is." 2 Bates' Anno. Stat. (Ohio) 1897, p. 2229, title V., chap. A. The proviso excepted mixtures and compounds, recognized as ordinary articles of

food, not injurious to health, and labeled as required.

It is not asserted that this police regulation is in contravention of the Constitution of the United States, but it is said that when the commissioner, in the discharge of his duty under the law, reached the conclusion that the coating of Ariosa with a glaze of sugar and eggs was calculated to conceal damage or inferiority, and to make the article appear better or of greater value than it really was, and that the article was not a compound or mixture, and proposed to prosecute, he thereby construed the act in a way, which, if his construction were correct, would render it unconstitutional.

But these were findings of fact which resulted in bringing the article within the prohibition, and excluded it from the proviso, and neither findings nor prosecutions would in themselves constitute a deprivation of property, or a denial of the equal protection of the law, by the state, or any direct interference with interstate commerce, and the constitutionality of the statute was conceded.

[415] *The suggested controversy was purely hypothetical, and based the supposed constitutional objections on the contingency that, on issues of fact, it might be judicially determined that Ariosa came within the statute, which complainants denied.

If the commissioner's conclusions were erroneous, the courts were open for the correction of the error, and the possibility that they might agree with the commissioner could not be laid hold of as tantamount to an actual controversy as to the effect of the Constitution on the determination of which the result of the present suit depended. Indeed, in the only case called to our attention by counsel involving the status of Ariosa, the court of common pleas of Lucas county, Ohio, held that it was not within the prohibition of the statute. *White v. Ohio*, 12 Ohio N. P. 659.

Reference to the Constitution to strengthen objections to a particular construction, or the pursuit of a certain course of conduct, is not sufficient to invoke jurisdiction. Whatever grounds of equity interposition may have existed here,—and we express no opinion on that subject,—the jurisdiction of the circuit court as a court of the United States depended alone on diverse citizenship. If the allegation of that fact had been omitted from the bill, the jurisdiction could not have been maintained.

Appeal dismissed.

Mr. Justice **Day** took no part in the disposition of the case.

*UNITED STATES FIDELITY & GUARANTY COMPANY, *Plff. in Err.*,

v.

UNITED STATES, for the use, etc.†

(See S. C. Reporter's ed. 416-427.)

Principal and surety—extension of time for payment—discharge of surety.

A sixty-day extension of time for the payment of a bill for materials furnished to the principal obligor by a third party does not, at least in the absence of any evidence of loss thereby occasioned, discharge the surety on a bond conditioned not only for the faithful performance of the original contract with the United States for the construction of a public work, but for the prompt payment of all persons supplying labor and materials in the prosecution of such work.

[No. 39.]

Argued October 30, 1903. Decided December 7, 1903.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting questions as to the discharge of a surety by extensions of time of payment. Answered in the negative.

Statement by Mr. Justice **Brown**:

This was an action originally begun in the circuit court for the district of Colorado by the United States, for the use and benefit of the Golden Pressed & Fire Brick Company (hereinafter called the brick company) against John A. McIntyre and the United States Fidelity & Guaranty Company (hereinafter termed the guaranty company), upon a bond executed April 11, 1898, in pursuance of an act of Congress of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), to secure the performance of a contract theretofore entered into by McIntyre with the Secretary of the Treasury to furnish all the labor and materials, and do all the work required for the foundation and superstructure of a mint in the city of Denver.

The questions certified are founded upon the following facts: McIntyre, having agreed to erect the building, executed a bond

†This case is reported by the Official Reporter under the title of "*Guaranty Co. v. Pressed Brick Co.*"

NOTE.—On release of surety by extension of time of payment—see notes to *Miller v. Stewart*, 6 L. ed. U. S. 189; *Creath v. Sims*, 12 L. ed. U. S. 111; and *Bank of Uniontown v. Mackey*, 35 L. ed. U. S. 486.

On effect upon surety's liability of usury in consideration for extension of time to principal—see note to *Fleming v. Borden*, 53 L. R. A. 316.

to the United States, with the guaranty company as surety, conditioned not only upon the faithful performance of his work to erect the building according to his contract, and to any changes or additions made thereto, but to "promptly make payment to all persons supplying him labor or material [417] in *the prosecution of the work contemplated by said contract." During the progress of the work the brick company furnished the contractor brick for the construction of the building to the amount of \$6,517.55, which had been reduced by payments to \$2,711.65, for which the action was brought.

The defendant denied its liability upon the ground that on October 1, 1898, the brick company, without the knowledge or consent of the guaranty company, granted to McIntyre an extension of the time of payment of the balance then due on account of the purchase price of such brick; and accepted two promissory notes, one for thirty days after date (October 1), and another sixty days after September 15, 1898, the first one of which was paid. There was no allegation that, by reason of the extension of the time of payment of the sum so due on October 1, the guaranty company had sustained any loss or injury, but it was insisted that it was nevertheless thereby released and discharged from any further liability upon such bond.

The circuit court held that the extension did not operate to discharge the guaranty company from its liability, and the circuit court of appeals, to which the case was carried, certified to this court the following questions of law arising from these facts:

"First. Did the action of the brick company on October 1, 1898, in taking two promissory notes, one for the sum of \$1,275 and the other for the sum of \$2,508.10, for the amount of the brick company's account, then due and payable, one of said notes running for thirty days and the other for sixty days, and each bearing 10 per cent interest per annum from date, operate to discharge the United States Fidelity & Guaranty Company from its liability, assumed under the provisions of the aforesaid bond, to pay to the Golden Pressed & Fire Brick Company the amount of said indebtedness?

"Second. Did the extension of the time of payment of the balance due from said McIntyre, on October 1, 1898, by the taking of two notes in the manner and form aforesaid, [418] operate *to discharge the United States Fidelity & Guaranty Company of its liability to pay the amount of said indebtedness to the brick company, irrespective of the question whether said guaranty company did or did not sustain an actual loss or damage on account of such extension?"

191 U. S.

Mr. Andrew W. Gillette argued the cause, and, with Mr. James H. Brown, filed a brief for plaintiff in error:

The contract of the plaintiff in error is one of suretyship, and as such is to be strictly construed.

United States v. American Bonding & T. Co. 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925; *United States use of Schumacker v. McIntyre*, 111 Fed. 590; *United States v. Freckl*, 92 Fed. 299, Affirmed in 39 C. C. A. 491, 99 Fed. 237.

The extent of the surety's obligation to laborers and materialmen is to be determined in each instance by the language of the bond read in the light of the terms as to payment of such obligee's contract with the principal. It cannot be determined from the bond alone what was the price of the brick, nor what would be prompt payment therefor.

Brown v. Markland, 22 Ind. App. 652, 53 N. E. 295; *Ulster County Sav. Inst. v. Young*, 161 N. Y. 23, 55 N. E. 483.

The statutory bond in suit imposes upon the surety a dual obligation: (1) To the government for the completion of the principal contract; (2) to laborers and materialmen to see that they are promptly paid. These obligations are entirely separate and distinct.

United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 549; *United States use of Fidelity Nat. Bank v. Rundle*, 40 C. C. A. 450, 100 Fed. 400; *Griffith v. Rundle*, 23 Wash. 453, 55 L. R. A. 381, 63 Pac. 199; *United States Fidelity & G. Co. v. Omaha Bldg. & Constr. Co.* 53 C. C. A. 465, 116 Fed. 145; *United States v. Freckl*, 92 Fed. 299, Affirmed in 39 C. C. A. 491, 99 Fed. 237; *Dewey v. State*, 91 Ind. 173; *Conn v. State*, 125 Ind. 514, 25 N. E. 443; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531; *United States use of Snyder v. Hazzard*, 53 App. Div. 410, 65 N. Y. Supp. 1051; *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302.

Payment when due is prompt payment.

Mullin v. United States, 48 C. C. A. 677, 109 Fed. 817.

Extension of time of payment discharges a surety.

2 Brandt, Suretyship & Guaranty, § 342; 1 Story, Eq. Jur. § 326; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685; *Martin v. Thomas*, 24 How. 315, 16 L. ed. 147; *Smith v. United States*, 2 Wall. 219, 17 L. ed. 788; *Winne v. Colorado Springs Co.* 3 Colo. 155; *Bangs v. Strong*, 7 Hill, 250; *United States v. American Bonding & T. Co.* 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925.

The taking of a note for a debt then due has the effect in law to extend the time of payment to the maturity of the note, and to release a surety.

United States v. American Bonding & T. Co. 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925; *Hart v. Hudson*, 6 Duer, 305; *Rees v. Berrington*, 2 Ves. Jr. 540, 2 White & T. Lead. Cas. in Eq. 1867, 1869; *Myers v. Welles*, 5 Hill, 463; *Appleton v. Parker*, 15 Gray, 175; *Okie v. Speneer*, 2 Whart. 253; *Norton v. Roberts*, 4 T. B. Mon. 491; *Fel-lows v. Prentiss*, 3 Denio, 512, 45 Am. Dec. 484; *Templeman v. Texas Brewing Co.* (Tex. Civ. App.) 35 S. W. 935; *Elyton Co. v. Hood*, 121 Ala. 373, 25 So. 745; *Brooks v. Wright*, 13 Allen, 72; *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061; *Andrews v. Marrett*, 58 Me. 539.

The implied agreement of the brick company for extension of time of payment of McIntyre's indebtedness was based upon a sufficient consideration.

Myers v. Welles, 5 Hill, 463; *St. Paul Trust Co. v. St. Paul Chamber of Commerce*, 70 Minn. 486, 73 N. W. 408; *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061; *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685.

A surety is discharged by a change in the contract for the performance of which he is bound, regardless of whether or not he is damnified by such change.

Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189; *Reese v. United States*, 9 Wall. 13, 19 L. ed. 541; *Bethune v. Dozier*, 10 Ga. 235; *Burley v. Hitt*, 54 Mo. App. 272; *Norton v. Roberts*, 4 T. B. Mon. 491; *Rees v. Berrington*, 2 Ves. Jr. 540; 2 White & T. Lead. Cas. Eq. 1867, 1869.

Mr. T. J. O'Donnell argued the cause and filed a brief for defendant in error:

This contract should be construed with due regard to the fact that it is given in pursuance of a statute, and so construed that the object of the statute may be promoted. The statute being remedial, the construction must be one that will advance the remedy.

United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 549; *United States use of Fidelity Nat. Bank v. Rundle*, 40 C. C. A. 450, 100 Fed. 400; *United States use of Fidelity Nat. Bank v. Rundle*, 52 L. R. A. 505, 46 C. C. A. 251, 107 Fed. 227; *United States Fidelity & G. Co. v. Omaha Bldg. & Constr. Co.* 53 C. C. A. 465, 116 Fed. 145; *United States use of Sica v. Kimpland*, 93 Fed. 403; *Mullin v. United States*, 48 C. C. A. 677, 109 Fed. 817.

The general principles enunciated in these cases were followed by the state courts in actions arising upon bonds given under the act of Congress.

Griffith v. Rundle, 23 Wash. 453, 55 L. R. A. 381, 63 Pac. 199; *United States for use of Snyder v. Hazzard*, 53 App. Div. 410, 65 N. Y. Supp. 1051.

The undertaking in the case at bar, so far as it was made for parties in like situation to the defendant in error, is not an undertaking to assure the performance of an existing contract.

United States v. Freel, 39 C. C. A. 491, 99 Fed. 237, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875.

The parties furnishing labor and materials protected by an undertaking such as that given in the case at bar are not affected by a change in the contract made by the principals.

Doll v. Crume, 41 Neb. 655, 59 N. W. 806; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302; *Conn v. State*, 125 Ind. 514, 25 N. E. 443; *Dewey v. State*, 91 Ind. 173; *United States use of Snyder v. Hazzard*, 53 App. Div. 410, 65 N. Y. Supp. 1051; *United States use of Anniston Pipe & Foundry Co. v. National Surety Co.* 34 C. C. A. 526, 92 Fed. 549.

In a case where a creditor has a lien or security the taking of a note does not constitute a payment.

Mehan v. Thompson, 71 Me. 492; *Cotton v. Atlas Nat. Bank*, 145 Mass. 43, 12 N. E. 850; *Bunker v. Barron*, 79 Me. 62, 8 Atl. 253; *Parham Sewing Mach. Co. v. Broek*, 113 Mass. 194.

It is held under mechanics' lien laws that the giving of credit, taking of notes or other security, does not waive or release the lien.

Mehan v. Thompson, 71 Me. 492; *Western Brass Mfg. Co. v. Boyce*, 74 Mo. App. 343; *Mountain Electric Co. v. Miles*, 9 N. M. 512, 56 Pac. 284; *Cushwa v. Improv. Loan & Bldg. Asso.* 45 W. Va. 490, 32 S. E. 259.

The bond in suit should be treated as a contract of insurance.

Cowles v. United States Fidelity & G. Co. (Wash.) 72 Pac. 1032; *Frost, Guaranty Insurance, § 3*; *People ex rel. Kasson v. Rose*, 174 Ill. 310, 44 L. R. A. 124, 51 N. E. 246; *Guarantee Co. v. Mechanics' Sav. Bank & T. Co.* 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766; *American Credit Indemnity Co. v. Athens Woolen Mills*, 34 C. C. A. 161, 92 Fed. 581; *Bank of Tarboro v. Fidelity & Deposit Co.* 128 N. C. 366, 38 S. E. 908; *Jackson v. Fidelity & C. Co.* 21 C. C. A. 394, 41 U. S. App. 552, 75 Fed. 359; *Shakman v. United States Credit System Co.* 92 Wis. 366, 32 L. R. A. 383, 66 N. W. 528; *Tebbetts v. Mercantile Credit Guarantee Co.* 19 C. C. A. 281, 38 U. S. App. 431, 73 Fed. 95; *People ex rel. Stevens v. Fidelity & C. Co.* 153 Ill. 25, 26 L. R. A. 295, 38 N. E. 752; *Eickhoff v. Fidelity & C. Co.* 74 Minn. 139, 76 N. W. 968;

Fidelity & C. Co. v. Crays, 76 Minn. 450, 79 N. W. 531; *Fidelity & C. Co. v. Eickhoff*, 63 Minn. 170, 30 L. R. A. 586, 65 N. W. 351; *State v. Hogan*, 8 N. D. 301, 45 L. R. A. 166, 78 N. W. 1051; *Robertson v. United States Credit System Co.* 57 N. J. L. 12, 29 Atl. 421; *Clafin v. United States Credit System Co.* 165 Mass. 501, 43 N. E. 293; *Hayne v. Metropolitan Trust Co.* 67 Minn. 245, 69 N. W. 916; *Strouse v. American Credit Indemnity Co.* 91 Md. 244, 46 Atl. 328, 1063; *Trenton Potteries Co. v. Title Guarantee & T. Co.* 50 App. Div. 490, 64 N. Y. Supp. 116; *Minnesota Title Ins. & T. Co. v. Drexel*, 17 C. C. A. 56, 36 U. S. App. 50, 70 Fed. 194; *Wheeler v. Real Estate Title Ins. & T. Co.* 160 Pa. 408, 28 Atl. 849; *Fidelity & C. Co. v. Yoder*, 63 Kan. 880, 64 Pac. 1027; *Seaton v. Heath* [1899] 1 Q. B. 782; *Dane v. Mortgage Ins. Corp.* [1894] 1 Q. B. 54; *Finlay v. Mexican Invest. Corp.* [1897] 1 Q. B. 517.

The rule that a surety is a favorite of the law has no application to a case where the surety receives compensation and is in the line of its regular business.

Frost, Guaranty Insurance, § 4; *Walker v. Holtzelaw*, 57 S. C. 459, 35 S. E. 754; *Tebbetts v. Mercantile Credit Guarantee Co.* 19 C. C. A. 281, 38 U. S. App. 431, 73 Fed. 95; *Com. v. Equitable Beneficial Asso.* 137 Pa. 412, 18 Atl. 1112; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552.

The parties to a contract which has been executed by another party as surety may still deal with each other in matters outside of the contract of the surety with the same effect as if no such contract or suretyship existed; and such dealings do not release the surety.

Benjamin v. Hillard, 23 How. 149, 16 L. ed. 518; *Roach v. Summers*, 20 Wall. 165, 22 L. ed. 252; *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; *Stuts v. Strayer*, 60 Ohio St. 384, 54 N. E. 368; *Joyce v. Auten*, 179 U. S. 591, 45 L. ed. 332, 21 Sup. Ct. Rep. 227; *Fertig v. Bartles*, 78 Fed. 866.

Even in the case of a strict suretyship where there is an absence of the technical rule in relation to the alteration of the contract, something must be shown to the injury of the surety in order to discharge him from liability.

Wood v. Brown, 43 C. C. A. 474, 104 Fed. 203.

Mr. Justice **Brown** delivered the opinion of the court:

This bond was given in pursuance of the act of 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), "for the protection of persons furnishing materials

and labor for the construction of public works." The act *requires, in substance, that [423] persons contracting with the United States for the construction of any public building, etc., shall be required, before commencing such work, to execute the usual penal bond, "with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract," with a right on the part of the materialman to bring suit in the name of the United States for his use and benefit against the contractor and his sureties. The bond in this case contained two entirely distinct and separate obligations: First, that McIntyre should fulfil all the conditions and covenants of his contract, whatever changes in or additions to such contract might thereafter be made; and, second, promptly make payment to all persons supplying him labor and materials in the prosecution of the work. Of course, these covenants are to be read together, and the latter interpreted in the light of the former.

The question involved is whether the ordinary rule that exonerates the guarantor in case the time fixed for the performance of the contract by the principal be extended applies to a bond of this kind, executed by a guaranty company not only for a faithful performance of the original contract, but for the payment of the debts of the principal obligor to third parties. It is conceded that, by the general law of suretyship, any change whatever in the contract for the performance of which the guarantor is liable, made without his consent, such, for instance, as an extension of time for payment, if made upon sufficient consideration, discharges the guarantor from liability. *Miller v. Stewart*, 9 Wheat. 681, 6 L. ed. 190; *Smith v. United States*, 2 Wall. 219, 17 L. ed. 788; *Reese v. United States*, 9 Wall. 13, 19 L. ed. 541.

Counsel for the brick company argued with much persuasiveness that this rule of *strictissimi juris*, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary *consideration, has no application [424] to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation, and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract. It is, at least, open to doubt, however, whether any relaxation of the rule should be permitted as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of *strictissimi juris*,

and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment. The government wisely protects itself in these cases by providing in the bond that the obligation of the surety shall extend to all changes in or additions to the contract, which may thereafter be made,—a clause which we have held extends to such changes as might be found advantageous or necessary in the plans or specifications, but does not extend to a change in the location of the structure to be built. *United States v. Frecl*, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875. But no provision was made in the bond in that case with respect to the obligation of the principal and his surety to make payment to all persons supplying labor or material to the contractor in the prosecution of his work.

We do not, however, deem it necessary to express an opinion upon this subject, as we prefer to rest our decision upon the peculiar character of the covenant upon which this action is brought. In an ordinary guaranty the guarantor understands perfectly the nature and extent of his obligation. If he becomes surety for the performance of a building contract, he is presumed to know the parties, the terms of their undertaking, the extent and feasibility of the work to be done, the character and responsibility of the principal obligor, and his ability to carry out the contract. If he guarantees the payment of a particular debt, he usually knows the exact amount of the debt, the time when it matures, and something of the ability of the principal to meet it. If he becomes responsible for the payment of the principal's [425] debts generally, or lends his credit *to a proposed purchaser of goods, he knows the amount of his liability, and the means of his principal to meet them. In such cases he contracts in reliance upon the exact terms of his principal's undertaking, and has a right to suppose that no change will be made without his consent; and the courts have gone so far as to hold that any change will exonerate him, though it really redound to his benefit.

This covenant, however, is inserted for an entirely different purpose from that of securing to the government the performance of the contract for the construction of the building. Inasmuch as neither the contractor nor his subcontractor can secure themselves by a mechanic's lien upon the proposed building, the government, solely for the protection of the latter requires a covenant for the prompt payment of his claims, and the same security that it requires for the performance of the principal contract. In this covenant the surety guarantees noth-

ing to the principal obligee,—the government,—though the latter permits an action upon the bond for the benefit of the subcontractors. The covenant is made solely for their benefit. The guarantor is ignorant of the parties with whom his principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and it is to be assumed that the surety contracts with knowledge of this fact. Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of sixty days, or whether, after the materials are furnished, the time for payment is extended sixty days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain.

Stress is laid upon the fact that the defendant company guaranteed that the principal obligor should "promptly" make payment to his materialmen, and that this, properly interpreted, *required that the con-[426] tractor should pay at once upon the maturity of the bills, and that as such bills became due October 1, 1898, the promptness guaranteed required their immediate payment. We are not impressed with the force of this contention. If the word "promptly" has any particular significance in this connection, it is satisfied by such payment as the subcontractor shall accept as having been promptly made; or perhaps it was intended to give him an immediate action upon the bond, in case such payment be not made with sufficient promptness. It was not intended, however, that the want of an immediate payment should be set up as a defense by the surety. As these bills are rarely paid the very day they become due, the narrow construction would destroy the principal value of the security.

The facts of this case do not call for an expression of opinion as to whether, if an unusual credit were given, and in the meantime the principal obligor had become insolvent, or the surety were otherwise damnified by the delay, it might not be exonerated, since neither of these contingencies supervened in this case, and we are remitted to the naked proposition whether the giving of a customary credit, with no evidence of loss thereby occasioned, is sufficient to discharge the surety. We find no difficulty whatever in answering this question in the negative. The rule of *strictissimi juris* is a stringent

one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a subcontractor, as was the case in *United States use of Heise v. American Bonding & T. Co.* 89 Fed. 921, 925, or to cases not otherwise within the scope of the undertaking.

[427] *Bonds containing the covenant in question are not common, though they have sometimes appeared in the state courts, and the construction here given them has been generally adopted (*United States use of Snyder v. Hazard*, 53 App. Div. 410, 65 N. Y. Supp. 1051), although these cases have generally turned upon the question whether the rights of the materialmen were affected by a change made in the contract by the principals. *Dewey v. State*, 91 Ind. 173; *Conn v. State*, 125 Ind. 514, 25 N. E. 443; *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Griffith v. Rundlc*, 23 Wash. 453, 55 L. R. A. 381, 63 Pac. 199.

Both of the questions certified are answered in the negative.

LA REPUBLIQUE FRANCAISE *et al.*, Petitioners, ,
v.

SARATOGA VICHY SPRING COMPANY.

(See S. C. Reporter's ed. 427-441.)

Unfair competition—exclusive right to use of word "Vichy" in connection with mineral water—laches—nullum tempus—equitable relief.

1. The exclusive right to the use of the word "Vichy," under which the waters of the springs of a commune in France of that name have been known for centuries, belongs to the owner of such springs as against every one whose waters are not drawn therefrom, or, at least, from the same hydrographical region,

NOTE.—On laches or abandonment as a defense in suits for infringement of trade-marks or names, or for unfair competition in trade—see note to *Saxlehner v. Eisner & M. Co.* 45 L. ed. U. S. 60.

As to trade-mark in geographical name—see note to *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 45 L. ed. U. S. 365.

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which may be called generally the basin of Vichy.

2. The rule of *nullum tempus* cannot be invoked by the French Republic to answer the defense of laches in a suit to enforce an exclusive right to the use of the word "Vichy" in connection with mineral waters as against persons using that word to denote a water not drawn from springs in the commune of France of that name, where it has entered into an eighty-year lease of such springs to its complainant for a fixed annual rental, which lease has still thirty years to run.
3. No exemption from the defense of laches to a suit by the French Republic and its lessee of the Vichy springs to enforce an exclusive right to the use of the word "Vichy" in connection with mineral waters as against persons using that word to denote waters not drawn from springs in the commune of France of that name was effected by the declaration in the treaty with France of June 11, 1887, art. 8, that "the commercial name shall be protected in all the countries of the Union without obligation of deposit, whether it forms part or not of a trade or commercial mark."
4. Equity will not enforce the right to an exclusive use of the word "Vichy" in connection with mineral waters, which by long adverse use has become generic, as against persons using that word to denote a water not drawn from springs in a commune in France of that name, where no attempt whatever was made to simulate the labels on the imported water, and the two waters not only differ in their ingredients and taste, but one is a still, and the other is an effervescing, water.

[No. 53.]

Argued November 4, 1903. Decided December 7, 1903.

ON CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the Circuit Court for the Northern District of New York, dismissing a bill to enforce an exclusive right to the use of the word "Vichy" in connection with mineral water, and granted an injunction against the use of any label in which the place of origin of the water was not as prominently displayed as the word "Vichy." *Affirmed.*

See same case below, 46 C. C. A. 418, 107 Fed. 459.

Statement by Mr. Justice **Brown**:

This was a bill in equity brought in the circuit court of the United States for the northern district of New York by the French Republic, as owner, and La Compagnie Fermière de l'Etablissement Thermal de Vichy (hereinafter termed the Vichy company), as lessee, of the springs of Vichy, France, against the Saratoga Vichy Spring Company, for the unlawful use of the word "Vichy," claimed by the plaintiffs as a commercial name or trade-mark, and appropri-

ated for the waters of the defendant, which are drawn from a certain natural spring at Saratoga, New York.

Defense: That for fifty years mineral water has been sold throughout the world under the name of "Vichy," and that such name has come to denote a type of water, namely, alkaline, noncathartic, carbonated water, and does not stand for the water of any one spring; that defendant has never sold Vichy as and for that of the plaintiffs, nor in resemblance thereto, but has so labeled its water that the purchaser shall know that it is a natural mineral water of Saratoga; and that plaintiffs' claim is stale.

The bill was dismissed by the circuit court upon the ground that plaintiffs had no exclusive right to the use of the word "Vichy," and that defendant had never been guilty of an attempt to palm off its waters as the imported article. 99 Fed. 733. On appeal, the [429] court of appeals reversed *the decision of the circuit court and granted an injunction against the use of one particular label, or "any other label in which the place of the origin of the water is not as plainly and prominently made known as the fact that it is named 'Vichy.'" 46 C. C. A. 418, 107 Fed. 459.

Plaintiffs thereupon applied for a writ of certiorari, which was granted. Defendant made no similar application, but acquiesced in the decree, and discontinued the offending label.

Messrs. Charles Bulkley Hubbell and Archibald Cox argued the cause and filed a brief for petitioners:

The courts have not accepted the reasoning which leads to the conclusion that, because the suppression of a lie will benefit more than one person, its continuance should be permitted.

Clark Thread Co. v. Armitage, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.* 17 C. C. A. 576, 35 U. S. App. 847, 70 Fed. 1017; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 49, 86 Fed. 608.

In the absence of the affirmative defense relating to the use by the public in the United States of the name of complainant's spring, the case in all its parts would be with the complainants.

Congress & E. Spring Co. v. High Rock Congress Spring Co. 45 N. Y. 291, 6 Am. Rep. 82; *Radde v. Norman*, L. R. 14 Eq. 348; *Raggett v. Findlater*, L. R., 17 Eq. 29; *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395; *Anheuser Busch Brewing Asso. v. Piza*, 23 Blatchf. 245, 24 Fed. 149; *Lever Bros. v. Pasfield*, 88 Fed. 484; *Carlsbad v.* 248

Kutnow, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167; *Hill v. Lockwood*, 32 Fed. 389.

In the absence of laches or acquiescence, the use by the defendant of the designation "Saratoga Vichy" would be an obvious infringement of complainant's rights.

Congress & E. Spring Co. v. High Rock Congress Spring Co. 45 N. Y. 291, 6 Am. Rep. 82; *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; *Lever Bros. v. Pasfield*, 88 Fed. 484; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167; *Royal Baking Powder Co. v. Raymond*, 70 Fed. 376, 29 C. C. A. 245, 55 U. S. App. 575, 85 Fed. 231; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Anheuser-Busch Brewing Co. v. Fred Miller Brewing Co.* 87 Fed. 864; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141; *New Home Sewing Mach. Co. v. Bloomingdale*, 59 Fed. 284; *Sanitas Co. v. Condry*, 56 L. T. N. S. 621; *Amos H. Van Horn v. Coogan*, 52 N. J. Eq. 380, 28 Atl. 788; *Roy Watch Case Co. v. Camm-Roy Watch Case Co.* 28 Misc. 45, 58 N. Y. Supp. 979; *Hutchinson v. Covert*, 51 Fed. 832; *Colgate v. Adams*, 88 Fed. 899; *Hohner v. Gratz*, 52 Fed. 871; *Thomas G. Plant Co. v. May Co.* 44 C. C. A. 534, 105 Fed. 375; *Ilier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Oppermann v. Waterman*, 94 Wis. 583, 69 N. W. 569; *Lee v. Haley*, L. R. 5 Ch. 155; *Russia Cement Co. v. Le Page*, 147 Mass. 206, 17 N. E. 304; *American Grocers' Pub. Asso. v. Grocers' Pub. Co.* 25 Hun, 398.

The appropriation by the defendant of the word "Vichy" was without a shadow of justification, and in fraud of plaintiff's rights.

Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

The over-accentuation of the word "Vichy" cannot be justified.

Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141.

The extent of a man's piratical invasions of his neighbor's rights does not convert his piracy into a lawful trade.

Ford v. Foster, L. R. 7 Ch. 611.

Obvious fraud continued for a period of years in connection with the abandonment of an honest bottle and the adoption and use of a simulated bottle and label ought not, upon principles of eternal justice, to be admitted to repel relief.

Prevost v. Gratz, 6 Wheat. 481, 5 L. ed. 311.

The adverse uses of the word "Vichy," however general and long continued, were all of them essentially unfair and equivocal.

Pinto v. Badman, 8 R. P. C. 181; *Chivers v. Chivers*, 17 R. P. C. 420; *Edge v. Gallon*,

17 R. P. C. 557; *Saxlehner v. Siegel-Cooper Co.* 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16; *Reddaway v. Banham* [1896] A. C. 200; *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83; *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395; *Putnam Nail Co. v. Bennett*, 43 Fed. 800; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 204, 41 L. ed. 130, 16 Sup. Ct. Rep. 1002; *Groft v. Day*, 7 Beav. 84; *Menendez v. Holt*, 128 U. S. 521, 32 L. ed. 528, 9 Sup. Ct. Rep. 143; *Shaver v. Heller & M. Co.* 48 C. C. A. 48, 108 Fed. 821.

Words which have denoted a unique product of nature found only at a particular place have been held to be in the nature of trade-names.

Carlsbad v. Kutnow, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 168; *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588; *Braham v. Beachim*, L. R. 7 Ch. Div. 848; *Radde v. Norman*, L. R. 14 Eq. 348; *Seixo v. Provezende*, L. R. 1 Ch. 192; *Delaware & H. Canal Co. v. Clark*, 13 Wall. 315, 20 L. ed. 581; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 550, 34 L. ed. 1005, 11 Sup. Ct. Rep. 396; *Shaver v. Heller & M. Co.* 48 C. C. A. 48, 108 Fed. 821; *Gage-Downs Co. v. Featherbone Corset Co.* 83 Fed. 213; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608; *Clisby v. Reese*, 32 C. C. A. 80, 59 U. S. App. 721, 88 Fed. 645.

The case is the same as if the French government were a patentee and the Vichy company the exclusive licensee; and in such a case there is no question that the owner of the patent would be an indispensable party.

Waterman v. Mackensie, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 334; *Birdsell v. Shaliol*, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; *Paper Bag Cases*, 105 U. S. 766, 26 L. ed. 959; *Otis Bros. Mfg. Co. v. Crane Bros. Mfg. Co.* 27 Fed. 550; *Story*, Eq. Pl. § 72; *Gregory v. Stetson*, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. Rep. 422; 1 Foster, Fed. Prae. § 42, p. 110; *Chadbourne v. Coe*, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 479; *Williams v. Bankhead*, 19 Wall. 563, 22 L. ed. 184.

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It is certain that, if the government of the United States were a complainant in this case, as the government of France is a complainant, there could be no imputation of laches.

United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; *Dox v. Postmaster-General*, 1 Pet. 318, 7 L. ed. 160; *United States v. Knight*, 14 Pet. 301, 10 L. ed. 465; *Gibbons v. United States*, 8 Wall. 269, 19 L. ed. 453; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *People v. Gilbert*, 18 Johns. 229; *Steele v. United States*, 113 U. S. 128, 28 L. ed. 952, 5 Sup. Ct. Rep. 396; *United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 120, 30 L. ed. 81, 6 Sup. Ct. Rep. 1006; *United States v. Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; *United States v. Insley*, 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. Rep. 485; *Sau Pedro & C. D. A. Co. v. United States*, 146 U. S. 120, 36 L. ed. 911, 13 Sup. Ct. Rep. 94; *United States v. Thompson*, 98 U. S. 486, 25 L. ed. 194; *United States v. Van Zandt*, 11 Wheat. 184, 6 L. ed. 448; *Lindsey v. Miller*, 6 Pet. 666, 8 L. ed. 538; *Gaussen v. United States*, 97 U. S. 584, 24 L. ed. 1009.

A custom or usage to be recognized must be reasonable, certain, and moral.

United States v. Buchanan, 8 How. 83, 12 L. ed. 997; *Tilley v. Cook County*, 103 U. S. 155, 26 L. ed. 374; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; *Vaughan v. Holdes*, Cro. Jac. 80; *Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,785; *Broadbent v. Wilks*, Willes, 360; *Hilton v. Granville*, 5 Q. B. 701; *Codman v. Evans*, 5 Allen, 308, 81 Am. Dec. 748; *Tanistry's Case*, Davies Rep. pp. 78-87; *Viner's Abridgment, Customs (H)*, 24.

Unless a name of origin has wholly lost its meaning, unless the word "genuine" is without value to differentiate the original article from others bearing the name, proof of its use by others is simply proof of a fraudulent usage. And this, we submit, may be said to be one sufficient reason for the many authoritative cases which discourage a recognition of laches in cases relating to commercial reputation and good will.

McLean v. Fleming, 96 U. S. 258, 24 L. ed. 833.

Mere laches in a case of this character does not defeat the right to injunctive relief.

Actiengesellschaft Vereinigte Ultramarin-Fabriken v. Amberg, 48 C. C. A. 264, 109 Fed. 151.

Acquiescence, however long continued, cannot create a license.

Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; *Morgan v. Rogers*, 19 Fed. 596; *Pinto v. Badman*, 8 R. P. C. 181; *Witthaus v. Braun*, 44 Md. 303, 22 Am. Rep. 44; *Sax-*

lehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

There is no possible foundation for a charge of abandonment in this case.

McLean v. Fleming, 96 U. S. 258, 24 L. ed. 833; *Menendez v. Holt*, 128 U. S. 523, 524, 32 L. ed. 529, 9 Sup. Ct. Rep. 143; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 549, 34 L. ed. 1004, 11 Sup. Ct. Rep. 396; *Brown Chemical Co. v. Meyer*, 139 U. S. 546, 35 L. ed. 250, 11 Sup. Ct. Rep. 625; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 186, 41 L. ed. 125, 16 Sup. Ct. Rep. 1002; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 357; *Rodgers v. Philp*, 1 O. G. 29; *Browne, Trade-Marks*, 2d ed. p. 661; *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111; *Filley v. Fassett*, 44 Mo. 173, 100 Am. Dec. 275; *Cahn v. Gottschalk*, 14 Daly, 542, 2 N. Y. Supp. 13; *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461, Fed. Cas. No. 9,026; *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. 298; *Gillott v. Esterbrook*, 47 Barb. 455, Affirmed in 48 N. Y. 374, 8 Am. Rep. 553; *Colman v. Crump*, 70 N. Y. 573; *Sanders v. Jacob*, 20 Mo. App. 96; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Consolidated Fruit Jar Co. v. Thomas*, Cox's Man. Case No. 665; *Julian v. Hoosier Drill Co.* 78 Ind. 408; *Sawyer v. Kellogg*, 9 Fed. 601; *Williams v. Adams*, 8 Biss. 452, Fed. Cas. No. 17,711; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941.

The court will not send the complainants to a court of law.

Hartford v. Chipman, 21 Conn. 488; *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; *Mann v. Appel*, 31 Fed. 378; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580.

One of the grounds upon which courts of equity take jurisdiction is to protect the public against fraud and imposition.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 200, 41 L. ed. 130, 16 Sup. Ct. Rep. 1002; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 845; *Montgomery v. Thompson* [1891] A. C. 217; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608.

"Vichy" is a commercial name.

Congress & E. Spring Co. v. High Rock Congress Spring Co. 45 N. Y. 201, 6 Am. Rep. 82; *Radde v. Norman*, L. R. 14 Eq. 348; *Raggett v. Findlater*, L. R. 17 Eq. 29; *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395; *Anheuser Busch Brewing Asso. v. Piza*, 23 Blatchf. 245, 24 Fed. 149; *Lever*

Bros. v. Pasfield, 88 Fed. 484; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167; *Hill v. Lockwood*, 32 Fed. 389.

Action by the legislative department of the government is not necessary in order that the protection guaranteed by the treaty may be invoked.

Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

Mr. Edgar T. Brackett argued the cause and filed a brief for respondent:

It is certainly neither illegal nor immoral to claim a likeness to, or superiority to, another article mentioned; but, on the other hand, this is the fairest competition.

Brown Chemical Co. v. Stearns, 37 Fed. 360.

The final test must be the likeliness of the name or the package to deceive the buying public; if none, there is no occasion for interference.

Centaur Co. v. Marshall, 38 C. C. A. 413, 97 Fed. 785; *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040.

Unless there is evidence of actual deception, relief will not be granted.

Jennings v. Johnson, 37 Fed. 364.

A label may be in small print, and still be equally conspicuous with larger.

Cahn v. Hoffman House, 7 Misc. 461, 28 N. Y. Supp. 388.

The defendant, in adopting the word "Vichy" in connection with its water, did not intend to defraud the complainants, nor to deceive the public; it has never sold its water as, or for, the Vichy water of the complainants, nor in resemblance thereto, but all its water has been, in proper manner, labeled and marked, so that the purchaser shall know that the goods sold by the defendant is a natural mineral water of Saratoga, and not the water of the complainants.

This testimony is without the slightest contradiction in word or in deduction, and evidence of such intent was competent.

Pope v. Hart, 35 Barb. 630; *Cortland County v. Herkimer County*, 44 N. Y. 22; *Bayliss v. Coekeroft*, 81 N. Y. 363; *Davis v. Marvine*, 160 N. Y. 269, 54 N. E. 704; *Lally v. Emery*, 54 Hun, 517, 8 N. Y. Supp. 135.

A name alone is not a trade-mark when it is understood to signify, not the particular manufacture of a certain proprietor, but the kind or description of the thing which is manufactured.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; *Burton v. Stratton*, 12 Fed. 696; *Hostetter v. Fries*, 21 Blatchf. 339, 17 Fed. 620; *Air-Brush Mfg. Co. v. Thayer*, 84 Fed. 640; *Brown Chemical Co. v. Stearns*, 37 Fed. 360; *Clotworthy v. Schepp*,

42 Fed. 62; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Corbin v. Gould*, 133 U. S. 308, 33 L. ed. 611, 10 Sup. Ct. Rep. 312; *Sterling Remedy Co. v. Gorey*, 110 Fed. 372; *Vitascope Co. v. United States Phonograph Co.* 83 Fed. 30; *New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co.* 99 Fed. 85; *Barrett Chemical Co. v. Stern*, 176 N. Y. 27, 68 N. E. 65.

Improper delay in applying for relief, or laches in the enforcement of his rights, causes a party to forfeit his right to relief by injunction.

Amoskeag Mfg. Co. v. Garner, 55 Barb. 151; *Leggett v. Standard Oil Co.* 149 U. S. 287, 37 L. ed. 737, 13 Sup. Ct. Rep. 902; *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324; *McKnight v. Taylor*, 1 How. 161, 11 L. ed. 86; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Brown v. Bucna Vista County*, 95 U. S. 157, 24 L. ed. 422; *Lewis v. Chapman*, 3 Beav. 133; *Lansdale v. Smith*, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; *McLaughlin v. People's R. Co.* 21 Fed. 574.

The French Republic has no interest in the controversy here, and is not a proper party to the record.

Kernochan v. New York Elev. R. Co. 128 N. Y. 559, 29 N. E. 65.

Even if the Republic of France were correctly on the record as a nominal party for the benefit of the complainant company and to enable it to vindicate its rights, such presence on the record in a nominal capacity would not save any rights to the complainant company that it would not have had in its own name.

Maryland use of Markley v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; *United States v. Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083.

The name "Vichy" is a geographical name, as it is alleged in the bill, and as is shown by the proof; and as such geographical name the complainants have no right to insist on its exclusive use as a trade-name.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Barrett Chemical Co. v. Stern*, 176 N. Y. 27, 68 N. E. 65; *Levy v. Waitt*, 25 L. R. A. 190, 10 C. C. A. 227, 21 U. S. App. 394, 61 Fed. 1008; *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.* 35 C. C. A. 237, 94 Fed. 667; *Hoyt v. J. T. Lovett Co.* 31 L. R. A. 44, 17 C. C. A. 652, 39 U. S. App. 1, 71 Fed. 173; *La Republique Francaise v. Schultz*, 94 Fed. 500; *Luyties v. Hollender*, 30 Fed. 632.

The case of *Saxlehner v. Eisner & M. Co.* 191 U. S.

179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7, must be regarded as controlling on the main points raised in this case.

Mr. Justice **Brown** delivered the opinion of the court:

This suit is brought to vindicate the right of plaintiffs to the exclusive use of the word "Vichy" as against the defendant, and, incidentally, as against all persons making use of the word to denote a water not drawn from the springs of Vichy, now owned by the French Republic, and leased to the Vichy company.

The title of the French Republic to the springs of Vichy, a commune of France, is clearly established. Known for their medicinal qualities since the time of the Roman Empire, and originally belonging to the feudal lord of Vichy, they were sold by him in 1444, together with the castle and its dependencies, to Pierre, Duke of Bourbon, in whose family they remained until 1531, when, for the treason of the Constable of Bourbon, they were confiscated by Francis I., and became the property of the Crown, in whose possession they remained until 1790, when they were united to the public domain, and afterwards passed to the French Republic and its successors, and were operated directly by the officers of the state until June, 1853, when they *were leased for [435] a fixed rental to a firm of which the Vichy company is the successor. The bottling and exportation of the waters was commenced before 1716, and in 1853 they began to be exported directly to this country, the shipments in 1893 amounting to about 300,000 bottles. For many years they have been bottled and sold all over the world.

The rights of the defendant originated from a spring discovered in 1872 in the township of Saratoga Springs, New York, the waters of which, though differing from the water of the Vichy spring both in ingredients and taste, have a certain resemblance to them which suggested the use of the word "Vichy." The water began to be bottled and sold in 1873 by the owners of the spring, and in 1876 became the property of the defendant which has since sold the water, using various bottles, circulars, and labels, containing more or less conspicuously displayed the word "Vichy."

1. As the waters of Vichy had been known for centuries under that name, there is reason for saying the plaintiffs had, in 1872, acquired an exclusive right to the use of the word "Vichy" as against every one whose waters were not drawn from the springs of Vichy, or at least, as observed by a French court, "from the same hydrographical region which may be called generally the basin of Vichy."

True the name is geographical; but geographical names often acquire a secondary signification indicative not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of palming off the productions of one person as those of another. *Elgin Nat. Watch Co. v. Illinois Watch Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588; *Lee v. Haley*, L. R. 5 Ch. App. 155; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; **Braham v. Beachim*, L. R. 7 Ch. Div. 848; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35; *Seizo v. Provezende*, L. R. 1 Ch. App. 192.

In a French case arising in this connection, and brought by the Vichy company against a rival company owning two springs in the same neighborhood, complaining that, by the composition of its name and the arrangement of its labels, as well as by the tenor of its different appeals to the public, the company owning these springs had created a damaging confusion between the two companies and their product, it was held that, while the rival company had a right to the use of the word "Vichy," it was bound to state the name of its springs, the place where they were located, as "near Vichy" in letters identical in height and thickness as those of the word Vichy in their advertisements and labels, and also the name of their springs in letters at least half their size,—in other words, it was bound to adopt such precautions as would fully apprise the public that it was not purporting to sell the waters of the original Vichy company, though, being in the same basin, they were entitled to use that designation.

2. A serious difficulty in the way of enforcing an exclusive right on the part of the plaintiffs to the use of the word Vichy is their apparent acquiescence in such use by others. For thirty years the defendant, the Saratoga Vichy Company, has been openly and notoriously bottling and selling its waters under the name of the "Saratoga Vichy" until its competition has become an extremely serious matter to the plaintiffs, whose importations began in 1853 with only 316 bottles, which by the year 1893 had increased to 298,500 bottles. The entire shipment of the Vichy company amounted in 1896 to nearly ten millions of bottles. Under such circumstances, and in view of the fur-

ther facts that other waters were openly manufactured and sold in this country under the name of Vichy, and that a manufactured water was dealt out by the glass under that name in innumerable soda water fountains throughout the country, as shown by the record in this case, it is impossible to suppose that the plaintiffs were not aware of these infringements *upon their exclusive[437] rights. It argues much more than ordinary indifference and inattention to suppose that the large amount of this rival water could be advertised and sold all over the country without the knowledge of their agents, who would naturally be active in the protection of their own interests, if not the interests of their principals. In fact, they had allowed the name to become generic and indicative of the character of the water. With all these facts before them, and with the yearly increasing sales and competition of the defendant company, no move was made against them for twenty-five years, and until 1898, when this bill was filed. A clearer case of laches could hardly exist. *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 36, 45 L. ed. 60, 75, 21 Sup. Ct. Rep. 7.

It is said, however, that the doctrine of laches has no application to the neglect of the government to pursue trespassers upon its rights, and that the French Republic is entitled to the benefit of that rule. It is at least open to doubt whether the maxim *nullum tempus*, applicable to our own government, can be invoked in behalf of a foreign government suing in our courts. The doctrine is one of public policy, and is based upon the assumption that the officers of the government may be so busily engaged in the ordinary affairs of state as to neglect a vindication of its interests in the courts. Whether this exemption can be set up by a foreign government in the prosecution of suits against our own citizens—in other words, whether the latter are not entitled to the benefit of the ordinary defenses at law—is a question which does not necessarily arise in this case, and as to which we are not called upon to express an opinion.

However this may be, it is clear that the rule of *nullum tempus* cannot be invoked in this case. While the French Republic is nominally the plaintiff, its interest in the litigation is little, if anything, more than nominal. For fifty years it has ceased to operate these springs through its own agents, since in 1853 the then Emperor of the French leased them to the predecessors of the Vichy company, which has since that time bottled and sold the water under successive leases as its own, upon the payment of an annual rental of 100,000 francs *to the[438] government. Its present lease does not expire until 1934. It thus appears that the

French Republic has had no real interest in the product of the springs for fifty years, and that it can have no such interest for thirty years to come. Its only title to sue, then, is in a possible depreciation of the rental value of this property after the lapse of the present lease, caused by the unlawful use of the name Vichy by the defendant. This is quite too inappreciable to answer the defense of laches, and, indeed, it is doubtful whether it justifies its joinder as coplaintiff in the suit. To hold that the French Republic appears in this litigation to be suing for the use and benefit of the Vichy company would more accurately describe their relations.

In such cases either where the government is suing for the use and benefit of an individual, or for the prosecution of a private and proprietary, instead of a public or governmental right, it is clear that it is not entitled to the exemption of *nullum tempus*, and that the ordinary rule of laches applies in full force. *United States v. Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; *Maryland use of Markley v. Baldwin*, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 538, 35 L. ed. 1099, 1106, 12 Sup. Ct. Rep. 308; *Curtner v. United States*, 149 U. S. 662, 37 L. ed. 890, 13 Sup. Ct. Rep. 985, 1041; *United States v. American Bell Teleph. Co.* 167 U. S. 224, 264, 42 L. ed. 144, 162, 17 Sup. Ct. Rep. 809; *Miller v. State*, 38 Ala. 600; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210.

The plaintiffs, then, are put in this dilemma: If the Republic be a necessary party to the suit here, as it sues in its private and proprietary capacity, the defense of laches is available against it. Upon the other hand, if it be an unnecessary party, the defense of laches may certainly be set up against the Vichy company, its coplaintiff.

We do not think the position of the plaintiffs in this connection is affected or strengthened by the eighth article of the treaty of June 11, 1887, with France and other nations, known as the Industrial Property Treaty (Comp. of Treaties, 684), which declares that "the commercial name shall be protected in all the countries of the Union [439] without obligation of deposit, *whether it forms part or not of a trade or commercial mark." [25 Stat. at L. p. 1376.] That article was evidently designed merely to protect the citizens of other countries in their right to a trade-mark or commercial name, and their right to sue in the courts of this country, as if they were citizens of the United States. It could never have been intended to put them on a more favorable footing

than our own citizens, or to exempt them from the ordinary defenses that might be made by the party prosecuted.

This is made the more apparent from article 2 of the treaty, which reads as follows: "The subjects or citizens of each of the contracting states shall enjoy, in all the other states of the Union, so far as concerns patents for inventions, trade or commercial marks, and the commercial name, the advantages that the respective laws thereof at present accord, or shall afterwards accord to subjects or citizens. In consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each state."

If there were any doubt about the rights of the plaintiffs under the eighth article, they are completely removed by the wording of the second. The rights of the French Republic are the same, and no greater under this article than those of the United States would be.

3. But conceding that the defense of laches would not be available in a case of actual fraud, or an attempt to foist upon the public the waters of the defendant as those of the original Vichy spring (*McIntire v. Pryor*, 173 U. S. 38, 43 L. ed. 606, 19 Sup. Ct. Rep. 352; *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; *Prevost v. Gratz*, 6 Wheat. 481, 497, 5 L. ed. 311, 315; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143), we find but little evidence of such purpose in this record. The two waters not only differ in their ingredients and taste, but the French Vichy is a still, and the Saratoga Vichy, as well as the other American Vichies, an effervescing, water. There is no attempt made whatever by the defendant to simulate the *label of the plaintiffs upon the [440] body of the bottle. The word "Vichy" is never used by the defendant alone, but always in connection with Saratoga. The two labels not only differ wholly in their design and contents, but even in their language,—that of the plaintiffs being wholly in French. Plaintiffs' label contains the word "Vichy" prominently displayed, with a picture of the thermal establishment where it is bottled, and the name of the particular spring. Defendant's label contains the two words, "Saratoga Vichy," in type of the same size, and displayed with equal prominence, and a statement that the Saratoga Vichy is far superior to the imported Vichy. It is true that in 1896 a small label was attached to the neck of the bottle upon which the name "Vichy" was more prominent than that of

"Saratoga." This label was printed upon a white background, with the word "Vichy" in prominent red letters, while the word Saratoga appeared in much smaller black letters included between the extended "V" and "Y" of the word "Vichy." The circuit court considered this to be immaterial, and thought it inconceivable that anyone of ordinary perception could be induced to buy this water as the imported Vichy. A majority of the court of appeals, however, while agreeing with the circuit court as to the total dissimilarity of the main labels, thought a purchaser might be deceived by the neck label into buying the Saratoga for the imported article, and in that particular reversed the circuit court, and enjoined the use of the neck label, or of any other label in which the place of the origin of the water was not as plainly and as prominently made known as the word "Vichy." As the defendant did not apply for a certiorari, and has acquiesced in the decree of the circuit court of appeals by changing the offending label, we are not called upon to express an opinion as to the deceptive character of this label. *Hubbard v. Tod*, 171 U. S. 474, 43 L. ed. 246, 19 Sup. Ct. Rep. 14.

It was said by this court in *Delaware & H. Canal Co. v. Clark*, 13 Wall. 322, 20 L. ed. 583, "In all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor *as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief." Applying this doctrine to the case under consideration we are clearly of the opinion that there is no such similarity in the labels as at present used, and that there is no such fraud shown in the conduct of the defendant, as would authorize us to say that plaintiffs are entitled to relief.

The decree of the Court of Appeals is therefore affirmed.

NORFOLK & WESTERN RAILWAY COMPANY *et al.*, Plffs. in Err.,
v.

JOHN R. SIMS, Sheriff, etc.

(See S. C. Reporter's ed. 441-451.)

Interstate commerce—validity of license tax on goods shipped C. O. D.

The license tax imposed by N. C. Laws 1901, p.

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed.

116, § 52, upon all those "engaged in the business of selling" sewing machines in the state, is an unconstitutional interference with interstate commerce so far as applied to the sale of a single machine shipped into the state by a nonresident manufacturing corporation, upon the written order of a customer, under an ordinary C. O. D. consignment.

[No. 74.]

Argued November 12, 1903. Decided December 7, 1903.

IN ERROR to the Supreme Court of the State of North Carolina, to review a judgment which affirmed a judgment of the Superior Court of Person County in that state, enforcing a license tax for selling a sewing machine in the state. *Reversed*, and remanded for further proceedings.

See same case below, 130 N. C. 556, 41 S. E. 673.

Statement by Mr. Justice **Brown**:

This was a controversy between the sheriff of Person county, North Carolina, on the one part, and the railway company and Mrs. O. L. Satterfield on the other, which might have been the subject of a civil action, and which the parties agreed to submit, under the Code of North Carolina, to the judge of the superior court upon the following facts, and upon the question of the liability of the defendants for a license tax under § 52 of "An Act to Raise Revenue," ratified March 15, 1901. *(Laws of 1901, p. 116.) The material part of the section reads as follows: [442]

"Every manufacturer of sewing machines, and every person or persons or corporation engaged in the business of selling the same in this state, shall, before selling or offering for sale any such machine, pay to the state treasurer, a tax of \$350, and obtain a license, which shall operate for one year from the date of the issue."

The Norfolk & Western Railway Company, a Virginia corporation, operates a railroad from its main line at Lynchburg, Virginia, via Roxboro in Person county, North Carolina, to Durham in the same state. This company had itself complied with the revenue act of 1901, and paid a license tax for the privilege of carrying on its business as a common carrier within the state of North Carolina.

Sears, Roebuck, & Company (incorporated), of the city of Chicago, are manufacturers and dealers in sewing machines at Chicago, Illinois.

The defendant, Mrs. Satterfield, a resident of Person county, N. C., about November 1,

U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

On license taxes as affecting interstate com-

1901, sent an order by mail to Sears, Roebuck, & Co. for a sewing machine, which was shipped by them as railroad freight from Chicago to Mrs. Satterfield at Roxboro, the railway company at Chicago issuing, on behalf of itself and its connecting railroad lines, a through bill of lading therefor, under which the sewing machine was to be delivered to Mrs. Satterfield on surrender of the bill of lading, and payment of freight charges to the delivering carrier, the Norfolk & Western Railway Co.

The bill of lading was sent by Sears, Roebuck, & Co. by express, C. O. D., to the express agent at Roxboro, who received from Mrs. Satterfield the price of the sewing machine, and delivered the bill of lading to her. The express agent and the railway station agent were one and the same person. Mrs. Satterfield, having paid the purchase price, presented the bill of lading to the station agent, tendered the freight charges, and demanded the delivery of the sewing machine.

[443] *The railway company was willing and would have delivered the same had not the plaintiff, the sheriff and *ex officio* tax collector of Person county, insisted that Sears, Roebuck, & Co. could not sell the machine to Mrs. Satterfield without paying the license tax of \$350, and forbade the delivery of the machine until the tax was paid, and thereupon levied upon the machine for such tax. He also insisted that the railway company would, by delivering the machine, be acting as the agent of Sears, Roebuck, & Co., and would be liable to prosecution for misdemeanor in aiding and abetting them in an unlawful sale of the sewing machine.

It also appears in the agreed statement of facts that other machines were sent by the same consignors to various purchasers in North Carolina, upon the lines of other interstate railroads, and were delivered upon the presentation of other bills of lading under the same conditions as above described.

The court found that Sears, Roebuck, & Co. were indebted to the state for \$350 license tax; that the levy upon the machine was lawful and valid, and plaintiff was ordered to sell the machine and apply the proceeds to the payment of the tax. The judgment was affirmed by the supreme court of the state. 130 N. C. 556, 41 S. E. 673.

Messrs. Theodore W. Reath and William A. Guthrie argued the cause, and, with Mr. Jos. I. Doran, filed a brief for plaintiffs in error:

The sale of a sewing machine by a citizen

of Illinois to a citizen of North Carolina upon a mail order, the order being received in Illinois and the machine being sent from Illinois to North Carolina C. O. D., is commerce among the several states, which cannot be regulated or taxed by the states.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; *State v. Hanaphy*, 117 Iowa, 15, 90 N. W. 601; *State v. Hickox*, 64 Kan. 650, 68 Pac. 35.

Messrs. Robert D. Gilmer and James E. Shepherd argued the cause and filed a brief for defendant in error:

The railroad and express agents concerned in all of these transactions were the agents of the Chicago company, and it was only through them as such agents that a complete sale of machines was effected.

Hutchinson, Carr. §§ 389-391; *Norfolk S. R. Co. v. Barnes*, 104 N. C. 25, 5 L. R. A. 611, 10 S. E. 83; *Tiedeman, Sales*, § 85.

Where the seller determines, or the contract requires him to make, the common carrier his own agent there is no transfer of possession until the goods have been delivered by the carrier to the vendee or his agent.

Tiedeman, Sales, §§ 87, 95; *Dows v. National Exch. Bank*, 91 U. S. 631, 23 L. ed. 218.

The case of *O'Neil v. Vermont*, 144 U. S. 324, 36 L. ed. 450, 12 Sup. Ct. Rep. 693, is decisive of the one at bar upon this, and also upon the question of interstate commerce.

The carrier's duty has been performed, and it holds the machines in its warehouse as the agent of the Chicago company, and such agency concerns, alone, the completion of a sale by the receipt of the purchase money and delivery. It has nothing whatever to do with the carriage of the goods,

merce—see notes to *Rothermel v. Meyerle*, 9 L. R. A. 366, and *American Fertilizing Co. v. Board of Agriculture*, 11 L. R. A. 179.

Respecting peddlers and drummers as related
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to interstate commerce—see notes to *Re Spain*, 14 L. R. A. 97, and *Stockard v. Morgan*, 46 L. ed. U. S. 785.

and, therefore, no interstate commercial element can enter into the matter.

2 Shinn, *Attachm.* § 578; *Freeman, Executions*, § 160; *Schouler, Bailments & Carriers*, § 498.

Mr. Justice **Brown** delivered the opinion of the court:

To the ordinary mind it seems a somewhat startling proposition that a manufacturing corporation, located and doing its main business in a distant city, having no manufactory in North Carolina, no stock in trade, no place for the sale of its goods there, and no agent authorized to sell them, can be compelled to take out a license required of all those "engaged in the business of selling," from the mere fact that it had done what hundreds of others were doing daily,—sent a single machine there upon a written order of a customer, and under an ordinary C. O. D. consignment. If this may be done, the revenues of every state may be largely increased by adopting a similar system, since a large part of the business of retail shops in the principal cities is done by orders received, filled, and the goods delivered in the same way. Of course, it is impossible to estimate the number of business houses in other states which are accustomed to collect their accounts in this manner.

If this were the law it would also follow that the consignor of every cargo of wheat sent to New York for export under a bill of lading, accompanied by a draft for the payment of the money in the usual method, might be compelled to take out a license in the state of New York as a dealer in produce, notwithstanding that all the real business was done in Chicago or North Dakota.

So, too, what the state may do directly it may authorize its municipalities to do, and if, under legislative sanction, each of the large towns in the state of North Carolina [447] saw fit to adopt a similar license tax, the consequence would be, not a simple interference with interstate commerce, but a practical destruction of one important branch of it.

While it may be entirely true that the property in the thing sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier, and hence it may be said that the sale is not completed until then, yet, as matter of fact, the bargain is made, and the contract of sale completed as such, when the order is received in Chicago, and the machine shipped in pursuance thereof.

A sale really consists of two separate and distinct elements: first, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property which may precede, be accompanied

by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell, and its acceptance. That possession shall be retained until payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have never understood that a license could be imposed upon this transaction except in connection with the prior agreement to sell, although, in certain cases arising under the police power, it has been held that the sale is not complete until delivery, and sometimes not until payment. Were it not for the opinion of the supreme court of North Carolina, we should have said that the words "engaged in the business of selling the same within the state" had reference to the word "selling" in its popular and ordinary sense of selling from a stock on hand or upon a special order to a manufacturer, and not to a mere method of collecting the money; but, however this may be, it is evident the state courts could not give it a construction which would operate as an interference with interstate commerce, and that upon this question the opinion of this court is controlling.

The cases relied upon by the state do not support its contention. In *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, a Connecticut *corporation, manufacturing sewing machines at Bridgeport, had an agency at Nashville, Tennessee, from which an agent was sent out to sell machines. It was held that he was subject to a license tax upon "all peddlers of sewing machines, without regard to the place of growth or produce of material or manufacture." As it appeared that the sale was made, and wholly made, in the state of Tennessee, and apparently from a stock kept in that state, through an agent of the company, the case is not in point. This case was followed, upon a similar state of facts in *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 *Inters. Com. Rep.* 68, 15 *Sup. Ct. Rep.* 367.

The case most earnestly pressed upon attention, however, is that of *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 *Sup. Ct. Rep.* 693. This was a prosecution before a justice of the peace for selling, furnishing, and giving away intoxicating liquors. The defendant was a dealer in liquors at Whitehall, New York, and was in the habit of receiving at his store orders for liquors from Vermont, accompanied by a jug to contain the liquor; and the liquors, as in this case, were sent under a C. O. D. consignment.

It was held by this court that, as the only question considered by the Supreme Court in its opinion was whether the liquor was

sold by O'Neil at Rutland or at Whitehall, and the court arrived at the conclusion that the completed sale was in Vermont, that this conclusion did not involve any Federal question, and the writ of error was dismissed. Mr. Justice Blatchford took express pains to say that "no point on the commerce clause of the Constitution of the United States was taken in the county court, . . . or considered by the supreme court of Vermont." The case was put by the supreme court of the state solely upon its police power. "If," said that court, "an express company or any other carrier or person, natural or corporate, has in possession within this state an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the state, it is a necessary incident of the police powers of the state that such article should be subject to seizure for the protection of the community."

[449] *It will thus be seen that the supreme court of Vermont disclaimed the decision of the very question involved in this case as to the power of the states to interfere with interstate commerce by taxation of the thing imported, and the writ of error was dismissed upon the ground that no Federal question was presented for its decision, and none was necessary to the determination of the case. Mr. Justice Field, in his dissenting opinion, thought the commerce clause of the Constitution was involved, and that the transaction was a clear interference with commerce between the states.

Upon the other hand, for the past seventy-five years, and ever since the original case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, we have uniformly held that states have no power to tax directly, or by license upon the importer, goods imported from foreign countries or other states, while in their original packages, or before they have become commingled with the general property of the state, and lost their distinctive character as imports. In that case a law of Maryland required importers to take out a license before they could be permitted to sell their imported goods. That was declared to be void not only as a tax upon imports, but as an infringement upon the power of Congress to regulate commerce. The case is one of the most important ever decided by this court, and has been adhered to by a uniform series of decisions since that time.

In *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, it was declared that a tax upon commercial agents not having a business house in the state was unconstitutional as a regulation of commerce when applied to soliciting the sale of goods on behalf of individuals or firms doing busi-

ness in another state, Mr. Justice Bradley remarking, apropos of what was subsequently decided in *O'Neil v. Vermont*, "that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or, when it does those *things[450] which may otherwise incidentally affect commerce, such as . . . the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes . . . upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein, . . . and no regulations can be made directly affecting interstate commerce." This case was affirmed in *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1.

The same rule was applied in *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, and *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, to a statute requiring the payment of a license from persons dealing in merchandise not the growth, produce, or manufacture of the state, and requiring no such license from persons selling goods grown, produced, or manufactured within the state. In *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881, a license tax imposed upon the agent of a railroad between Chicago and New York, soliciting business in San Francisco, was held to be void. To the same effect are *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, and *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576. Finally, in *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229, another of the same line of cases, it was held that a city ordinance imposing a license upon every person engaged in the business of selling or delivering picture frames, etc., was an interference with interstate commerce, so far as applied to picture frames made in other states, and shipped to an agent in the state of North Carolina; and that the transaction was not taken out of the protection of the commerce clause by the fact that the agent placed the pictures in their proper frames, and delivered them to the persons ordering them. Most of the prior cases are noticed in this opinion.

Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another state, shipped to North Carolina in its original package *for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the state. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exemption of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce.

The judgment of the Supreme Court of North Carolina is therefore reversed and the case remanded to that court for further proceeding not inconsistent with this opinion.

Mr. Justice **Holmes** did not participate in the decision of this case.

SCHUYLER NATIONAL BANK OF
SCHUYLER, NEBRASKA, and William
H. Sumner, *Plffs. in Err.*,
v. .

JAMES GADSDEN, George Thrush, Mattie
Thrush, *et al.*

(See S. C. Reporter's ed. 451-461.)

Usury by national bank—Federal law governs.

A controversy respecting usurious interest paid on a note held by a national bank, secured by collateral note and mortgage, which arises in a suit to foreclose the mortgage, is none the less governed by the Federal law on the subject of usury by national banks, as expressed in U. S. Rev. Stat. § 5198 (U. S. Comp. Stat. 1901, p. 3493), affording the remedy of an independent action to recover back the usurious payments, because the collateral note and mortgage were executed in favor of the bank president for the benefit of the bank, which was prohibited by the Federal law from taking real estate security for a debt coincidentally contracted.

[No. 50.]

*argued and submitted November 3, 1903.
Decided December 7, 1903.*

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment

NOTE.—On the effect of usury by national bank—see note to *Citizens' Nat. Bank v. Gentry*, 56 L. R. A. 673.

On usury by national banks generally—see note to *Farmers' & M. Nat. Bank v. Dearing*, 23 L. ed. U. S. 196.

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which affirmed a judgment of the District Court of Dodge County of that State, allowing a recovery by way of set-off of usurious interest paid to a national bank. *Reversed* and remanded for further proceedings.

See same case below, 63 Neb. 881, 89 N. W. 403.

Statement by Mr. Justice **White**:

*On August 8, 1890, George Thrush, one of the defendants in error, being indebted to the Schuyler National Bank, one of the plaintiffs in error, for money then and theretofore lent, executed a note to the bank for the sum of \$5,000, payable six months after date. As collateral security for the payment of this note, Thrush and his wife executed a note and mortgage for \$5,000 to one Sumner, who was at that time the president of the bank. The collateral note and mortgage were delivered to the bank, and by it retained. The note made to the bank was renewed by the bank from time to time, and various payments of interest and on account of the principal were made to the bank, the principal sum thereby being reduced in March, 1894, to \$3,000. In that month and year a new note was executed to the bank for the principal sum then due and interest, in all, \$3,229. No money dealings were had at any time between either Thrush and his wife and Sumner individually.

James Gadsden, one of the defendants in error sued Thrush and his wife in a Nebraska court to foreclose an asserted mortgage on real estate. Junior encumbrances of record were made parties defendant, among them being Sumner, to whom the mortgage for \$5,000, securing the collateral note previously referred to, had been executed. He answered and by cross petition asserted the lien of the mortgage, which he alleged was made to him as trustee, for the benefit of the Schuyler National Bank; he prayed foreclosure of such lien, and the payment of the indebtedness to the bank, stated to be \$3,229 and interest. The Schuyler National Bank was subsequently made a party defendant; and, by answer and cross petition, claimed the benefit of the mortgage to Sumner, securing the indebtedness just stated, and joined in the prayer for foreclosure. Separate answers, similar in tenor, were filed on behalf of Thrush and his wife, in which were averred, in numerous paragraphs, many payments to the bank of usurious interest during a period of five years, and in substance it was prayed that the amount of such payments might be deducted *from the principal sum claimed by the bank to be due. In each of the answers was contained the following paragraph:

"That the said note of \$5,000 of the defendants George Thrush and Mattie N.

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Thrush, together with the mortgage securing the same, were not executed and delivered to said William H. Sumner upon any consideration whatsoever, but the same are simply held by said defendant as collateral security to the amount owing by the defendant, George Thrush, on the said indebtedness now being evidenced by said \$3,229 note, in this: that the said note of \$5,000 and the mortgage securing the same were executed and delivered by this defendant and Mattie N. Thrush to said Sumner for the purpose that said Sumner might protect therewith said bank on account of the indebtedness of said George Thrush to said bank, and said note and mortgage were accepted by said Sumner with the knowledge and consent of said bank, and because said bank refused to take said mortgage, and said Sumner in no wise protected said loan or advanced any money thereon and at the time of the maturity thereof, by virtue of the premises and the payments of usurious and illegal interest made thereon, as aforesaid, there was due and owing, after deducting the payments made upon the principal and the said payments of usurious interest, the small balance, to wit, of \$252.20, and for the aforesaid balance the said defendant Sumner is entitled to a lien upon said premises under and by virtue of said mortgage and promissory note of \$5,000."

A reply was filed to these answers. It was therein stated in substance that most of the alleged usurious interest had been paid to the bank more than two years before the commencement of the action, and that the remaining interest payments were not in excess of the rate allowed by law to be contracted for. The pleading concluded with the claim "that this court has no jurisdiction in this action to consider the question raised in said answer to each and every item of interest mentioned in said answer as paid to said Schuyler National Bank; that said items are not proper items of set-off or counter claim and cannot *be adjudicated except in a suit brought expressly for that purpose under the provisions of § 5198 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3493)."

[454] A decree was entered determining the priority of liens between the respective lienholders, and providing for a foreclosure. Among other things it was adjudged that the mortgage to Sumner was executed and delivered for the benefit of the bank, and that the bank was entitled to the proceeds of the note and mortgage. As to the defense of usury set up in the answers, it was decided that, as the transaction was one with a national bank, it was governed by the laws of the United States, and, therefore, recovery by way of set-off of the usurious in-

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terest alleged to have been paid was refused. Recovery of the interest embraced in the claim of the bank was, however, denied, and judgment was entered only for the principal sum found to be due and owing to the bank.

On appeal, the supreme court of Nebraska reversed the judgment of the district court in the particular just noticed, and remanded the cause with directions "to ascertain the amount of money advanced to Thrush by the Schuyler National Bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any." 56 Neb. 565, 76 N. W. 1060. On a rehearing, the appellate court reaffirmed its previous decision. 58 Neb. 340, 45 L. R. A. 654, 78 N. W. 632. Thereupon a writ of error was allowed from this court, which was subsequently dismissed for want of jurisdiction. 179 U. S. 681, 45 L. ed. 384, 21 Sup. Ct. Rep. 918. Subsequently the state district court entered a judgment in conformity with the mandate of the supreme court of Nebraska, and such judgment was affirmed on appeal. 63 Neb. 881, 89 N. W. 403. The present writ of error was thereupon allowed.

Mr. Charles J. Phelps argued the cause and filed a brief for plaintiff in error:

The penalties imposed by §§ 5197, 5198, of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3493) are the only ones which can be imposed in this suit.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196.

Where real-estate security has been taken to secure a present or future loan, no one but the government can be heard to complain that the bank has exceeded its power.

State Nat. Bank v. Flathers, 45 La. Ann. 75, 12 So. 243; *Winton v. Little*, 94 Pa. 64; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Swope v. Leifingwell*, 105 U. S. 3, 26 L. ed. 939; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. Rep. 234; *Wherry v. Hale*, 77 Mo. 20.

The debt is the basis of the bank's claim and rights; the mortgage is a mere incident of the debt, and follows it.

Webb v. Hoselton, 4 Neb. 318, 19 Am. Rep. 638.

As between these parties, no burden would fall upon the bank had it been named in the mortgage as a mortgagee.

National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443.

Usurious interest paid in cash upon renewals of a note given to a national bank, and of all other notes of which it was a con-

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solidation, cannot be set off in an action against the note, as the remedy provided by U. S. Rev. Stat. § 5198 (U. S. Comp. Stat. 1901, p. 3493), when such usurious interest has been actually paid—*viz.*, a recovery in an action of twice the amount of interest thus paid—is exclusive.

Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

George Thrush and **Mattie N. Thrush** in *propriis personis* submitted the cause for defendants in error. *Messrs. George H. Thomas* and *Frank Dolezal* were on their brief.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The question for decision is, Did the supreme court of Nebraska rightly decide that the controversy concerning usurious interest paid was to be governed by the statutes of Nebraska on that subject, and not by the laws of the United States on the same subject, as expressed in § 5198 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3493)? We say this is the sole question, because it is undoubted that if the rights of the parties are to be determined by the laws of the United States, the ruling below was wrong. This results from the prior adjudications of this court, holding that where usurious interest has been paid to a national bank, the remedy afforded by § 5198 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3493), is exclusive, and is confined to an independent action to recover such usurious payments. *Haseltine v. Central Nat. Bank*, 183 U. S. 132, 46 L. ed. 118, 22 Sup. Ct. Rep. 50, and cases cited. If, on the other hand, the controversy is governed by the local law of Nebraska, then the construction and application of that law made by the court of last resort of the state is binding.

In fact, this is not controverted and could not be since the supreme court of Nebraska conceded that if the contention as to usurious interest ought to be determined by the laws of the United States, the conclusion which the court reached was erroneous. That court, however, held that the rights of the parties were to be measured by the law of the state instead of the law of the United States, because the collateral mortgage was not made, *eo nomine*, to the bank, but to an individual. This view was deemed to be fortified by the suggestion that, as the collateral note was secured by mortgage on

[457] real estate, *it could not, under the laws of the United States, have been lawfully made in favor of a national bank. The collateral note and mortgage, it was, therefore, intimated, must be assumed to have been executed to an individual to avoid the effect of

the laws of the United States, and the consequent knowledge which would have been conveyed to the proper officers of the United States that the bank was violating the law.

The reasoning by which the judgment of the supreme court of Nebraska was controlled is, in our opinion, erroneous. The court did not hold that; because the collateral mortgage was taken in the name of an individual, it could not be enforced by the bank under the law of Nebraska, but simply held that, although it was enforceable by the bank, the remedy as to the usurious interest was governed exclusively by the state law, upon the theory that the transaction was not with the bank. But the usurious interest had all been paid, not to the individual upon the collateral note, but to the bank, upon the principal obligation held by it. It was this interest so paid to the bank on the principal note held by it which was in effect imputed so as to fix the amount due. The result of this was to treat the transaction as an individual one in order thereby to exclude the law of the United States, and then at once to treat it as a bank transaction for the purpose of ascertaining and imputing the sums of usurious interest which had been paid. This was to administer the rights of the parties upon distinct and wholly inconsistent theories. Either it was an individual transaction or it was not. It could not in reason have been at one and the same time both the transaction of the bank excluding the individual and a dealing between individuals excluding the bank. As the usurious interest for which a remedy was afforded had been paid to the bank in dealings by the bank with its debtor, and as the necessary effect of the judgment below was to reduce the debt due to the bank by allowing the imputation of the sum of the usurious interest, we are of opinion that the controversy was governed by the laws of the United States, and not by the law of the state of Nebraska.

*Nor do we think the suggestions made in [458] the opinion of the court below respecting the power of a national bank under the laws of the United States to accept real estate security operate in any way to modify the conclusion we have just expressed. It is not contended that under the law of Nebraska an agent, acting in his own name, may not take security for the benefit of a principal, or that there is or could be any valid statute of the state of Nebraska discriminating against national banks, and depriving them of the benefit of transactions so consummated. This being true it follows that the taking of real estate security by the president of the bank in his individual name, for the benefit of the bank, was in legal effect but the taking of security by the bank it-

self. Now it is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real-estate security by a national bank for a debt coincidentally contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subjects the bank to be called to account by the government for exceeding its powers. In *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496, the rule on this subject, as settled by the previous authorities, was thus stated by the court, speaking through Mr. Justice Harlan (p. 76, L. ed. p. 111, Sup. Ct. Rep. p. 499):

"In *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188, it appeared that a national bank loaned money upon the security of a note and a deed of trust of lands, both of which were assigned to it. The statute declared that a national banking association could loan money 'on personal security,' and could purchase, hold, and convey real estate for certain named purposes, 'and for no others,' among which was not included the securing of a present loan of money by a deed of trust or mortgage on real property. The court, while assuming that the statute, by clear implication forbade the bank from making a loan on real estate, refused to restrain the bank from enforcing the deed of trust. The decision went upon these grounds: That the bank parted with its money in good faith; that the question as [459] to the violation *of its charter by taking title to real estate for purposes unauthorized by law could be raised only by the government in a direct proceeding for that purpose; and that it was not open to the plaintiff in that suit, who had contracted with the bank, to raise any such question in order to defeat the collection of the amount loaned. If any doubt existed as to the scope of the decision in that case, it was removed by *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443, where it was held that the right of a national bank to enforce a mortgage of real estate taken by it to secure indebtedness then existing, as well as future advances, could not be questioned by the debtor, and that a disregard by the bank of the provisions of the act of Congress upon that subject only laid the association open to proceedings by the government for exercising powers not conferred by law."

It follows from the foregoing reasons that the supreme court of Nebraska erroneously determined the rights of the parties by the rule of the state law, when it should have applied the law of the United States.

The judgment of the Supreme Court of Nebraska is reversed, and the cause is re-
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manded for further proceedings not inconsistent with this opinion.

Mr. Justice **Brown**, with whom was Mr. Justice **Brewer**, dissenting:

I am constrained to dissent from the opinion of the court in this case.

The facts, concisely stated, are as follows: George Thrush executed a note to the bank for \$5,000, payable in six months. At the same time Thrush and wife executed a collateral note and mortgage for the same amount to Sumner, president of the bank. This note and mortgage, given partly for an antecedent and partly for a contemporaneous debt, were delivered to the bank, and retained by it.

The note made to the bank was renewed from time to time, *and various payments of [460] interest and principal were made, and the principal sum thereby reduced, in March, 1894, to \$3,000. At that time a new note was executed to the bank for the principal sum due and interest, namely, \$3,229. No dealings were had at any time between Thrush and wife and Sumner individually.

Suit having been begun by Gadsden to foreclose a prior mortgage, and Sumner having been made a party as junior encumbrancer, he answered, and by cross petition asserted the lien of the mortgage, which he alleged was made to him as trustee of the bank. The bank being also made defendant, filed an answer and cross petition, claiming the benefit of the mortgage to Sumner.

It is clear that there was but one actual debt. The question is, whether, in asserting its right to foreclose the mortgage made to Sumner individually, it must not submit itself to the laws of the state affecting usury; in other words, whether, in the foreclosure of a mortgage created under the laws of a state, and executed by one citizen of a state to another, its obligations are to be determined by state law or Federal law. Congress forbids such a mortgage; the state permits it. There can be no doubt that the bank caused the mortgage to be given to Sumner on account of the law forbidding national banks from receiving security by way of mortgage upon real estate, and to obviate any difficulties which might be interposed either by the mortgagor or by the government, by taking the mortgage in the name of the bank.

Had the mortgage expressed upon its face the exact truth, namely, that it was given for the benefit of a national bank, and partly, at least, for the security of a contemporaneous debt, it would have fallen within the ban of the Federal statute. It is true the state law permitted it, but accompanied it with a forfeiture of the entire interest

if usury were taken. The question is whether, in enforcing this mortgage, which the bank was prohibited from taking in its own name, it may claim an exemption from the usury laws of the state. So long as the

[461]*dealings were solely between the bank and Thrush, and payments were made upon the bank note in question, the transaction with regard to usury was governed by the Federal law. But in case the bank elected to foreclose the mortgage, I think it took the benefit of it *cum onere*. He who seeks equity must do equity. It could not take the benefit of the mortgage to Sumner, and claim a right to foreclose for the amount due, without, at the same time, admitting that the payments which had been made were made upon a debt secured by the mortgage, and subject to the disability of the state law. As was justly said by the supreme court of Nebraska: "It would be highly unconscionable to permit a person to give a contract a false form to evade the burdens which would follow from its true expression, and then permit him to show the truth as against the form to evade the burdens cast by a contract in the form which has been so chosen." [56 Neb. 565, 76 N. W. 1060.] The bank ought not to be permitted to blow hot and cold in the same transaction. If it claimed the benefit of a mortgage made to an individual, it should take it with such burdens as would rest upon it if the transaction had originally been what it was represented to be upon its face. The opinion of the court suggests an easy method by which the prohibition of the Federal statute against the lending of money upon real estate security may be successfully evaded without the slightest danger to the bank.

BALTIMORE & POTOMAC RAILROAD COMPANY and the Philadelphia, Wilmington, & Baltimore Railroad Company, *Plffs. in Err.*

v.

CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landri-gan, Deceased.

(See S. C. Reporter's ed. 461-477.)

Negligence—presumption of caution—instruction as to railway gates—province of court and jury.

1. In the absence of evidence to the contrary, there is a presumption that a pedestrian, be-

fore attempting to cross railroad tracks, stopped, looked, and listened.

2. An instruction as to the effect of closed gates at a railway crossing as a notice of danger to a person attempting to cross the tracks is not erroneous, where it tells the jury that if the gates were generally kept down at night without regard to the presence or absence of passing trains, and the pedestrian had knowledge of that fact, then the circumstance that the gates were down when he was run over in attempting to cross the tracks at night was not of itself a warning to him of the presence of danger, and that contributory negligence could not be imputed to him from that fact alone.
3. The issue whether a person attempting to cross railway tracks was struck by a runaway car or an express train is properly submitted to the jury, where there was evidence on the issue from which reasonable men might draw different conclusions.

[No. 71.]

Argued November 10, 11, 1903. Decided December 7, 1903:

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action to recover damages for a death alleged to be due to negligence. *Affirmed.*

See same case below, 20 App. D. C. 135.

Statement by Mr. Justice McKenna:

This action was brought under the death statute of the District of Columbia for damages for the death of the husband and intestate of defendant in error. The death was the result of injuries alleged to have been caused by the negligence of the plaintiffs in error. The negligence is alleged to have consisted in the insufficient coupling of the cars of the plaintiffs in error, whereby one broke loose from the others and ran over the deceased; in not equipping the car with good brakes; and not having upon it a light sufficient to give warning of its approach. The answer was not guilty.

The case was tried to a jury, which returned a verdict in favor of the defendant in error in the sum of \$6,500. This amount was agreed to as correct if the jury should find on the other issues for the defendant in error.

Judgment was entered for that amount and costs. It was affirmed on appeal to the court of appeals of the District.

The testimony is somewhat long, and we think it is only necessary to give an outline

NOTE.—Respecting a presumption as to the exercise of due care by a person who is found to have been killed by the alleged negligence of another—see note to *Hendrickson v. Great Northern R. Co.* 16 L. R. A. 261.

On the province of the court and jury in determining the question of negligence—see notes to *Roux v. Blodgett & D. Lumber Co.* 13 L. R. A. 728, and *Emry v. Raleigh & G. R. Co.* 15 L. R. A. 332.

of what it tended to prove to illustrate and determine the questions presented.

The plaintiffs in error operated a steam railroad in the city of Washington, District of Columbia, and maintained four tracks on Virginia avenue southwest, crossing South Capitol street. The most northerly of the tracks, called "The Reservation" or "No. 1" track, was used for freight and shifting purposes. The two intermediate tracks were used for south bound and north bound passenger traffic. The most southerly track was called the "ladder" or "lead track." It [463] was so called because all the tracks in the railroad yard were connected with it, and all the switches lead into it. It extended west across South Capitol street to an alley, and terminated at what was known as the property yard, where coal, ties, iron, and other commodities were stored. Gates and a gateman were maintained at the crossing. There was evidence tending to show that the portion of this track lying west of the crossing was used for storing freight cars, but not passenger coaches, and that no portion lying west was used for shifting or making up the trains; but there was also evidence tending to show that it was so used as occasion required. Landrigan's body was found at the southwest crossing, south of the "lead track," "but nearer the track than the gate," and there was flesh and blood alongside of the track upon its south side. There was also testimony tending to show that the gates were generally kept down (one witness testified that, in his experience, they were always down) from 10 or 11 o'clock at night until next morning, whether trains were passing or not, and persons with vehicles sometimes found it necessary to request the gateman to raise the gates, and sometimes to wake him up out of sleep for that purpose. Preceding and at the time of the accident a switching crew was making up a train of cars for the transportation of troops to the south, and it became necessary to "cut out" a Pullman ear, called the "Lylete," which was standing on one of the tracks. Immediately next to it was a tourist ear. It was equipped with a Miller coupler; the Pullman with a Janney coupler. Both couplers were of the automatic type, but of different patterns, and not designed to couple together, and in order to draw the ears out on the "ladder" track they were coupled together with the ordinary link and pin coupling.

There was considerable testimony as to the manner in which the coupling was done, and of its efficiency, which testimony it is not necessary to detail. It went to the jury with the other testimony. It is enough to say that the couplers were of unequal height, and the link could not be put in the

slot of both couplers. It was put in the slot [464] of the Janney coupler, and the other end laid on the top of the Miller coupler, "and the only thing to keep the link from slipping over the head of the pin was a shoulder around the head of the pin." It came loose, and one of the employees, who had been in charge of the train, testified that "the couplings 'slipped around,' he supposed, when they were going around the curve, and that had the tendency to make them come apart; that he supposed it was due to the slack caused by coming over the switch and 'the ladder' track." The "ladder" track had a slight incline to the crossing, and when the ear broke loose it started towards the crossing. An employee had tried the brake on the straight track, but when some one "hollered" that the ear had broken off, he "went to work on the brake again." "It did not then 'dropped off the end of the ear and seem to catch hold," he testified; and he caught the rear end of it—the head end—and at the same time Hottel (yardmaster) got on the end that he got off of; the witness called for Wilber to help him to put the brake on, and they did all they could to stop the ear, but the ear had got too much start; the brake seemed to work all right—he did not have any fault to find with the brake, only the ear had gotten too much start; he first tried the rear brake and could not get that to work; then went to the other one; while witness and Wilber were working on the forward brake Hottel jumped on and tried to work the rear brake; they did not succeed in stopping the ear, because it had gotten too much of a start. He got off at South Capitol street on the southeast side, stood there for a second or two, and then ran after the ear to see what damage it had done. There were some other ears down on the end of this track, that this ear ran into, and it would not have been safe for the witness to have stayed on the ear."

The witness testified that he "did not know Landrigan personally; had seen him a number of times; he saw him after he was hurt; Landrigan's legs were run over, but he could not say whether it was by the ear or another train; train No. 78, which left the [465] depot about 11:55 or 11:35, was passing there about the time of the accident; this train No. 78 is known as the midnight express for New York, and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction; when witness saw Landrigan the latter was lying on the south side of the outside rail of the 'ladder track,' the most southerly track of the four tracks of the crossing; immediately before he saw Landrigan lying there the coach 'Lylete' passed over the crossing at South Capitol street and witness came right along behind

this car, after train 78 passed, to see if the coach had done any damage down there, and saw Landrigan lying there with some one around him; he went down where the car had stopped and came back and found out what the trouble was." As to the position of the gates, he said: "He first noticed the gates when he came down there after he had jumped off the end of the car; the gates were down then on both sides of the street. He did not notice the gates before 78 passed, stood on the southeast side of South Capitol street until 78 passed, and then started to run down the main track, and as he ran down the track he noticed that the gates were down on both sides." And further, "the runaway car passed the southwest crossing of South Capitol street before No. 78 reached there; it struck just the middle part of No. 78 as the train came by there; because he had not been down that far; he the runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing; it was almost at the same time."

There was a white light in the dome of the vestibule of the runaway car or on the platform, and the effect of the light was testified to as follows by one witness:

"The lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath; it gave a bright light,—you could see it all right; the lamp was inside of the door, and the door was closed; the glass in the door extended about half way down, and the light shone through the glass in the door."

[466] *By another witness:

"That the light in the car was in the dome,—in the vestibule,—just on the outside of the door, over the platform; he knows there was a light in the west end of the car, the end going toward South Capitol street,—which was the front end of the car the way it was moving; this light could be seen more plainly than a lamp; such lights contain two burners, are lighted by oil, and are more brilliant than a lantern; the reflector is over the top of the light; there is a kind of white shade over them; that the light in the vestibule of the car could be seen by people on the ground; it hung down low, and did not set right up in the dome; it had a shade over it, but he does not know whether you could call it a reflector or not; it was plain enough to be seen by anybody who was on the ground."

By another witness:

"That the light in the vestibule of a Pullman car is so located as to illuminate the platform only; that is the purpose of that light; that it does not throw the light more than a couple of feet beyond the end of the

bumper of the car; it is not intended to illuminate the track.

"And thereupon, on cross-examination, said witness further testified that such a light was not intended for a locomotive headlight; that if a man was standing on the track some distance from the advancing end of a car showing such a light he would not see the source of the light, but would see the reflected light on the platform on the car; he could see the illuminated end of the car; that if he was not looking exactly in that direction this light would not attract his attention away from something else; that if he were looking up the track he could see the light if he were not too far away."

And the evidence showed "that a Pullman car running along an ordinarily straight track at a rate of speed a little faster than a man ordinarily runs, or can run, does not make any noise."

Landrigan was employed as a machinist and assistant boss on the night force at the round house, which was situated between *H[467] and I streets, on South Capitol street. He had been employed for eight years. His home was north of the railroad tracks on Virginia avenue, and the most usual and direct route to his home from the round house was up South Capitol street to the southwest crossing, "then right over to the north side of Virginia avenue; and it was the way Landrigan usually took." On the night of the accident he left the round house about 11:50 o'clock, and about twelve o'clock was found in the place and condition described in the testimony. The night "was not a clear night, nor was it a real dark night,—there was no moon and there were a few clouds." The crossing was lighted up by street lamps located on each side of the four corners, and there was an electric light in the reservation north of the tracks, and another one south and east of the tracks near the signal tower.

There was testimony to the effect that to a person outside of the gate the flagman's box would "obstruct the view of the ladder track to the east, but one standing on the inside of the gate on the open space, you could look straight up the track to the eastward, and there was nothing to break your view." And also that two freight cars obstructed the view to the west.

There was no eyewitness to the accident, and Landrigan, in response to the inquiry, "How did this thing happen?" replied, "I came under the gates and something struck me, and a whole train of cars ran over me." He died about four o'clock without making further explanation.

At the close of the testimony the plaintiffs in error moved the court to instruct the

jury to find a verdict for them. The court refused, and this is assigned as error. The case was then submitted on the evidence of the defendant in error.

Errors are also assigned upon the giving and refusing of certain instructions.

Messrs. J. Spalding Flannery and Frederic D. McKenney argued the cause, and, with **Mr. Wayne MacVeagh**, filed a brief for plaintiffs in error:

Where two causes are separate and independent, that cause which is the nearest in point of time to the exposure is regarded as the proximate and direct cause, and the other as secondary and remote.

Atna F. Ins. Co. v. Boon, 95 U. S. 130, 24 L. ed. 399; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Washington & G. R. Co. v. Hickey*, 166 U. S. 528, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661; *Cullen v. Baltimore & P. R. Co.* 8 App. D. C. 69.

It is negligence *per se* for a wayfarer to disregard the warning given by gates which are down or closed at a railway crossing.

Granger v. Boston & A. R. Co. 146 Mass. 276, 15 N. E. 619; *Allerton v. Boston & M. R. Co.* 146 Mass. 241, 15 N. E. 621; *Schmidt v. Philadelphia & R. R. Co.* 149 Pa. 357, 24 Atl. 218; *Debbins v. Old Colony R. Co.* 154 Mass. 402, 28 N. E. 274; *Marden v. Boston & A. R. Co.* 159 Mass. 393, 34 N. E. 404; *Peck v. New York, N. H. & H. R. Co.* 50 Conn. 379; *Baltimore & O. R. Co. v. Colvin*, 118 Pa. 230, 12 Atl. 337; *Cleary v. Philadelphia & R. R. Co.* 140 Pa. 19, 21 Atl. 242; *Sheehan v. Philadelphia & R. R. Co.* 166 Pa. 354, 31 Atl. 120; *Duvall v. Michigan C. R. Co.* 105 Mich. 386, 63 N. W. 437; *Douglas v. Chicago, M. & St. P. R. Co.* 100 Wis. 405, 76 N. W. 356; *Lake Shore & M. S. R. Co. v. Ehlert*, 63 Ohio St. 320, 58 N. E. 812.

If Landrigan did not look and listen before attempting to cross the tracks, or if he looked and failed to heed the warnings of his senses, he was guilty of such contributory negligence as will prevent recovery.

Northern P. R. Co. v. Freeman, 174 U. S. 384, 43 L. ed. 1017, 19 Sup. Ct. Rep. 763; *Hook v. Missouri P. R. Co.* 162 Mo. 569, 63 S. W. 360.

The true rule in cases of this character is that there is no presumption of law either way, or in favor of either party.

Beach, Contrib. Neg. § 182; *Missouri P. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326; *Philadelphia, W. & B. R. Co. v. Stebbins*, 62 Md. 504; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104.

One is not entitled to say that he was injured by the negligence of another if he,
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by the use of ordinary care, might have escaped the damage.

Davey v. London & S. W. R. Co. L. R. 12 Q. B. Div. 70; *Wakelin v. London & S. W. R. Co.* L. R. 12 App. Cas. 41; *The Bernina*, L. R. 12 Prob. Div. 58; *Sewell v. New York, N. H. & H. R. Co.* 171 Mass. 302, 50 N. E. 541; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

Messrs. J. J. Darlington and Charles A. Douglass argued the cause, and, with **Mr. Joseph D. Wright**, filed a brief for defendant in error:

Where there is a reasonable dispute as to the evidentiary facts tending to establish negligence, or as to the reasonable inferences which a jury might draw therefrom, the ultimate fact as to whether the party charged with negligence is guilty is for the jury; but, where the facts are undisputed, and the inferences therefrom all one way, the controversy turns upon the question of law that must be decided by the court.

Douglas v. Chicago, M. & St. P. R. Co. 100 Wis. 407, 76 N. W. 356.

When a given state of facts is such that reasonable men may clearly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; *Cowen v. Merriman*, 17 App. D. C. 186.

Assuming that the plaintiff either succeeded in establishing a custom to keep the gates closed, or that the testimony on that point was sufficient to go to the jury, then going under the gates, considering the facts of this case, was not negligence *per se*.

Dashiell v. Washington Market Co. 10 App. D. C. 81.

Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greater incentive to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care.

Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; *Cowen v. Merriman*, 17 App. D. C. 186; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104.

A judge is not bound to charge upon assumed facts *ipsissimis verbis* of counsel,

nor to give categorical answers to a judicial catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts.

Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403.

[471] *Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

The correctness of the ruling in denying the motion to instruct the jury to find a verdict for the plaintiffs in error depends upon the correctness of the ruling in granting or refusing the special instructions prayed. The principles embraced in them are but specifications of the legal propositions contained in the motion, and upon which its soundness or unsoundness depended. If the ruling of the court was right on those instructions it was right on denying the motion. We proceed, therefore, to the consideration of the propositions embraced in the instructions.

The charge of the defendant in error is that the railroad companies were guilty of negligence. The railroads deny this, and claim besides that the deceased came to his death by his own negligence, or by negligence which contributed to that result. As an element in the question of the entire innocence of the railroad companies, there is involved the construction and effect of the evidence in regard to the coupling of the cars, and the sufficiency of the light upon the Pullman car to give notice and warning of its approach. In regard, however, to that evidence, the instructions of the court are not questioned in this court. No error is assigned on them here, and whatever of argument is addressed to them or to the evidence is intended to show that those acts, even if they were acts of negligence, were not effective causes of the injury of the deceased, but that his own negligence was such cause. The determination of the contentions of plaintiffs in error, therefore, depends upon the question of the negligence of the deceased, and the instructions given in relation thereto. At the request of the plaintiff in the action, defendant in error here, the court instructed the jury as follows:

"1. In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial

evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop and look and listen; but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary.

"2. The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury were generally kept down at night from 10:30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train or trains or locomotives, and shall further conclude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone.

"3. While knowledge by the deceased of the presence of the Fenton engine on the north track or partly upon the South Capitol street crossing, and the approach of No. 78 upon one of the central tracks at or near the time of the accident, might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at which they shall find from the evidence the accident occurred."

The defendants, plaintiffs in error here, submitted instructions to the court which were emphatic contraries of the instructions given at the request of the plaintiff, and expressed the law to be that the fact of the gates being down was of itself *a warning to [473] the deceased; and further, if he disregarded the warning, he was guilty of contributory negligence; and that the gates being down, they were "closed or lowered for all trains, cars, or engines which were moving or passing or which might move or pass upon all or any of said tracks at said crossing, and were a warning of danger which the plaintiff's intestate was bound to heed, and if the jury shall find that the plaintiff's intestate met his death by going under said gates and upon or so near to one of said tracks as to be struck by a car moving on said track, he was guilty of negligence contributing to the

accident, and the plaintiff cannot recover in this action."

The following instruction was also prayed:

"It appearing from the uncontradicted evidence in the case that the defendants maintained at all hours of the night a gate-man in charge of the gates at the crossing in question, who raised and lowered said gates as occasion might require, and it further appearing from such evidence that such gateman was accustomed to open or raise said gates for the passage of pedestrians or vehicles when it was safe to do so, and it further appearing that the crossing in question being adjacent to the shifting, storage, and engine yards of said defendants, and between such yards and their passenger and freight stations in the city of Washington, and that the main tracks leading to and from said station also passed over the same, said crossing was an especially dangerous place, the jury are instructed that, in the absence of any evidence tending to show that the plaintiff's intestate, upon approaching said crossing, and finding the gates between him and the tracks lowered or closed, made any request of the gateman to raise or open the same, or submitted any inquiry as to whether any engines, cars, or trains were approaching said crossing before he went under said gates and entered upon the crossing within the same and thereby received the injuries which resulted in his death, said intestate was guilty of negligence directly contributing to his own misfortune and the plaintiff cannot recover."

[474] (1.) There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked, and listened. The law was so declared in *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 366, 41 L. ed. 186, 192, 16 Sup. Ct. Rep. 1104. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation,—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction objected to. But, notwithstanding the incentives to the contrary, men are sometimes inattentive, careless, or reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence.

This was the ruling in *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763, the case which plaintiffs in error oppose to *Texas & P. R. Co. v. Gentry*. In the *Freeman Case* a man thirty-five

years old, with no defect of eyesight or hearing, familiar with a railroad crossing, and driving gentle horses, which were accustomed to the cars, approached the crossing at a trot not faster than a brisk walk, with his head down, looking at his horses, and drove upon the track, looking "straight before him, without turning his head either way." This was testified to by witnesses. There was direct evidence, therefore, of inattention. There is no such evidence in this case, and the instructions given must be judged accordingly. The court did not tell the jury that all those who cross railroad tracks stop, look, and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence. The instruction was a recognition of "the common experience of men," from which it was judged in the *Freeman Case* that the deceased in that case had not looked or listened, and submitted to the jury that which it was their constitutional duty to decide. And there was enough evidence to justify dispute, and from which different conclusions could be drawn.

* (2.) We think there was no error in the [475] instruction as to the effect of the gates as a notice of danger under the practice of the companies. Indeed, the instruction is so obviously right that argument advanced to support it drops into truisms. One thing or condition cannot be any certain evidence of another thing or condition unless they invariably coexist. Of course, two things may occasionally coexist, but this furnishes no argument for plaintiffs in error. It only raises the query, When do the things coexist? and, making an application to the pending case, When did the closed gates and passing trains coexist? When were the former a witness of the latter? Always? The testimony answers, no. Between 10:30 and 11 o'clock at night, until morning, the gates were generally kept down without regard to passing trains. During that time, therefore, they had no more relation to passing trains than the signal tower or any other inanimate object at or near the crossing. Gates at a railroad crossing have a useful purpose. Open, they proclaim safety to the passing public; closed, they proclaim danger; but, it is manifest, if they be open or closed, regardless of safety or danger, they cannot be notice of either. Counsel perceive this, and extend their contention to urging that it is the duty of those who want to cross, be they pedestrians or those driving teams, to seek the gateman, and not to attempt to cross until he raise the gates.

Those driving teams must do so if they pass at all, and a controversy such as this

record presents could not occur as to them. But there are more who walk than ride, and every time their way is stopped by gates at a railroad crossing must they awake a sleeping gateman, or seek an absent one, or be charged with negligence, and that despite the fact that the practice of the railroad company has made closed gates not necessarily an indication of danger? The contention makes the neglect of duty by the railroad as efficacious as the performance of duty. At times a railroad must have exclusive use of a crossing, but at such times it is its duty to close the gates. The use over, it is its duty to open them, and it cannot [476] neglect that duty and claim the same consequence as if it had been performed. The instructions of the court were very guarded. It told the jury if the gates where the injury occurred were generally kept down at night from 10:30 or 11 o'clock, without regard to the presence or absence of trains, and that deceased had knowledge of that fact, then "the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was *not of itself* a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone."

The italics are ours, and the words italicized put a careful limitation upon the instruction, and, so limited, it was not erroneous.

(3.) It was an issue in the case whether the deceased was struck and run over by the Pullman car or by the passenger express No. 78, and on that issue the court instructed the jury that if the deceased was struck and run over by the passenger express, their verdict should be for the plaintiffs in error. This instruction is complained of. Plaintiffs in error contend that there was no evidence from which it could be determined that it was the Pullman car, and not the passenger express train, which injured the deceased, and it was error, therefore, to submit the issue to the jury. The action of the court was right. There was certainly evidence on the issue from which reasonable men might draw different conclusions.

As we have already seen, the most direct evidence of the passing of the north bound express was to the effect that "the runaway car passed the southwest crossing before 78 (the passenger express) reached there; it struck first the middle part of No. 78 as the train came by there; the runaway car had just about gotten across the crossing when the engine of 78 began to cross the crossing; it was almost about the same time."

If it be admitted that this leaves the issue in doubt, and justifies no inference, there are circumstances to be considered. If

the deceased was struck by No. 78, it is difficult to understand how he got to the place and in the condition he was found. *Was he [477] hurled there by the impact of the train? If that were possible, how came his legs to be crushed? Not by the runaway car, because that had passed; not by train 78, for he had been cast aside and away from that. The circumstances, therefore, seem to indicate that he was not struck by train 78, but was run over by the runaway car, and, we think, there is nothing inconsistent with that conclusion in his statement. His situation was horrible. If, in our different situation, we may venture to judge of it at all, we may wonder that he had or could retain any perception of what had occurred. Certainly, exact accuracy of statement could not have been expected of him, and to his shocked and almost overwhelmed senses it might well have seemed that not one car only, but a train of cars had run over him. Finding no error in the record, *the judgment is affirmed.*

PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.,
v.

WILLIAM HUGHES and Benjamin F. A. Fleming, Trading as Hughes & Fleming.

(See S. C. Reporter's ed. 477-491.)

Error to state court—Federal question—limitation of liability in interstate carriage.

1. Whether the highest state court should apply the law of the place of contract to a controversy respecting the right of a common carrier to limit its liability for negligence to the agreed valuation is not a Federal question which will sustain the jurisdiction of the Supreme Court of the United States over a writ of error to the state court.
2. The highest court of the state may administer the common law according to its own understanding and interpretation, without liability to a review in the Federal Supreme Court, unless some right, title, immunity, or privilege, the creation of the Federal power, has been asserted and denied.
3. The refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for inter-

NOTE.—On writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On carrier's power to limit amount of liability in cases of negligence—see notes to *Ballou v. Earle*, 14 L. R. A. 433; and *Chicago, M. & St. P. R. Co. v. Solan*, 42 L. ed. U. S. 688.

Respecting the right of a common carrier to limit its common-law liability by contract in the absence of negligence—see note to *Little Rock & Ft. S. R. Co. v. Cravens*, 18 L. R. A. 527.

state carriage to the valuation agreed upon does not contravene the various provisions of the Interstate commerce acts (24 Stat. at L. 379-82, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3159; 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), making it obligatory to provide proper facilities for interstate carriage of freight, and preventing carriers from obstructing continuous shipments on interstate lines.

4. No unlawful regulation of interstate commerce is made by the refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon, in the absence of congressional action providing a different measure of liability.

[No. 56.]

Argued November 5, 1903. Decided December 7, 1903.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed the judgment of the Court of Common Pleas of Philadelphia in favor of plaintiff in a suit to recover for a loss resulting from the negligence of a carrier in transporting a shipment of property. *Affirmed.*

See same case below, 202 Pa. 222, 51 Atl. 990.

Statement by Mr. Justice **Day**:

The defendants in error brought suit in the court of common pleas of Philadelphia against the Pennsylvania Railroad Company, to recover for injuries to a horse shipped by them from Albany in the state of New York to Cynwyd, in the state of Pennsylvania. The shipment was under a bill of lading of the New York Central and Hudson River Railroad Company, bearing date of August 10, 1900. It recited the receipt of the horse—

“for transportation from — to destination, if on the said carrier’s line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions, which are admitted and accepted by the said shipper as just and reasonable, *viz.*:

“That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of — per —, which is the lower published tariff rate, upon the express condition that the carrier assumes liability on the said live stock to the extent only of the

following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier *nor any connecting carrier shall be liable in [479] any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers, or their employees or otherwise.

“If horses or mules—not exceeding \$100 each.”

The through rate of freight was not filled out in the blanks in the shipping receipt or the bill of lading, but was collected by the agent of the Pennsylvania Railroad Company at Cynwyd, and it appears was the reduced tariff rate usually charged on such shipments where the limited liability clause above recited is inserted. The shipper signed the bill of lading, which contained the following stipulations:

“Thomas Grady does hereby acknowledge that he had the option of shipping the above-described live stock at a higher rate of freight according to the official tariffs, classifications, and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies, as common carriers of the said live stock, upon their respective roads and lines, but has voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned.”

The agreement further provided:

“No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation.”

Upon the trial the jury returned a verdict in favor of the plaintiff for \$10,000, and judgment was rendered accordingly. The horse was transported in safety to the end of the line of the receiving carrier, and delivered to the defendant company, *and in-[480]jured while the car in which he was shipped was standing on the track of the Pennsylvania Railroad Company in the city of Philadelphia, it being run into by heavily laden cars.

Upon appeal to the supreme court of Pennsylvania, the judgment was affirmed. 202 Pa. 222, 51 Atl. 990.

Mr. John G. Johnson argued the cause and filed a brief for plaintiff in error:

The common law of the United States as interpreted by this court permits carriers, in the course of interstate commerce, in consideration of making a reduced rate, to limit their liability to a designated valuation.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176; *Liverpool & G. W. Steam. Co. v. Phoenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; *Primrose v. Western U. Tel. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Calderon v. Atlas S. S. Co.* 170 U. S. 272, 42 L. ed. 1033, 18 Sup. Ct. Rep. 588; *The Queen of the Pacific*, 180 U. S. 49, 45 L. ed. 419, 21 Sup. Ct. Rep. 278.

The contract was valid because valid in the place where made.

Morgan v. New Orleans, M. & T. R. Co. 2 Woods, 244, Fed. Cas. No. 9,804; *Liverpool & G. W. Steam. Co. v. Phoenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 538, 39 Am. Dec. 398.

A contract for a transportation to be performed connectedly in several states, valid in the place where made, and in accordance with the public policy which governs interstate transportation, is enforceable everywhere.

A state law or state policy which interferes with, or regulates, interstate commerce is void because it is exclusively within the power of Congress to regulate such commerce.

Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

The Federal question involved in this appeal is properly raised upon the record.

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 533, 46 L. ed. 676, 22 Sup. Ct. Rep. 446; *Sully v. American Nat. Bank*, 178 U. S. 298, 44 L. ed. 1076, 20 Sup. Ct. Rep. 935; *Erie R. Co. v. Purdy*, 185 U. S. 153, 46 L. ed. 850, 22 Sup. Ct. Rep. 605; *Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Jacobi v. Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; *Home for Incurables v. New York*, 187 U. S. 155, 47 L. ed. 117, 23 Sup. Ct. Rep. 84; *Detroit, Ft. W. & B. L. R. Co. v. Osborn*,

189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

Mr. A. S. L. Shields argued the cause and filed a brief for defendants in error:

The jurisdiction of this court to review the judgment of the highest court of a state is purely statutory, and will in all cases be strictly confined to questions arising under the provisions of § 709 of the Revised Statutes of the United States.

Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

The mere averment of the existence of Federal jurisdiction does not necessarily involve the attaching of that jurisdiction.

Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *Sawyer v. Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633.

The question was raised too late.

Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123; *San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; *Onondago Nation v. Thacher*, 189 U. S. 306, 47 L. ed. 826, 23 Sup. Ct. Rep. 636.

The Federal power to regulate interstate commerce, however absolute and exclusive, is not a complete denial of the power of a state to control its own corporations engaged in interstate commerce.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; *Missouri, K. & T. R. Co. v. Huber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Calderon v. Atlas S. S. Co.* 170 U. S. 272, 42 L. ed. 1033, 18 Sup. Ct. Rep. 588; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

Mr. Justice Day delivered the opinion of the court:

The right to review the judgment of the supreme court of Pennsylvania herein depends upon the proper assertion of a right or privilege under the Federal Constitution or statutes which was denied to the plaintiff in error by the adverse holding of the state court.

Upon the trial in the common pleas court, it was contended that the special contract above recited limited the recovery of the plaintiff to the sum of \$100. The court refused to so charge, but holding that the pol-

icy and law of Pennsylvania, as declared by her courts of last resort, did not permit such limitations on the liability of common carriers, left to the jury to determine the value of the horse, and the question of the negligence of the defendant.

In view of being carried to the supreme court of Pennsylvania, two errors were assigned to the refusal of the court to charge:

[485] "1. That it was lawful in the state of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been *for a through consignment from Albany to Cynwyd, a place within this state, said contract must be considered in its entirety, and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which state it was partly performed; and that consequently the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment.

"2. That the plaintiff is not entitled to recover in excess of \$100."

Neither of these assignments of error presents a Federal question in such sense as to give this court jurisdiction to review the judgment of the state court under § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575). Nothing is better settled in Federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege, or immunity under the Federal Constitution or laws set up and denied in the state courts. *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

The first error assigned in the common pleas court raised the question as to the law of the contract. It does not assert that any Federal right was invaded or denied. It seems to have been conceded at the trial that the law of the state of New York, where the contract was made, permitted the making of a contract limiting the liability of the carrier to the agreed valuation in consideration of the lower freight rate for carriage, the shipper having the opportunity to have the larger liability for the value of the goods if the higher rate of freight for carriage was paid. This rule also prevails in the courts of the United States (*Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151), wherein it was held that a contract fairly made and signed by the shipper, agreeing on a valuation of the property carried, with a rate of freight based on such

valuation, on the condition that the carrier assume liability only to the extent of such agreed valuation *in case of loss by the negli- [486] gence of the carrier, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible and the freight received, and of protecting the carrier against extravagant valuations. But this is not a question of Federal law wherein the decision of the highest Federal tribunal is of conclusive authority. In *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360, 7 Atl. 134, the supreme court of Pennsylvania expressly declined to follow the rule laid down in *Hart v. Pennsylvania R. Co.* adhering to its own declared doctrine denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different states. The Federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the *Hart Case*, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some right, title, immunity, or privilege, the creation of the Federal power, has been asserted and denied. *Bethell v. Demaret*, 10 Wall. 537, 19 L. ed. 1007; *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 666, 20 L. ed. 759; *New York L. Ins. Co. v. Hendren*, 92 U. S. 287, 23 L. ed. 709; *United States v. Thompson*, 93 U. S. 586, 23 L. ed. 982.

In the supreme court of Pennsylvania a further assignment of error was made as follows:

"III. The learned court below erred in entering judgment in conflict with the act of Congress of February 4, 1887, entitled 'An Act to Regulate Commerce.' Section 1 of said act clearly provides that where the transportation is from one state to another, under a through bill of lading, its provisions shall be carried out, unless it be in conflict with a statute of the state in which it may be performed, or in conflict with the policy of the United States as laid down in the Federal courts, and that, as the contract was valid in the place where made, and, as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the Federal *courts, the judgment should have been [487] for the valuation mentioned in the contract."

Of this assignment of error, Mr. Justice Potter, delivering the opinion of the supreme court of Pennsylvania, said:

"The third assignment of error suggests that the entry of judgment is in conflict

with the Interstate Commerce Act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to me to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce."

Upon the authority of *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 533, 46 L. ed. 674, 22 Sup. Ct. Rep. 446, it may be admitted that the question of the decision of the state court being in contravention of the legislation of Congress to regulate interstate commerce was sufficiently made, and the adverse decision to the party claiming the benefit of that act gives rise to the right of review here. In refusing to limit the recovery to the valuation agreed upon, did the state court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error (24 Stat. at L. 379-82, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3159; 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, [488] p. 3158,) provide for equal *facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the

schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose, without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?

It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic.

*In *Missouri, K. & T. R. Co. v. Haber*, 169[489] U. S. 614-635, 42 L. ed. 878, 885, 18 Sup. Ct. Rep. 488, 496, after reviewing previous cases in this court, Mr. Justice Harlan, delivering the opinion of the court, says:

"These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a state belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes."

In the absence of Congressional legislation upon the subject, an act of the legislature of Alabama, to require locomotive engineers to be examined and licensed by a board to be appointed by the governor for that purpose, was sustained in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

An enumeration of the instances in which this court has sustained the validity of local

laws intended to promote the safety and comfort of passengers, employees, persons crossing railroad tracks, and adjacent property owners, is given in the opinion by Mr. Justice Brown, in *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514-16, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

The case of *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, is, in our opinion, virtually decisive of the question made upon this branch of the case. In that case cattle were loaded at Rock Valley, Iowa, to be shipped to Chicago. The contract, as here, was for interstate transportation. An injury happened to the drover in charge of the cattle in Iowa, due to the negligence of the transporting company. The shipper had signed a contract providing: "That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of \$500.00." The company averred and offered to prove *that, in view of this limited liability, it had agreed to transport the cattle at a reduced rate. The statute of Iowa provided: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." Iowa Code of 1879, § 1308. The trial court charged that the limitation contained in the contract was void, and a verdict of \$1,000.00 damages was returned. A judgment on the verdict was affirmed in the supreme court of Iowa. In delivering the opinion of this court, Mr. Justice Gray said:

"A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress and punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law.

191 U. S. U. S., Book 48.

They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. . . . The statute now *in question, so far as it concerns liability for injuries happening within the state of Iowa,—which is the only matter presented for decision in this case,—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that state. But the principle recognized is that, in the absence of Congressional legislation upon the subject, a state may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.

We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce, in the absence of Congressional action providing a different measure of liability when contracts such as the one now before us are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary.

The judgment of the Supreme Court of Pennsylvania is affirmed.

[492]*MATILDA R. BEASLEY and Joseph C. Beasley, *Appls.*,

v.

TEXAS & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 492-498.)

Appeal—finality of judgment—specific performance—covenant not to build railroad station.

1. A decree of a circuit court of appeals which reversed a decree of a circuit court sustaining a demurrer to, and dismissing a bill for, specific performance, and dismissed the bill without prejudice to an action at law, is final for the purpose of review in the Supreme Court of the United States.
2. Public policy precludes a decree for the specific performance of a covenant in a deed of a railroad's right of way not to build or establish a depot within 3 miles of the one therein stipulated for,—especially where the erection of the structure in dispute has been ordered by the state railroad commission.

[No. 79.]

Submitted December 3, 1903. Decided December 14, 1903.

A PPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which reversed a decree of the Circuit Court for the Western District of Louisiana sustaining a demurrer to, and dismissing a bill for, specific performance, and ordered the bill to be dismissed without prejudice to an action at law. *Affirmed.*

See same case below, 53 C. C. A. 434, 115 Fed. 952.

The facts are stated in the opinion.

Messrs. E. B. Kruttschnitt and W. P. Hall submitted the cause for appellants.

Messrs. John F. Dillon, William Wirt Howe, and Walker B. Spencer submitted the cause for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of appeals ordering a bill against a railway company incorporated under the laws of the United States to be dismissed. The bill seeks to enjoin the railway company from building a depot within 3 miles of one already built at Uni, in Louisiana, and alleges the following facts: Mrs. Beasley, the first-named plaintiff, conveyed to a Louisiana cor-

poration—the Texarkana, Shreveport, & Natchez Railway Company—a strip of land 100 feet wide, for a railroad track through her plantation, habendum to the company and its assigns so long as the *railroad was[494] maintained and operated over the strip. By the act of sale, which was executed by both parties, it was declared to be a part of the consideration for the transfer “that the grantee or its assigns shall not build . . . or establish any other depot along the line of said railroad within three miles north or south of the one stipulated for.” The defendant purchased the road from the grantee “subject to the obligations and stipulations contained in” the act of sale. It now is constructing a depot on the road within a mile and a fraction of the one at Uni. The bill further alleges that there is no public necessity for a depot within the stipulated limits. There was a demurrer for the reason that there is an adequate remedy at law, and the demurrer was sustained by the circuit court, and the bill dismissed. This decree was reversed by the circuit court of appeals, and the bill was ordered to be dismissed for want of equity, without prejudice to an action at law. There is a motion to dismiss the appeal to this court on the ground that the decree was not final in form; but the decisions are the other way, and the case being one in which the decree of the circuit court of appeals can be reviewed in this court under the act of March 3, 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547] we have jurisdiction, and the motion must be overruled. *Merrill v. National Bank*, 173 U. S. 131, 43 L. ed. 640, 19 Sup. Ct. Rep. 360. See *Great Western Tel. Co. v. Burnham*, 162 U. S. 339, 342, 40 L. ed. 991, 992, 16 Sup. Ct. Rep. 850.

The act of sale gives its own definition of the word “depot,” but no question is made that the depot intended to be built is within the prohibition of the instrument in that and other respects. We assume that if the plaintiff's grantee had built the structure it would have broken its agreement. We also assume, for the purposes of the case, without deciding, that the contract, as a contract, is not void, although similar contracts have been pronounced void in some of the cases cited below. On these assumptions the question is how far the burden of that agreement passed to the defendant, and whether, at least as against the defendant, equity will require it to be specifically performed.

*Such a liability, wherever asserted, would[495] have to be worked out, if at all, in terms of easement, covenant running with the land, implied contract, or equitable restriction.

Although the Louisiana Code recognizes such servitudes “as the prohibition of build-

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 239; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; and *Gibbons v. Ogden*, 5 L. ed. U. S. 302.

ing on an estate, or of building above a particular height" (Rev. Civil Code, art. 728 [724]; see art. 718 [714]), and although it has been held at common law that such a servitude for the benefit of neighboring land may be created within reasonable limits, and created by words of covenant (*Ladd v. Boston*, 151 Mass. 585, 588, 24 N. E. 858; *Brown v. O'Brien*, 168 Mass. 484, 47 N. E. 195; compare La. Rev. Civil Code, art. 743 [739]), it was not argued that there was an easement in this case. It would be questionable whether the obligation was "not imposed on the person or in favor of the person, but only on an estate or in favor of an estate" (La. Rev. Civil Code, art. 709 [705]; Code Napoleon, 686); whether it was not, in the words of Marcadé, commenting on this article of the Code Napoléon, a *servitude réelle entachée de personnalité*. 2 Marcadé, 627. "There can be no prædial servitude when the object is merely to satisfy the wants of the present owner." Sohm, Inst. Roman Law, Ledlie's transl. § 56, II., p. 262. Apart from the peculiarities of Louisiana law, there would be almost equal difficulty in regarding the agreement as a covenant the burden of which ran with the land according to the principles of the common law, and for substantially the same reason. It is true that the covenant is negative, but it does not benefit the use and occupation of the plaintiff's land physically, and is not intended to. It is intended simply to improve the market value of that land by giving to it a right not to be competed with in the way of railway conveniences. *Norcross v. James*, 140 Mass. 188, 192, 2 N. E. 946. As to an implied contract, that would be a fiction, and the plaintiff's rights, so far as the question of policy is concerned, would not be enlarged by adopting that form. See *Lincoln v. Burrage*, 177 Mass. 378, 380, 52 L. R. A. 110, 59 N. E. 67.

[496] Whether the true theory of equitable restrictions is the same *as that of covenants running with the land, or different, as their historical antecedents are different in part, it would seem that the two must have somewhat similar limits. With regard to injunctions, we see in art. 298, 3, of the Code of Practice, cited by the plaintiff, no reason to suppose that the law of Louisiana is peculiar in any way affecting the present case. Whatever the form which the attempt to restrict may take, obviously it is not desirable to allow large tracts of land to be tied up and cut off from the ordinary incidents of ownership, according to the invention of the owner, in perpetuity, in favor of other large tracts which may come by division into many hands. La. Rev. Civil Code, art. 656 (652). See *Parish v. Municipality*, No. 2, 8 La. Ann. 145, 169. If such restrictions should be enforced without limit in equity as against all

purchasers with notice, the practical result would be an unlimited extension of easements; since notice always can be secured by registration. Easements hitherto have been confined pretty narrowly, both in quality and in space. Equitable relief has been refused upon a covenant by a grantee not to open or work a quarry upon his land adjoining the land conveyed, in a suit between assignees of the original grantor and grantee. It was a mere covenant against competition. *Norcross v. James*, 140 Mass. 188, 2 N. E. 946. On the other hand, a covenant by a grantee not to sell sand from half an acre was enforced against the grantee's son and grantee in favor of the grantor in *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, and in old times it would seem that a covenant in connection with a gift of a mill in Tenbury not to raise another mill in Tenbury might have been enforced against the heir of the covenantor. Y. B. 5 Edw. III., 57, pl. 71; S. C. 7 Edw. III., 65, pl. 6, 7. Of course, there are numberless cases in which contracts have been enforced which in a more immediate sense affected the occupation and enjoyment of the quasi dominant land. It is to be noted, too, that the restriction is confined to a narrow strip, which very likely might have been subjected to a servitude of way.

We do not think it necessary to decide whether the foregoing *general considera-[497] tions would be enough to prevent the burden of this agreement falling on the defendant, or whether the allegation which has been quoted, and which means no more than that the defendant bought with notice, is enough to establish a relation of contract or quasi contract between the parties. There are more specific obstacles in the way of the bill. Whether a railroad station shall be built in a certain place is a question involving public interests. Assuming that a contract like the present is valid as a contract, and making the more debatable assumption that the burden of the contract passed to a purchaser with notice, it does not follow that such a contract will be specifically enforced. Illegality apart, a man may make himself answerable in damages for the happening or not happening of what event he likes. But he cannot secure to his contractor the help of the court to bring that event to pass, unless it is in accordance with policy to grant that help. To compel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action. It has been intimated by this court that a covenant much like the present should not be enforced in equity, and that the railroad should be left at liberty to follow the course which its best interests and those of the pub-

lic demand. *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 405, 34 L. ed. 385, 390, 10 Sup. Ct. Rep. 846; *Northern P. R. Co. v. Washington*, 142 U. S. 492, 509, 35 L. ed. 1092, 1098, 12 Sup. Ct. Rep. 283. See further, *Marsh v. Fairbury, P. & N. W. R. Co.* 64 Ill. 414, 16 Am. Rep. 564; *People ex rel. Hunt v. Chicago & A. R. Co.* 130 Ill. 175, 184, 22 N. E. 857; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Florida C. & P. R. Co. v. State*, 31 Fla. 482, 508, 20 L. R. A. 419, 13 So. 103; *Currie v. Natchez, J. & C. R. Co.* 61 Miss. 725, 731; *Holladay v. Patterson*, 5 Or. 177; *Texas & P. R. Co. v. Scott*, 23 C. C. A. 424, 429, 37 L. R. A. 94, 41 U. S. App. 624, 77 Fed. 726.

The difficulty is illustrated as well as made greater in the case at bar. There is in [498] Louisiana a railroad commission having *authority to require all railroads to build and maintain depots. La. Const. 1898, art. 384. That fact is enough to suggest the possibility of a conflict if an injunction were granted. But further, although it was not pleaded, it was admitted at the bar that the commission had ordered the erection of the station in dispute. It is true that this admission was coupled with charges of improper influence. But such imputations would not be tried or listened to in a collateral proceeding like this. It is apparent, therefore, that if the facts appeared of record an injunction would be denied, and that as soon as they do appear it must be denied, so that a trial would be an public necessity or demand for a depot within the stipulated limit. But this no more could be tried for the purpose of collaterally impeaching the decision of the railroad commission than could the purity of their motives.

It is objected that the foregoing was not the ground of the demurrer. But as was observed by the court below, other grounds are open on demurrer *ore tenus*, and apart from that consideration, if it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument for such a result, whatever the pleadings. The defendant may desire the relief to be granted. It is suggested that it does. But the very meaning of public policy is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone. See *Northern P. R. Co. v. Washington*, 142 U. S. 492, 509, 35 L. ed. 1092, 1098, 12 Sup. Ct. Rep. 283.

Decree affirmed.

Mr. Justice **Brewer** concurred in the result. Mr. Justice **Brown** took no part in the decision.

*DEPOSIT BANK OF FRANKFORT, *Plff.* [499]
in *Err.*,
v.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.

(See S. C. Reporter's ed. 499-525.)

Judgments—conclusiveness as between Federal and state courts.

A final decree of a Federal court enjoining the collection of certain taxes, and adjudging that an irrevocable contract of exemption from taxation which, under the Federal Constitution, cannot be impaired by subsequent legislation, was constituted by Ky. Sess. Laws 1885-6, pp. 140, 144-7, 201, which decree rests upon the effect as *res judicata* of a similar judgment of an inferior state court respecting taxes of other years, is, while it remains in force, conclusive in the further proceedings had in the state court, notwithstanding the reversal of its original judgment by the highest state court after the decree of the Federal court was rendered, and the repudiation both by the highest state court and, in another case, by the Federal Supreme Court, of the view that there was a contract exemption, and the fact that by the settled law of Kentucky an adjudication in respect of taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years.

[No. 33.]

Argued October 20, 21, 1903. Decided December 14, 1903.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which reversed a judgment of the Franklin Circuit Court dismissing the petition in an action for the recovery of taxes from a bank. *Reversed* and remanded.

See same case below, 23 Ky. L. Rep. 1285, 65 S. W. 10.

Statement by Mr. Justice **Day**:

This action was brought by the board of councilmen of the city of Frankfort, in the Franklin circuit court, for the recovery of certain ad valorem taxes under levies for the years 1892, 1893, and 1894. The tax for the year 1892 has been eliminated from the controversy, and the matters now disputed in-

NOTE.—As to conclusiveness and effect of judgments as between Federal and state courts—see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478, and Union & Planters' Bank v. Memphis, 49 C. C. A. 468.

On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L. R. A. 572; Bollong v. Schuyler Nat. Bank, 3 L. R. A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L. R. A. 577; Morrill v. Morrill, 11 L. R. A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429, and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

clude the taxes for the years 1893 and 1894, and interest. The bank in the first instance relied upon the provisions of a certain law of the state of Kentucky, known as the Hewitt law, as exempting it from *the taxes sought to be enforced. This law was passed in 1886 (Session Laws of Kentucky, 1885-6, pp. 140, 144-7, 201), and provided:

"Section 1. That shares of stock in state or national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof equal to \$100, or on each \$100 of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each \$100 of so much of their surplus, undivided surplus, and undivided accumulations as exceeds an amount equal to 10 per cent of their capital stock, which shall be in full of all tax, state, county, and municipal.

"Sec. 4. That each of said banks, institutions, or corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levy of said tax, and agree to pay the same as herein provided, and to waive and release all rights under the act of Congress, or under the charters of the state banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the state of Kentucky shall be evidenced by writing, under the seal of such bank, and delivered to the governor of this commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

"Sec. 5. The said bank may take the proceeding authorized by § 4 of this act at any time until the meeting of the next general assembly: provided, they pay the tax provided in § 1 from the passage of this act.

"Sec. 6. This act shall be subject to the provisions of § 8, chapter 68, of the General Statutes.

[501] "Sec. 7. If any bank, state or national, shall fail or refuse to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in § 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by § 2 of this act, and the taxes — state, county, and municipal — shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed upon the assessed taxable prop-

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erty in the hands of individuals: Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

The Deposit Bank of Frankfort accepted the terms of the Hewitt law, and made payment of the taxes as therein provided.

The circuit court of Franklin county, by judgment upon the pleadings in this case, sustained the bank's claim of exemption, holding the Hewitt law to be an irrevocable contract between the bank and the state. Upon appeal, this judgment was reversed by the Kentucky court of appeals, that court holding that the Hewitt act did not constitute an irrevocable contract, and had been repealed by the later act of 1892, under which act the bank was not exempt from payment of the taxes in controversy.

After the case was remanded to the circuit court for a new trial the bank filed a supplementary answer, setting up as an estoppel a decree of the United States circuit court for the district of Kentucky rendered in 1898, in a case to which the bank and the complainant were parties. The decree in that case was rendered upon a bill filed by the bank, in which it set up, among other things, a certain judgment of the Franklin circuit court rendered in 1896, in which it was adjudged that the Hewitt law constituted an irrevocable contract exempting the bank from taxation. At the time of the rendition of the *decree in the [502] United States court the judgment of the state circuit court relied on was in full force although subsequently reversed by the Kentucky court of appeals.

In the Federal court the following decree was rendered:

"The court being sufficiently advised, files its opinion herein.

"It is therefore adjudged, ordered, and decreed as follows:

"First. That the demurrer of the defendants Board of Councilmen of the city of Frankfort and Franklin county and of the defendants Samuel H. Stone, G. W. Long, and Charles Finley be, and the said demurrers are, hereby overruled; to which the said defendants each except.

"Second. The plea of defendants Board of Councilmen of the city of Frankfort and Franklin county to the bill of complaint is overruled; to which the said defendants except.

"Third. Thereupon came the complainant, by Frank Chinn, its counsel, and files its replication to the answer of the defendants

Board of Councilmen of the city of Frankfort and Franklin county. The defendants county of Franklin and city of Frankfort offered to file an amended answer; to which complainant objected, and the motion to file is overruled; to which said defendants except, and said amended answer is made a part of the record by the order of the court.

"And by consent this cause came on to be heard for final decree. The complainant read upon hearing its bill of complaint and its amended bill of complaint herein, together with all the exhibits filed with said bills, to wit:

"Exhibit 'A,' being the record of the proceedings in the case of Deposit Bank of Frankfort against Franklin County and John W. Gaines, sheriff.

"Exhibit 'B,' being the records in the proceedings in the case of Deposit Bank of Frankfort against Franklin county and R. D. Armstrong, sheriff.

"Exhibit 'C,' being judgment of Franklin circuit court, entered February 1, 1896, in the suit of Deposit Bank of Frankfort against Franklin County.

[503] "Exhibit 'D,' being record of the proceedings in the case of *Board of Councilmen of City of Frankfort against Deposit Bank of Franklin.

"The defendant, The County of Franklin, read on the hearing its answer, and the defendant Board of Councilmen of the City of Frankfort read on the hearing the record of the proceedings in the case of Board of Councilmen of City of Frankfort against L. C. Norman, auditor, etc., and also read its answer.

"And it is now adjudged, ordered, and decreed that the defendants Samuel H. Stone, Charles Finley, and George W. Long be, and they are hereby, perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any other subsequent years until the expiration of the charter of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Franklin county or to any officer of the board of councilmen of the city of Frankfort or the county of Franklin; and the defendants County of Franklin and Board of Councilmen of the City of Frankfort are enjoined and restrained from endeavoring to collect any tax upon any such valuations; and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.

"It is further adjudged, ordered, and decreed that by reason of the several pleas of *res judicata*, relied on by the complainant in

its bill, and as shown by the exhibits therewith, the complainant has established a contract with the commonwealth of Kentucky, under the provisions of article 2 of the act of the general assembly of the state of Kentucky, entitled 'An Act to Amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for state purposes in a different *mode or at a [504] greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the commonwealth of Kentucky, and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by § 1, 2, and 3 of article 2 of the said act approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void.

"And it is further adjudged that the complainant recover of the defendant its costs in this action expended.

"And came defendants and prayed an appeal in open court, and tendered their assignment of errors; whereupon the court allowed the appeal, and orders the assignment of errors to be filed, and fixes the appeal bond at \$1,000."

This decree of 1898 was afterwards affirmed in this court. 174 U. S. 800, 43 L. ed. 1187, 19 Sup. Ct. Rep. 881. The Franklin circuit court in the case now before us dismissed the petition upon the ground that there had been no proper return of no property found, and did not pass upon the question as to whether the decree of the United States court was effectual as an estoppel between the parties. Upon appeal to the court of appeals of Kentucky, it was held by a majority of the court, three judges dissenting, that the decree relied upon was not an estoppel. By writ of error that judgment is brought here for review.

Mr. Frank Chinn argued the cause, and, with Mr. D. W. Lindsey, filed a brief for plaintiff in error:

The decree of the Federal court, relied on

as a bar to this action having been rendered by a court having jurisdiction of the cause and of the parties, is conclusive upon the city in every other court so long as that decree stands unreversed.

Hollister v. Abbott, 31 N. H. 442, 64 Am. Dec. 342; *Dupuy v. Johnson*, 1 Bibb, 562; *Garner v. Strode*, 5 Litt. (Ky.) 314; *Paul v. Smith*, 82 Ky. 451; *Davis v. McCorkle*, 14 Bush, 751.

And the fact that this action was begun before the bill in the Federal court suit was filed does not alter the rule.

12 Am. & Eng. Enc. Law, p. 149e.

As between national and state courts, neither will undertake to grant relief from a judgment rendered by the other. One having equitable grounds for relief from a judgment rendered in courts of either must apply to the court of the sovereignty in which the judgment was rendered.

Freeman, Judgm. § 485, p. 852; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768; *United States ex rel. Moses v. Keokuk*, 6 Wall. 514, 18 L. ed. 933; *English v. Miller*, 2 Rich. Eq. 320; *Strozier v. Howes*, 30 Ga. 578; 1 Stat. at L. 335.

Mr. W. H. Julian argued the cause, and, with *Messrs. T. H. Crockett* and *Ira Julian*, filed a brief for defendant in error:

An estoppel against an estoppel sets the matter at large.

Bigelow, Estoppel, 5th ed. p. 360.

All that this court has ever required of the state courts of last resort in giving effect to Federal-court judgments is that they be given the same effect that is given state-court judgments of the same character, and rendered under similar circumstances, by the courts of the state in which they are rendered.

Mills v. Duryee, 7 Cranch, 484, 3 L. ed. 413; *Hampton v. McConnel*, 3 Wheat. 234, 4 L. ed. 378; *McElmoyle v. Cohen*, 13 Pet. 326, 10 L. ed. 184; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 184, 40 L. ed. 664, 16 Sup. Ct. Rep. 471; *Abraham v. Casey*, 179 U. S. 218, 45 L. ed. 159, 21 Sup. Ct. Rep. 88; *Metcalf v. Watertown*, 153 U. S. 676, 38 L. ed. 864, 14 Sup. Ct. Rep. 947.

Viewed in the light of the Kentucky decisions alone the Federal-court judgment is not an estoppel in this case.

Newport v. Com. 106 Ky. 434, 45 L. R. A. 518, 50 S. W. 845, 51 S. W. 433; *Louisville Bridge Co. v. Louisville*, 22 Ky. L. Rep. 703, 58 S. W. 598; *Negley v. Henderson*, 22 Ky. L. Rep. 912, 59 S. W. 19; *Bell County Coke & Improv. Co. v. Pineville*, 23 Ky. L. Rep. 933, 64 S. W. 525; *Frankfort v. Deposit Bank*, 23 Ky. L. Rep. 1285, 65 S. W. 10; **191 U. S.**

Louisville Bridge Co. v. Louisville, 23 Ky. L. Rep. 1655, 65 S. W. 814.

The same character of judgment as that now relied on by appellee was held to be no estoppel solely upon the ground that the former judgment was erroneous and had been overruled.

Douglass v. Com. 15 Ky. L. Rep. 581, 24 S. W. 233.

There are two classes of estoppel by *res judicata*,—estoppel by former judgment, and estoppel by former verdict.

Bigelow, Estoppel, 5th ed. pp. 80–103.

The claim of estoppel now relied on here belongs to the second class.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 314, 38 L. ed. 456, 14 Sup. Ct. Rep. 592.

The estoppel by former verdict is restricted to issues of fact which were actually litigated and determined in the former suit, and which arise in the second suit under substantially the same circumstances as in the first action.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

Though the decree was rendered by a Federal court, it was rendered in Kentucky, and in a controversy between citizens of Kentucky, and should be regarded as a domestic judgment of the state of Kentucky,—at least for the purposes of this case.

Metcalf v. Watertown, 153 U. S. 680, 38 L. ed. 865, 14 Sup. Ct. Rep. 947.

***Mr. Justice Day** delivered the opinion of [508] the court:

The so-called Hewitt law, set forth in the foregoing statement, has given rise to much litigation in the courts of Kentucky, as well as in those of the United States. At one time it was held by the court of appeals of Kentucky that its provisions, when complied with by the bank seeking to avail itself of its privileges, constituted a valid and binding contract. *Com. use of Franklin County v. Farmers' Bank*, 97 Ky. 590, 31 S. W. 1013. In a later case the court of appeals of Kentucky held the law not to constitute an inviolable contract. *Deposit Bank v. Daviess County*, 102 Ky. 174, 44 L. R. A. 825, 39 S. W. 1030, 44 S. W. 1131. When the law was before this court, the same conclusion was reached. *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530.

It may be now regarded as the settled law that this enactment did not constitute a contract between the state and the banks as to taxation, but is subject to modification and repeal by subsequent laws of the state undertaking to tax bank property.

In this case we have to deal with the ef-

fect of a decree of the circuit court of the United States which is unreversed and affirmed in this court, and in which, between the parties to the present action, it was held that the Hewitt law was a valid enactment, and constituted a contract between the parties within the protection of the contract clause of the Constitution of the United States. A proper consideration of the question requires that it shall be distinctly understood just what this decree is. The bill which was the basis of the action of the court was broad in its terms, and sought not only to enjoin the collection of the taxes for the years 1895-6-7-8, which were involved, but to have it finally adjudicated that the Hewitt law constituted a contract between the parties which shielded the bank from taxation after complying with the provisions of that law. The decree not only provided for [509] *a perpetual injunction enjoining the taxation for the years specifically mentioned, but further:

"It is further adjudged, ordered, and decreed that by reason of the several pleas of *res judicata*, relied on by the complainant in its bill, and as shown by the exhibits therewith, the complainant has established a contract with the commonwealth of Kentucky under the provisions of article 2 of the act of the general assembly of the state of Kentucky, entitled 'An Act to Amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for state purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by §§ 1, 2, and 3 of article 2 of the said act approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution, and void."

The Constitution of the commonwealth of Kentucky, adopted after the passage of the Hewitt law, made provision for the enact-

ment of laws for the taxation of the property of banks. Passed under the authority of these constitutional provisions, the act of November 11, 1892, referred to in the decree of the Federal circuit court of 1898, is the legislation subsequent to the Hewitt law under which it is sought to assess and collect taxes involved in the present suit. If this decree is to be given *force and effect, as hav-[510] ing adjudicated the Hewitt law to be a binding contract covering the right to tax the bank, there can be no question that this subsequent legislation is violative of the constitutional inhibition against the states from enacting laws impairing the obligation of contracts. This legislation is in absolute conflict with the Hewitt law. *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530. The decree declares in terms, as direct and specific as it is possible to make them, that the act now sought to be enforced in the assessment and collection of taxes is in violation of the Federal Constitution, and therefore void.

The judgment of the state court upon which the decree of the Federal court is predicated was equally broad in its terms, and covered not only the particular years of assessment then in question but the broader right of the parties to be protected under the Federal Constitution against state enactments in violation of the contract provision of that instrument.

It is urged that the state judgment upon which the Federal decree of 1898 is based was afterwards reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed, and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed, based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself; was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could *be reopened and [511] examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judg-

ment could be rendered because of these divergent views, and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force. In the *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472, the question of what effect should be given to a decision of a court of the United States as proof of probable cause in a suit for a prosecution which was alleged to be malicious was before the court. It appeared that the judgment relied upon had been subsequently reversed, and it was held that this made no difference unless it was shown that the judgment was obtained by means of fraud. Mr. Justice Matthews, delivering the opinion of the court, said:

"Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate, and even after reversal it still remains, as in the case of every other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution, that he had probable cause for his proceeding."

The precise question was before the court of appeals of New York in *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123, in which case a judgment was relied upon as an estoppel in a suit between the *same parties. The first suit settled certain matters in controversy in the second suit, and was given force and effect as an estoppel, but was afterwards reversed by the appellate court. The second suit, in which it was relied upon, came before the court of appeals, and it was claimed that the reversal of the judgment in the first suit would avoid its force as an estoppel between the parties. The court said:

"If the judgment roll was competent evidence when received, its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have

the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have is to move on that fact in the court of original jurisdiction for a new trial, and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require."

It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, in the court of its rendition, to modify it or set it aside. It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based. *Cooley*, Const. Lim. 7th ed. 83, and cases cited.

Again, it is urged that the taxes herein involved are those for different years than were under consideration and covered by the decree of the Federal court relied upon. The vice of this argument consists in assuming that the taxes for specific years were alone involved and covered by the decree of the court. *The controversy was as to the force[513] and effect of the Hewitt law as a contract; not for one year, but for all years; not for one assessment, but for all assessments of taxes upon certain property of the bank. The contest was over the contract, and the consequent want of power to collect any and all taxes the assessment of which did violence to the contract rights of the bank. The court had jurisdiction of the parties and of the subject-matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by state legislation within the right guaranteed by the Federal Constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank. That a bank charter and laws having the effect of bank charters may constitute valid and binding contracts conclusive between the parties is now so well settled by the adjudications of this court as not to be open to discussion. *New Orleans v. Citizens Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905. In that case it was held that a judgment of the district court of

New Orleans, holding the charter of a bank to constitute a binding and conclusive contract between the parties, although involving the taxes of other years than those in suit, was *res judicata* and conclusive between the parties. In the course of the opinion, Mr. Justice White said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books, and enforced by many decisions of this court. . . .

[514] "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

This case is cited with approval in *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, in which the decisions of this court upon the subject of *res judicata* are reviewed by Mr. Justice Harlan, and the general doctrine thus stated:

"A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The thing established by the Federal decree relied upon here was the binding and conclusive character of the contract embodied in the Hewitt law and its acceptance. That it was such a contract was then adjudicated, and, irrespective of the reasons given for the decision, must remain concluded until the judgment constituting such adjudication is modified or reversed.

But it is said that the question here is simply what force and effect the state court should give to the decree of the Federal court relied upon. It is argued that there should

be given to a Federal judgment the same force and effect that the state court gives to a judgment of a court of the state in which the Federal judgment is relied upon,—neither more nor less. Cases are cited from the Kentucky court of appeals which may be said to establish that an adjudication concerning taxes for one year cannot be pleaded as an estoppel in suits in that state involving the taxes of other years. It is true that, for some purposes and within certain limits, it is only required that the judgments of *the[515] courts of the United States shall be given the same force and effect as are given the judgments of the courts of the state wherein they are rendered; but it is equally true that whether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise. *Cresecent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238. In the latter case, Mr. Justice Harlan, after reviewing the case upon this subject, thus states his conclusion:

"According to these decisions, and in view of the statute giving this court authority to re-examine the final judgment of the highest court of a state, denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the circuit courts of the United States under which the plaintiff in error claims title to the lands and property in question."

When is the state court obliged to give to Federal judgments only the force and effect it gives to state court judgments within its own jurisdiction? Such cases are distinctly pointed out in the opinion of Mr. Justice Bradley in *Dupasseur v. Rochercau*, 21 Wall. 135, 22 L. ed. 590, where the learned justice says:

"The only effect that can be justly claimed for the judgment in the circuit court of the United States is such as would belong to judgments of the state courts rendered under similar circumstances. *Dupasseur & Co.* were citizens of France, and brought the suit in the circuit court of the United States as such citizens; and consequently that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the state, and its proceedings were had in accordance with the forms and course of proceeding in the state courts. It is apparent, therefore,

that no higher sanctity or effect can be claimed for the judgment of the circuit court [516] of the United States rendered "in such a case, under such circumstances, than is due to the judgments of the state courts in a like case and under similar circumstances."

The cases which, by clear inference, cannot come within this class, are to be noticed.

When it was said that no higher sanctity or effect can be given to a judgment of the circuit court of the United States than to state judgments, the learned judge is careful to say "in like case, under similar circumstances." What are these cases? Manifestly those just stated, wherein the court derives its jurisdiction from the citizenship of the parties, and in the exercise of the jurisdiction to administer the laws of the state where the proceedings are had. Where language has been used in other cases to the effect that judgments of the Federal courts are to be given the effect given to domestic judgments, they will be found to be cases where questions of general law are under consideration, and coming within the class suggested by Justice Bradley in the opinion quoted. Such is the case of *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472. It was there held that a judgment of the United States court, relied upon as a ground of probable cause in a suit for malicious prosecution was to be given the same force and effect as judgments in the state courts. But Mr. Justice Matthews, delivering the opinion, was careful to add:

"Whatever deference may be due to the decisions of the state court of final resort in every case in which it has spoken, and whatever may be the respect to which its decisions upon questions of purely local law established as rules of property may be entitled, they are not authority binding upon the courts of the United States, sitting even in the same state, where the questions involved and decided relate to rights arising under the Constitutions and laws of the United States."

In *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25, it was held that the supreme court of the District of Columbia is a court of the United States, and its judgments conclusive in the courts of a state [517] except for "such cause as would be sufficient to set it aside in the courts of the District."

Mr. Justice Matthews, who delivered the opinion, again stated the doctrine that the judgments of the courts of the United States are upon the same footing, so far as concerns the obligation created by them, with judgments of the states. Other cases are found in the reports stating the general proposition.

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In *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604, the question was as to the effect to be given to a state judgment as *res judicata*. It was held that the Federal courts were not required to give such domestic judgments any greater force and effect than was awarded them by the courts of the state where rendered.

But it is equally well settled that a right claimed under the Federal Constitution, finally adjudicated in the Federal courts, can never be taken away or impaired by state decisions. The same reasoning which permits to the states the right of final adjudication upon purely state questions requires no less respect for the final decisions of the Federal courts of questions of national authority and jurisdiction.

This principle is now so thoroughly settled as to need but to be stated. It has been reiterated in a line of decisions following the great judgment of Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, in which the principle was firmly established. As early as *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416-432, 14 L. ed. 997-1003, Chief Justice Taney said:

"Indeed, the duty imposed upon this court to enforce contracts honestly and legally made would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which a state court had given, and which the writ of error brings up for revision here." *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Jefferson Branch Bank v. Skelly*, 1 *Black, 436, 17 L. ed. 173; *Douglas v. Kentucky*, 168 U. S. 488, 501, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199, 203, and cases cited. [518]

In the last named case, Mr. Justice Harlan, delivering the opinion, deals with the question as follows:

"The defendant insists that his rights having been acquired when these decisions of the highest court of Kentucky were in full force, should be protected according to the law of the state as it was adjudged to be when those rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state legislatures? Clearly not. The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the state seeks to prevent him from

exercising, were acquired under an agreement that constituted a contract within the meaning of the Federal Constitution. This contention is disputed by the state. So that the issue presented makes it necessary to inquire whether that which the defendant asserts to be a contract was a contract of the class to which the Constitution of the United States refers. This court must determine—indeed, it cannot, consistently with its duty, refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile state legislation.” *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972.

These cases thoroughly established the proposition that in no other way can the obligation of the Federal courts under the Constitution be discharged than by rigidly adhering to the right and duty to maintain the ultimate right of the Federal courts to protect the citizens of the United States, and of every state, in the enjoyment of rights and privileges guaranteed by the Federal Constitution.

[519] *We suppose there is no question that if the state court had refused to give effect to the Hewitt law as a binding contract, and that question were presented here upon writ of error, and this court reached a different conclusion, holding the Hewitt law to constitute a contract, the judgment of the state court would be reversed for the denial of the right claimed under the Federal Constitution. In the present case we are asked to go further and sustain the judgment of the state court in the face of a judgment of a Federal circuit court, affirmed in this court, and duly invoked for the protection of the party in whose favor it was rendered in an action between the same parties. In *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217, a suit was brought in an Iowa court by the homestead company to recover taxes for the years 1864 to 1871. The right to recover the same taxes had been litigated between the same parties and decided adversely to the homestead company in the case of *Iowa Homestead Co. v. Valley R. Co.* 17 Wall. 153, *sub nom. Iowa Homestead Co. v. Des Moines Nav. & R. Co.* 21 L. ed. 622. The railroad company set up the decree in its favor as a bar to the action. The homestead company replied: “That the decree or judgment referred to is null and void, for the reason that

the courts of the United States had no jurisdiction of said suit, and no legal power or authority to render said decree or judgment.” The supreme court of Iowa held that the question of prior adjudication had not been properly raised before it, and decided the case without considering the point. This court held that the point was duly made, and that the Federal court had jurisdiction in the suit relied upon, and decided in 17 Wallace; and held further that the supreme court of Iowa, in refusing to give effect to the prior judgment as an estoppel, had denied to the navigation company the Federal right set up. In delivering the opinion, Mr. Chief Justice Waite said:

“As the circuit court entertained the suit, and this court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same *general question, be[520] deemed a nullity. It was at the time of the trial in the present case in the court below a valid and subsisting prior adjudication of the matters in controversy, binding on these parties, and a bar to this action. In refusing to so decide the court failed to give full faith and credit to the decree of this court under which the navigation and railroad company claimed an immunity from all liability to the homestead company on account of the taxes sued for, and this was error.”

This reasoning is applicable here. The decree of the Federal court of 1898 gave judgment that the bank had a contract absolving it from all taxes, including those sued for. When the state court refused to give that judgment effect it denied a right secured by the Federal court judgment upon matters wherein its decision was final until reversed in an appellate court, or modified or set aside in the court of its rendition.

In our judgment the adjudication of the Federal court relied upon here, although based upon the judgment of a state court, given as a reason therefor, is equally effectual as it would have been had the Federal court reached the conclusion, as upon the original question, that the Hewitt law constituted a binding contract between the parties. Any other conclusion strikes down the very foundation of the doctrine of *res judicata*, and permits the state court to deprive a party of the benefit of its most important principle, and is a virtual abandonment of the final power of the Federal courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution, and established by the judgments of the Federal courts.

It is true that the final determination of the courts that the Hewitt law did not constitute a contract, and the reversal of the

state court judgment which was the basis of the decree in the Federal court, renders this case one where a court might wish to avoid the application of rules which may seem technical. But the protection of the right of parties as well as the interest of the public to end litigation by a final judgment, and to preserve inviolate the safeguards of the Federal Constitution, should never be overlooked [521] in view of the hardship of particular *cases. And we repeat that we are not dealing with any right of relief which the state may have in the Federal court wherein the original decree was rendered.

Judgment reversed and cause remanded.

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Brewer**, Mr. Justice **Brown**, and Mr. Justice **Peckham**, dissenting:

This was a petition in equity filed by defendant in error in the circuit court of Franklin county, Kentucky, seeking the recovery of certain taxes for the years 1893 and 1894, penalties and interest. To revise the judgment of the court of appeals of Kentucky rendered November 19, 1901, this writ of error was sued out, and the question is whether that court erred in declining to direct the Franklin circuit court to sustain a plea of former adjudication by the decree of the circuit court of the United States rendered June 25, 1898, in enforcement of a decree of the Franklin circuit court rendered in the same case February 1, 1896, and which was reversed by the state court of appeals, June 19, 1900.

The plea or supplemental answer was filed in the Franklin circuit court February 1, 1901, on the remanding of the case to that court. The case went off on other points, but, being again carried to the court of appeals, it was held that, as the taxes involved in this case were those for 1893 and 1894, and those involved in the case in the United States court were the taxes for 1895, 1896, 1897, and 1898, and as it was the settled law of Kentucky that an adjudication in respect of the taxes of one year was not a bar to recovery in litigation in respect of the taxes of another year, the decree of the United States circuit court, based on the reversed decree in this case, could not be treated as a bar to the collection of the taxes for 1893 and 1894, on the view that the thing adjudged was the existence of a contract created by the Hewitt law, which exempted the banks from liability [522] for such taxes during the lifetime of *their charters; and that to decide otherwise would be to hold that the prior decree in this case, though reversed, was nevertheless made binding by the decree of another jurisdiction rested upon it, as having determined the invalidity of taxes of other years, notwithstanding the law of the state to the contrary.

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And the court of appeals was fortified in its conclusion by the fact that the Supreme Court of the United States, the court of appeals, and the circuit court of the United States, in opinions delivered at the time of the rendition of the decree in question, had all held that the Hewitt law did not constitute an irrevocable contract.

The case before us stands in the same situation as if the Franklin circuit court had overruled the plea of former adjudication, and rendered decree for complainant, and the court of appeals had thereupon affirmed that decree; and it seems to me that the Franklin circuit court could not have done otherwise in view of the law of the state in respect of litigation as to taxes of different years.

Moreover, there is a distinction between estoppel by decree and estoppel by the findings on which the decree rests, in that the one operates as a bar to subsequent suits on the same cause of action, and the other to further litigation of the particular issuable facts found.

And I submit that the thing adjudged by the circuit court of the United States was not that the Hewitt law constituted a contract between the state and the banks, which exempted the banks from this taxation, but was that the board of councilmen was estopped to deny the alleged contract because of the decree of the Franklin circuit court. This is explicitly stated in the decree as the ground of the decree, and the decree could have rested on no other ground, as the suit was in effect a suit to enforce the state court decree, and, conceding the potency attributed to the doctrine of *res judicata*, the circuit court of the United States could not have exercised an original judgment on the question of contract or not, but was compelled *to accept the existence of the contract as "established" by the decree of the Franklin circuit court. [523]

I think it follows that when a decree rests on the establishment by a prior decree of a certain conclusion of law, such ground of the prior decree cannot be treated as merely reasons for the later decree, which, as mere reasons, may be ignored; and that this must necessarily be so when the court rendering the later decree is shut up to the single question of estoppel. This being so, I differ entirely from the view that the controversy in the Federal court was at large as to the force and effect of the Hewitt law as a contract exempting the banks from taxation not only for the specified years, but for all other years. The decree cannot be treated as giving to the Franklin circuit decree a wider scope than the law of the state allowed, and the law of the state was that the doctrine of *res judicata* is not applicable to taxes for

years other than those under consideration in the particular case. See *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 75, 47 L. ed. 712, 715, 23 Sup. Ct. Rep. 604, and cases cited.

It is true that the decree of the United States circuit court enjoined the taxes involved in that suit, and also the taxes for subsequent years, but this was upon the express ground that the decree of the state circuit court had established a contract of exemption during the corporate existence of the bank; and whatever the terms of the latter decree, the state law permitted a renewal of the controversy in respect of taxes not directly involved. To apply the Federal decree to any other than the taxes enumerated is to hold that matters of public law can be placed by estoppel beyond the power of reconsideration,—a doctrine not heretofore favored by this court. *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *Brownsville Taxing Dist. v. Loague*, 129 U. S. 493, 32 L. ed. 780, 9 Sup. Ct. Rep. 327; *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354.

[524] It is the duty of the state courts as well as of the Federal courts to see to it that no act of a state legislature impairing the obligation of a contract is sustained, and it is the duty of the Federal courts as well as of the state courts to see to it that no act of a state legislature is avoided on the pretext of impairment *of the obligations of a contract, when in fact there is no contract to impair. Here this court and the highest court of the state of Kentucky agree that there is no contract, and yet a valid law of Kentucky is overthrown on the pretense of a contract which confessedly has no existence. The reason given is that the Federal court once held that there was a contract, when, in truth, that court held that there was no contract, but that defendant in error was estopped to assert that fact by reason of a judgment of the state court, which has since been duly vacated. The decision is, therefore, not based upon any provision of the Federal Constitution, but upon a rule of general law as to the conclusiveness of a judgment. But that rule of general law is, like any other, subject to modification or change by the state, and it is as true of Kentucky as of Tennessee that the rule of *res judicata* as applied to taxes does not embrace other taxes than those immediately in litigation. Repeated decisions of this court are that a Federal judgment is entitled to the same consideration as a state judgment, "no more and no less," and we held in *Union & Planters' Bank v. Memphis* that what effect a judgment of a state court shall have as *res judicata* is a question of state law.

In my judgment the state courts, in rendering decree for the taxes of 1893 and 1894,

did not refuse to give the Federal decree such effect as it was entitled to.

Of course, I express no opinion as to the taxes for 1895-6-7 and 8; the immediate subject of the bill in the United States court. The situation of that case is peculiar. The decree of that court was affirmed in this court on appeal by an equal division, May 15, 1899. 174 U. S. 800, 43 L. ed. 1187, 19 Sup. Ct. Rep. 881. Leave was subsequently granted by this court to appellants to apply to the circuit court for leave to file such bill as counsel might be advised. The present defendant in error (appellant there) accordingly applied to that court for leave to file a bill of review, which was denied. 120 Fed. 165. The case was then carried to the circuit court of appeals for the sixth circuit, and that court affirmed the order of the circuit court. *124 Fed. 18. The court stated [525] that the judgment of the Franklin circuit court rested on a former decision of the court of appeals of Kentucky, holding the revenue act of 1892 void as an impairment of the state's contract with the banks, and that, after the decree of the United States circuit court, the court of appeals of Kentucky overruled its former decision; and the United States court of appeals then held that the consequent reversal of the Franklin circuit judgment furnished no adequate ground for the revision of the decree of the United States circuit court.

The prior decision of the court of appeals of Kentucky was rendered June 1, 1895, and is reported 97 Ky. 590, 31 S. W. 1013. That decision was overruled by a decision rendered March 24, 1897, and reported 102 Ky. 174, 44 L. R. A. 825, 39 S. W. 1030, 44 S. W. 1131, 19 Ky. L. Rep. 248. The decree of the circuit court of the United States was rendered June 25, 1898. There were many cases under consideration in the state court of appeals, and it happened that the decree of the Franklin circuit court was not in fact reversed until June 19, 1900. But as the ground on which that decree rested had been swept away in 1897, the circuit court of the United States might well have applied the rule laid down by Lord Redesdale, that where a party comes into a court of equity to have the benefit of a former decree, the court is at liberty to inquire whether the circumstances justified the relief. Mitford, Pl. 96; 138 U. S. 561, 34 L. ed. 1008, 11 Sup. Ct. Rep. 405. This was not done, and the Federal decree has not, as yet, been set aside.

But Lord Redesdale's rule is applicable in this case, and that is in itself sufficient to require the affirmance of the judgment of the court of appeals of Kentucky.

My Brothers **Brewer**, **Brown**, and **Peckham** concur in this dissent.

[526]*W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, *Plff. in Err.*,
v.

DUPLAN SILK COMPANY.

(See S. C. Reporter's ed. 526-532.)

Appeal—review of judgment of circuit court of appeals—case arising under Federal law.

1. A case does not arise under the laws of the United States so as to deprive the judgment of the circuit court of appeals therein of that finality which exists when the jurisdiction of the circuit court depends entirely on diverse citizenship, unless it appears by plaintiff's pleading that the suit really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends.
2. The removal from a state court to a Federal circuit court for diverse citizenship, of a suit by a trustee in bankruptcy for the conversion of property, the title to which vested in him by the adjudication in bankruptcy, places such suit in the Federal court as if it had been commenced there on that ground of jurisdiction, within the rule making the judgment of the circuit court of appeals final when the jurisdiction of the circuit court depends entirely on diverse citizenship, and not as if it had been commenced there by consent of defendant, under § 23 of the bankruptcy act.

[No. 83.]

Argued December 7, 1903. Decided December 21, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed the judgment of the Circuit Court for the Eastern District of Pennsylvania in favor of plaintiff in an action of trover brought by a trustee in bankruptcy, and remanded the case with instructions to enter judgment for defendant. *Dismissed.*

See same case below, 53 C. C. A. 321, 115 Fed. 689.

Statement by Mr. Chief Justice **Fuller**:

This was an action of trover commenced by plaintiff in error in the court of common pleas for the county of Lehigh, Pennsylvania, October 18, 1900, the declaration averring in substance that on January 13, 1900,

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308, and *Re Buchanan*, 39 L. ed. U. S. 884.

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certain lumber and building materials were the property of the firm of Bennett & Rothrock, and that, by virtue of an adjudication in bankruptcy of that date, plaintiff succeeded to the title of that firm to said lumber and materials, and that on January 15, 1900, defendant in error wrongfully converted the lumber and materials to its own use.

November 19, 1900, defendant in error presented its bond and petition for the removal of the cause to the circuit court of the United States for the eastern district of Pennsylvania, the petition alleging that the controversy in the suit was wholly between citizens of different states; that the plaintiff, trustee in bankruptcy of Bennett & Rothrock, and Bennett & Rothrock themselves, were at the time of the commencement of the suit, and at the time the petition for removal was presented, citizens of the state of Pennsylvania; and that the defendant was at the time of the commencement of the suit, and at the time the petition for removal was presented, a citizen of New York; and thereupon the cause was removed. The cause having been docketed and the record filed, defendant filed a plea of not guilty, and a trial was had November 11, 1901, resulting in a verdict for plaintiff for \$12,183. January 15, 1902, a motion by defendant for judgment *non obstante veredicto* was overruled and judgment entered in favor of plaintiff (112 Fed. 638), to review which defendant prosecuted a writ of error from the United States circuit court of appeals for the third circuit, and that court on May 7, 1902, reversed the judgment of the circuit court, and remanded the cause with instructions to enter judgment for defendant on the verdict. 53 C. C. A. 321, 115 Fed. 689. This writ of error was then allowed.

Mr. Thomas M. B. Hicks argued the cause, and, with Messrs. William H. Spencer and Clarence L. Peaslee, filed a brief for plaintiff in error:

Where a right is claimed by the plaintiff in a case which depends for its existence upon the construction to be given to a law of Congress a Federal question is involved, and the case arises under the laws of the United States.

Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Northern P. R. Co. v. Soderberg*, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 265; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *Van Allen v. Atchison, C. & P. R. Co.* 1 McCrary, 598, 3 Fed. 545; *Lowry v. Chicago, B. & Q.*

R. Co. 46 Fed. 83; *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 2; *Hughes v. Northern P. R. Co.* 9 Sawy. 313, 18 Fed. 106; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union L. S. L. & S. H. Co.* 12 Fed. 225; *Hodgson v. Millward*, 3 Grant Cas. 418; *Ellis v. Norton*, 4 Woods, 399, 16 Fed. 4; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

The circumstance that there may also come in question other principles or matters unconnected with the Federal law does not interfere with the jurisdiction.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.

Although the fact of diverse citizenship may have been the only jurisdictional ground expressly invoked, yet, if the existence of a Federal question appears on the record at the time the jurisdiction of the circuit court of the United States attaches, both grounds of jurisdiction actually exist and appear upon the record, and the judgment of the circuit courts of appeals is not final.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; *Union P. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

Where the suit by the trustee in bankruptcy against a stranger to the bankruptcy proceedings, aside from the mere fact of bankruptcy, involves Federal questions, which under the general judicature acts of Congress, give jurisdiction of the suit to the United States circuit courts, such jurisdiction is not withheld.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

For definition of the word "claim," see—

Webster, Internat. Diet.; Bouvier, Law Diet.; Rapalje & L. Law Diet.; Black, Law Diet.; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Coster v. Albany*, 43 N. Y. 413; *United States v. Spaulding*, 3 Dak. 93, 13 N. W. 357, 538; *Pea v. Waggoner*, 5 Hayw. (Tenn.) 1; *Bourland v. Hildreth*, 26 Cal. 205; *Robinson v. Wiley*, 15 N. Y. 491; *Lopez v. United States*, 24 Ct. Cl. 95, 2 L. R. A. 571; *Kansas use of Coates v. Ridenour*, 84 Mo. 253; *Howell v. Buffalo*, 15 N. Y. 523.

Had this suit continued to be prosecuted under the state jurisdiction, and had the verdict of the jury been in favor of the plaintiff in error as was the verdict in the United States circuit court, and had the judgment thereon been reversed by the su-

preme court of Pennsylvania as it was in this case by the United States circuit court of appeals, a writ of error to remove the case to the Supreme Court of the United States would have been of right.

Williams v. Heard, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885; *Dushane v. Beall*, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Talbot v. First Nat. Bank*, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; *Roby v. Colchour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

Had this case taken its course in the state courts, and had the title and right as specially set up and claimed by the plaintiff in error been shown forth in the opinions of the courts of the state in the same manner that they are in the opinions of the lower United States courts, there can be no question but that such denial of the same, and decision against their validity, would have entitled the plaintiff in error to have removed the case to this court by writ of error.

Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; *F. G. Oxlcy Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *United States v. Taylor*, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479; *Saynard v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940.

The Supreme Court of the United States, even if of the opinion that it does not possess ordinary appellate jurisdiction in this case, may, because of the importance of the questions involved, treat this writ of error as a certiorari.

The Three Friends, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; *Security Trust Co. v. Dent*, 187 U. S. 237, 47 L. ed. 158, 23 Sup. Ct. Rep. 61; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52; *Re Lau Ow Bew*, 141 U. S. 583, 35 L. ed. 868, 12 Sup. Ct. Rep. 43.

Mr. Richard C. Dale argued the cause, and, with *Mr. William Jay Turner*, filed a brief for defendant in error:

The jurisdiction of the Federal circuit court depended entirely on diverse citizenship.

Colorado Central Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Rouse v. Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Carey v. Houston*

& *T. C. R. Co.* 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

Had the supreme court of Pennsylvania, like the circuit court of appeals, rendered a judgment in favor of the present defendant in error, the same answer would have been given to an attempt by the plaintiff in error to have such judgment reviewed by this court.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

The validity of the bankruptcy act was in no wise questioned, and the case falls within the rule laid down in *Cameron v. United States*, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184, that this court will not review a judgment of the highest court of a state in a case where no question is raised as to the validity of a statute of the United States, but merely the application of the statute to the facts of the case is involved.

Mr. Wm. Y. C. Anderson also argued the cause for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

In our opinion the jurisdiction of the circuit court depended entirely on diverse citizenship, the judgment of the circuit court of appeals was final, and the writ of error must be dismissed. *Colorado Central Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40.

The views expressed in the latter case will suffice to indicate the governing rules. In [528] that case the complaint in the circuit court showed that the parties were citizens of different states, and did not claim under the Constitution or laws of the United States. At the trial plaintiff relied wholly upon a common-law right, but defendant invoked the Constitution and laws of the United States. Judgment having passed for plaintiff, which was affirmed by the circuit court of appeals, we dismissed a writ of error to that court on the ground that its judgment was made final by the statute. **Mr. Justice Gray**, delivering the opinion, said:

"Of suits of a civil nature, at law or in equity, the circuit courts of the United States have original jurisdiction, by reason of the citizenship of the parties, in cases between citizens of different states or between citizens of a state and aliens; and by reason of

the cause of action, 'in cases arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority,' including, of course, suits arising under the patent or copyright laws of the United States. Act of August 13, 1888, chap. 866, § 1 (25 Stat. at L. 433, U. S. Comp. Stat. 1901, p. 508); Rev. Stat. § 629, cl. 9 (U. S. Comp. Stat. 1901, p. 504). In order to give the circuit court jurisdiction of a case as one arising under the Constitution, laws, or treaties of the United States, that it does so arise must appear from the plaintiff's own statement of his claim. *Colorado Central Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Tennessee v. Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 369; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051.

"From final judgments of the circuit court in civil suits an appeal or writ of error lies to this court, or to the circuit court of appeals. It lies directly to this court in any case in which the jurisdiction of the circuit court is in issue; and in such case the question of jurisdiction only is certified to and decided by this court. It also lies directly from the circuit court to this court in cases involving the construction or application of the Constitution, or the constitutionality of a law, or the validity or construction of a treaty, of the United States, or in which the Constitution or a law of a state is claimed to be in contravention *of the Constitution [529] of the United States; and in any of these cases the appellate jurisdiction of this court is not limited to the constitutional question, but extends to the determination of the whole case. Act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 827, 828, U. S. Comp. Stat. 1901, p. 549); *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397.

"From final judgments of the circuit court in all other civil suits an appeal or writ of error lies to the circuit court of appeals; and the judgments rendered thereon by the circuit court of appeals are final (unless this court, by writ of certiorari or otherwise, orders the whole case to be brought up for its decision) in all cases in which the jurisdiction of the circuit court 'is dependent entirely upon the parties being aliens and citizens of the United States, or citizens of different states,' as well as in cases arising under the patent laws, or under the revenue laws. In all other civil actions (including those arising under the copyright laws of the United States), if the matter in controversy exceeds

\$1,000, besides costs, there is, as of right, an appeal or writ of error to bring the case to this court. Act of March 3, 1891, chap. 517, § 6.

"This plaintiff in error, having been defeated in the circuit court, did not bring the case directly to this court, as one involving the construction or application of the Constitution of the United States, or upon any other of the grounds specified in § 5 of the act of 1891. But it took the case, under § 6, to the circuit court of appeals, and, having been again defeated in that court, now claims, as of right, a review by this court of the judgment of the circuit court of appeals.

"The judgment of the circuit court of appeals being made final in all cases in which the jurisdiction of the circuit court is dependent entirely upon the parties being citizens of different states, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds \$1,000, the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United States, or [530] was one in which *the jurisdiction of the circuit court wholly depended upon the parties being citizens of different states.

"The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than \$2,000, showed that the circuit court had jurisdiction of the case by reason of the parties being citizens of different states. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to that Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Central Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35, is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the circuit court of appeals.

"The jurisdiction of the circuit court having been obtained and exercised solely because of the parties being citizens of different states, the judgment of the circuit court of appeals was final, and the writ of error must be dismissed for want of jurisdiction."

In the present case it is contended that the jurisdiction was not dependent entirely on the opposite parties to the suit being citizens of different states, because the suit

arose under the laws of the United States, and that, therefore, jurisdiction rested also on that ground. But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by plaintiff's pleading. *Arbuckle v. Blackburn*, 191 U. S. 406, ante, 239, 24 Sup. Ct. Rep. 148; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

*Plaintiff's declaration set forth no mat-[531] ter raising any controversy under the Constitution, laws, or treaties of the United States. It is true that if the lumber and materials belonged to Bennett & Rothrock on January 13, 1900, plaintiff in error succeeded to the title of the firm on the adjudication; but the question of Bennett & Rothrock's ownership on that day in itself involved no Federal controversy, and the mere fact that plaintiff was trustee in bankruptcy did not give jurisdiction. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000. Indeed, if the case had not been removed, and had gone to judgment in the court of common pleas, and that judgment had been affirmed by the supreme court of Pennsylvania on the same grounds as those on which the circuit court of appeals proceeded, a writ of error could not have been brought under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), for the case would not have fallen within either of the classes enumerated in that section as the basis of our jurisdiction. The validity of the bankruptcy act was conceded, and no right specially set up or claimed under it was denied.

Section 23 of the bankruptcy law does not enable us to maintain jurisdiction. The first two clauses read (before the amendment of February 5, 1903 (32 Stat. at L. 797, chap. 487) as follows:

"Sec. 23a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or

prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." [30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3431.]

[532] Plaintiff brought his action in the state court, and its removal *on the ground of diverse citizenship placed it in the circuit court as if it had been commenced there on that ground of jurisdiction, and not as if it had been commenced there by consent of defendant under § 23 of the bankruptcy act. The right to removal is absolute, and cannot be trammelled by such a consequence.

Nor can this writ of error be sustained under § 25 of the bankruptcy law, for the section has no application. The reasons for that conclusion will be found in *Holden v. Stratton*, 191 U. S. 115, ante, p. 116, 24 Sup. Ct. Rep. 45.

As to the suggestion that certiorari might now be issued, the judgment of the circuit court of appeals was rendered May 7, 1902, and there is nothing to take the case out of the general rule. *The Conqueror*, 166 U. S. 110, 114, 41 L. ed. 937, 939, 17 Sup. Ct. Rep. 510; *Ayres v. Polsdorfer*, 187 U. S. 585, 595, 47 L. ed. 314, 317, 23 Sup. Ct. Rep. 196.

Writ of error dismissed.

TOLTEC RANCH COMPANY, *Plff. in Err.*,
v.

GEORGE COOK, S. N. Cook, Alfred Ward,
George Ward, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley.

(See S. C. Reporter's ed. 532-542.)

Adverse possession—of lands within congressional land grant.

Adverse possession of land within the 10-mile limit of the grant to the Central Pacific Railroad Company, made by the act of Congress of July 1, 1862 (12 Stat. at L. 489, chap. 120), as amended by the act of July 2, 1864 (13 Stat. at L. 356, chap. 216), under a claim of right, and for the period prescribed by a state statute of limitations, transferred the title, although the patent to the railroad company in pursuance of such grant had not been issued.

[No. 48.]

Argued and submitted November 3, 1903.
Decided December 21, 1903.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of the District Court of the First Judicial District, Box Elder County, of that State, entered upon a verdict for defendants in a suit to quiet title. *Affirmed.*

See same case below, 24 Utah, 453, 67 Pac. 1123.

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Statement by Mr. Justice **McKenna**:

The Toltec Ranch Company, a California corporation, brought this action in 1901 in the district court of the first judicial district, Box Elder county, state of Utah, to quiet title to the S.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of section 27, township 8, north of range 2 west, Salt Lake meridian, United States survey. Title in fee was alleged. The defendants answered separately, *claiming different portions of the[533] land, and each alleged peaceable, continuous, and adverse possession under claim of title in himself and grantors adversely to the plaintiff for more than thirty years, and that plaintiff's cause was "barred by the statute of limitations as provided by §§ 2856 and 2872 inclusive, of the Revised Statutes of Utah." Under these sections to constitute a bar there must be an adverse holding for at least seven years.

The title of plaintiff, it was admitted, was derived as follows: Patent from the United States dated January 20, 1900, to the Central Pacific Railroad Company; the railroad company by deed dated October 17, 1895, to D. P. Tarpey; the latter and wife to M. F. Tarpey by deed December 8, 1895; M. F. Tarpey to plaintiff, October 17, 1896. The patent to the company was issued in pursuance of the grant to the company made by the act of Congress approved July 1, 1862, as amended by the act of July 2, 1864, to aid in the construction of a railroad and telegraph line from the Missouri to the Pacific ocean. 12 Stat. at L. 489, chap. 120; 13 Stat. at L. 356, chap. 216.

It was admitted that the land in controversy was within the 10 mile limit of the grant to the company, and that the map of location of the railroad was filed in the office of the Secretary of the Interior on the 20th of October, 1868.

It was also admitted that no claim of any right or title to or in the right of way of the railroad company across the lands in controversy was made by any or either of the defendants.

The defendants introduced evidence to sustain the averments of their answers.

The case was submitted to a jury on special interrogatories, and the jury found that the defendants had been in possession of the land claimed by them, either by themselves or their predecessors and grantors, from some time in 1868 to the commencement of the action. The jury also returned the following verdict: "We, the jury empaneled in the above-entitled cause, find the issues joined herein in favor of the said defendants and against the plaintiff, no cause of action." *Judgment was entered upon the verdict. It[534] was affirmed by the supreme court of the state. The court said, after discussing questions with which we are not concerned:

"The next question for consideration is whether the statute of limitations can prevail as a bar to the action when it appears that the patent of the United States government was not issued to the plaintiff until January 20, 1900." [24 Utah, 453, 67 Pac. 1123.]

The question was answered in the affirmative. The chief justice of the state granted this writ of error.

Mr. Maxwell Evarts argued the cause, and, with *Messrs. T. D. Johnson* and *Lindsay R. Rogers*, filed a brief for plaintiff in error:

The legal title to the land remained in the government until the patent was issued.

Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Bagnell v. Broderick*, 13 Pet. 436, 10 L. ed. 235; *Lindsey v. Miller*, 6 Pet. 666, 8 L. ed. 538; *Langdon v. Sherwood*, 124 U. S. 74, 31 L. ed. 344, 8 Sup. Ct. Rep. 429.

Under the Pacific land grants the title to the land granted remained in the United States until the cost of survey had been paid; and there is no evidence in the present case that the cost of survey has been paid, or that the land was ever surveyed.

Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; *Union P. R. Co. v. McShane*, 22 Wall. 444, 22 L. ed. 747; *Northern P. R. Co. v. Traill County*, 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201; *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475, 13 Sup. Ct. Rep. 617.

The railroad company under a land grant acquired no legal title to the land simply by filing its map of definite location.

Ankeny v. Clark, 148 U. S. 345, 37 L. ed. 475, 13 Sup. Ct. Rep. 617; *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

Certain conditions in the grants of Congress to the Pacific railroads have since been recognized, and certain exceptions contained in such grants have been given effect by the decisions of this court which may be said to limit the broad scope which might be inferred from the language used in the case of *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158.

Ankeny v. Clark, 148 U. S. 345, 37 L. ed. 475, 13 Sup. Ct. Rep. 617; *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; *Nelson v. Northern P. R. Co.* 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302.

Mr. B. H. Jones submitted the cause for defendants in error.

A grant may be made by a law as well as a patent pursuant to a law.

Ryan v. Carter, 93 U. S. 78, 23 L. ed. 807; *Langdcau v. Hanes*, 21 Wall. 521, 22 L. ed. 606.

When the route of the road was definitely fixed the sections granted became susceptible of identification, and the title then attached as of the date of the grant.

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158.

Ever since the definite location of this railroad ejectment suits have been brought upon the legal title to the land granted by the Pacific railroad acts without regarding the patent.

Corinne Mill, Canal, & Stock Co. v. Johnson, 156 U. S. 574, 39 L. ed. 537, 15 Sup. Ct. Rep. 409; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; *Tarpey v. Madsen*, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849. See also *Forrester v. Scott*, 92 Cal. 398, 28 Pac. 575; *Southern P. R. Co. v. Whitaker*, 109 Cal. 268, 41 Pac. 1083; *Jatunn v. Smith*, 95 Cal. 154, 30 Pac. 200.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The case is in narrow compass. The question presented is whether adverse possession under claim of right for the period prescribed by the statute of limitations of Utah before patent was issued by the United States can prevail against the latter. It has been decided by this court that adverse possession of land gives title to it and all of the remedies which attach to the *title. This was [538] expressly ruled in *Sharon v. Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720. The suit was a bill in equity to establish, as matter of record, a title acquired by adverse possession, and it was brought against those who, but for such acquisition, would have been the owners. **Mr. Justice Field**, speaking for the court, said:

"It is now well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he intrude upon the premises. In several of the states this doctrine has become a positive rule by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall of itself constitute a complete title. *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Campbell v. Holt*, 115 U. S. 620, 623, 29 L. ed. 483, 485, 6 Sup. Ct. Rep. 209." See also *Shelby v. Guy*, 11 Wheat. 361, 6 L. ed. 495.

Adverse possession, therefore, may be said

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to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance. And the Central Pacific Railroad Company had the title. *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158. It would seem, therefore, an irresistible conclusion that it could have been transferred by any of the means which the law provided. It is, however, contended otherwise, and *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475, 13 Sup. Ct. Rep. 617; *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, and *Nelson v. Northern P. R. Co.* 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302, are urged to support the contention. A comparison of those cases with *Deseret Salt Co. v. Tarpey* becomes necessary.

Deseret Salt Co. v. Tarpey was an action of ejectment. Tarpey was the plaintiff in the trial court. He relied for his title upon a lease from the Central Pacific Railroad Company, and it became necessary to consider the nature of the congressional grant to that company. The issue made was direct and unmistakable, and the decision was equally so. The plaintiff contended that the grant vested in the company the legal title. It was asserted on the other hand that the [539] title to the land was *retained until the cost of selecting, surveying, and conveying all the granted lands was paid, and, also, that by other provisions of the granting act the title remained in the government until patent issued. Both contentions were rejected. The court said that the terms of the grant "import the transfer of a present title, not one to be made in the future. They are that 'there be and is hereby granted' to the company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered." Those provisions were considered, and it was determined that they did not qualify the terms of the grant conveying the title, or essentially limit them. Anticipating the question that, if such be the import of the act, what was the necessity of patents, it was said, there were many reasons why the issue of patents would be of great service to the patentees. "While not essential to transfer the legal right, the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent the grant was relieved from the possibility of forfeiture for breach of its conditions, . . . they would thus be in the grantee's hands deeds of further assurance of his title, and therefore a source of quiet and peace to

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him in his possession." And the conclusion was that "the title transferred was a legal title, as distinguished from an equitable and inchoate interest." The distinction expressed the completeness of the title conveyed.

Ankeny v. Clark was an action for the recovery of the value of 12,767 bushels of wheat, which had been delivered by Clark to Ankeny in pursuance of a contract by which Ankeny agreed to sell and deliver to Clark two sections of land in Walla Walla county, in what was then the territory of Washington. After the delivery of the wheat Clark demanded a deed for the land. Ankeny, after some delay on one pretext or another, informed Clark that he could have a warranty deed to a part of the land, *and a quitclaim [540] deed to the part which was called railroad land, and informed him, as to the latter part, that if the Northern Pacific Railroad Company could not get title he would be obliged to procure title from the government. Ankeny promised to pay the necessary expenses of obtaining title in that way. Clark refused the offer, and gave notice that, unless a good title was conveyed to him for the whole of the land within five days, he would abandon possession, and claim compensation for the violation of the contract. Ankeny paid no attention to the notice, and Clark brought suit for the value of the wheat, and recovered. The case came to this court from the supreme court of the territory. In passing on the case this court said there were three principal matters of contention in the trial court. We are concerned with only one of them, and that is, "Did Ankeny have a good title to the northeast quarter of section 19, being part and parcel of the lands which he agreed to sell to Clark?" Clark asserted the negative of the question; Ankeny contended for the affirmative, and cited *Deseret Salt Co. v. Tarpey*. The court did not find it necessary to decide the issue thus accurately presented. It followed *Deseret Salt Co. v. Tarpey*, to the effect that the government could enforce the payment of the costs, and could withhold the patents until they were paid; and this, it was said, "gave the government a lien for said costs." And it was hence held that Ankeny "did not hold such a title as it was obligatory on the plaintiff [Clark] to accept." But *Deseret Salt Co. v. Tarpey* was not questioned. It was only decided that the land was subject to a lien, and, so burdened, Clark was not compelled to receive it.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, was an action by the railroad company for the recovery of certain lands containing veins or lodes of rock in place bearing gold, silver, and other precious metals. The plaintiff relied for title upon its grant. The defendant contended that the lands were excepted by

[541] express words from the grant. This contention was sustained. It is manifest, therefore, that the ease in no way militates with the decision in *Deseret Salt Co. v. Tarpey*, and the *court said so. Mr. Justice Field was the organ of the court in both cases, and he expressed the inapplicability of the *Tarpey Case* and left it unimpaired. What was there said was affirmed,—that the title passed at the date of the grant. Of what lands? Of those, it was held, which were not reserved as mineral. In other words, mineral lands were not conveyed, whether known or unknown to be such at the time of the grant. This was the main question decided. It was also held that the issue of patent would constitute a determination of the character of the land by reason of the power of the Land Department to determine and establish it. But it was not intimated, nor does it follow, that the conveyance of the title to the company was by the patent, and not by the granting act. There was, therefore, nothing decided which detracts from *Deseret Salt Co. v. Tarpey*.

Nelson v. Northern P. R. Co. was an action brought by the railway company to recover the possession of a quarter section of land claimed to be within the land grant of Northern Pacific Railroad, and the company held a patent. Nelson claimed to have settled upon the land three years before the definite location of the road. He claimed, therefore, to be within the exceptions of the grant. The land, when he settled upon it, was unsurveyed, and the effect of this constituted one of the questions in the case. Upon the filing of a map by the railroad company of its general route, an order was made by the Land Department withdrawing from settlement the lands within the limits of the grant. The effect of this order was another question in the case. It was held "that the railroad company did not acquire any vested interest in the land in dispute in virtue of its map of general route, or the withdrawal order based on such map," and it was further held that Nelson's settlement upon, and occupancy of, the land was valid, and constituted a claim upon the land within the meaning of the Northern Pacific act of 1864. In other words, it was held that the land was excluded from the grant by express words. The operative words which produced that effect were expressed in the following provision of

[542] § 3 of the act: "And whenever *prior to said time [of definite location] any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof," etc. [13 Stat. at L. 368, chap. 217.] This view was established in an elaborate opinion. The case,

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therefore, like *Barden v. Northern P. R. Co.*, decided only that lands did not pass by the grant which were reserved from it. An evident proposition, whatever might have been the difficulties in determining what lands were reserved. And there were difficulties. This court in consequence divided in opinion. But those difficulties do not confront us in the case at bar. They are settled, and in their settlement no doubts were cast upon the efficacy of the grants to convey title to all the lands they covered,—to all that was not reserved from them.

Judgment affirmed.

Mr. Justice **Brewer** concurs in the judgment.

TOLTEC RANCH COMPANY, *Plff. in Err.*,

v.

WILLIAM BABCOCK and Louisa Babcock.

(See S. C. Reporter's ed. 542-544.)

Adverse possession — of lands within congressional land grant.

This case is governed by the decision in *Toltec Ranch Co. v. Cook*, *ante*, 291.

[No. 49.]

Argued and submitted November 3, 1903.

Decided December 21, 1903.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of the District Court of the First Judicial District, Box Elder County, of that State, entered upon a verdict for defendants in a suit to recover the possession of certain lands. *Affirmed.*

See same case below, 24 Utah, 183, 66 Pac. 876.

The facts are stated in the opinion.

Mr. **Maxwell Evarts** argued the cause, and, with Messrs. *T. D. Johnson* and *Lindsay R. Rogers*, filed a brief for plaintiff in error.

Mr. **B. H. Jones** submitted the cause for defendants in error.

For contentions of counsel see their briefs as reported in *Toltec Ranch Co. v. Cook*, *ante*, 291.

*Mr. Justice **McKenna** delivered the [543] opinion of the court:

Plaintiff in error is a corporation, and brought this action in 1899 in the district court of the first judicial district of the state of Utah, county of Box Elder, for the recovery of the possession of 64 acres of land in section 17, township 11, north of range 2 west. The plaintiff alleged title in fee. The

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answer alleged that defendant, William Babcock, held the land as agent of his wife, Louisa Babcock, who settled upon it as a homesteader, having the qualifications thereof, in 1867, erected improvements of the value of \$1,500, and that the land was reserved from the grant of the Central Pacific Railroad Company. The answer also alleged continuous adverse possession for thirty years under the statutes of Utah. The replication admitted Louisa Babcock had been in exclusive possession for thirty years, neither admitted nor denied that the land was within the grant to the railroad company, denied the value of the improvements, and denied also that the action was barred by the sections of the statute of limitations cited by the defendant's answer.

Louisa Babcock intervened. She denied the allegations of the plaintiff, set up her settlement as a homesteader and the rights acquired by exclusive and adverse possession under §§ 2858 to 2872, inclusive, of the Revised Statutes of Utah. She also alleged that "on the 5th day of September, 1896, under a mistake, and entirely without authority of law, a patent of the United States was issued purporting to convey to the Central Pacific Railroad Company, under the acts of Congress granting lands to the Pacific railroads, the lands in controversy." And she prayed that "said patent be annulled and set aside, and for such other and further relief as may be just."

The plaintiff, answering the complaint in intervention, admitted the issuance of the patent, but denied all other allegations.

[544] There was also an action brought by the Toltec Company *against Babcock for hay and alfalfa seed alleged to have been grown upon the land. The answer raised the issues presented in the ejectment case.

The plaintiff depended for title upon a patent issued to the Central Pacific Railroad Company the 5th of September, 1896, in pursuance of the acts of Congress of July 1, 1862, and July 2, 1864 (12 Stat. at L. 489, chap. 120; 13 Stat. at L. 356, chap. 216), and a conveyance from the company to it by deed dated November 4, 1897. Against this title adverse possession was claimed as we have seen.

The cases were tried together and to a jury, which found "the issues in favor of the defendants and against the plaintiff, 'no cause of action.'" Judgment was entered for defendants. It was affirmed by the supreme court of the state on appeal. 24 Utah, 183, 66 Pac. 876.

The court concluded its opinion as follows: "From the foregoing considerations, and from a careful examination of the proof, we are of the opinion that the intervenor is

entitled to hold the land in controversy, and the crops raised thereon, by adverse possession, and that, as against the plaintiff, she has the absolute title thereto. We see nothing in the record which justifies a reversal. The judgment is affirmed, with costs."

This writ of error was allowed by the chief justice of Utah. It presents the same questions which have been decided in *Toltec Ranch Co. v. Cook*, 191 U. S. 532, ante, 291, 24 Sup. Ct. Rep. 166. On the authority of that case, therefore, the judgment is affirmed.

Mr. Justice **Brewer** concurs in the judgment.

***ULYSSES S. G. WHITE**, *Appt.*, [545]

v.

UNITED STATES.

(See S. C. Reporter's ed. 545-555.)

Navy personnel act—credit of service for computing pay—prospective effect.

A credit of service for the purpose of computing future pay only, and not for the readjustment of past compensation, must be deemed intended by the proviso in the Navy personnel act of March 3, 1899, § 13 (30 Stat. at L. 1004, U. S. Comp. Stat. 1901, p. 1072), that all officers who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, "for computing their pay" with five years' service, in view of the declared purpose for which such credit is given, and of the provision in the first clause of the statute, which makes increased pay begin with the next fiscal year.

[No. 75.]

Argued November 12, 13, 1903. Decided December 21, 1903.

A PPEAL from the Court of Claims to review a judgment dismissing a petition for increased pay under the Navy personnel act. *Affirmed.*

See same case below, 37 Ct. Cl. 365.

The facts are stated in the opinion.

Mr. William B. King argued the cause, and, with **Mr. George A. King**, filed a brief for appellant:

Statutes are to be understood in the plain meaning of their words, and not construed by presumptions drawn from their consequences.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; *Bates Refrigerating Co. v. Sulzberger*, 157 U. S. 36, 39 L. ed. 611, 15 Sup. Ct. Rep. 508; *McCluskey v. Cromwell*,

NOTE.—That statutes generally are prospective in operation—see note to *Stewart v. Vandervort*, 12 L. R. A. 50.

11 N. Y. 593; Black, Interpretation of Laws, Preface, p. III.

A series of cases decided in this court and the court of claims under an earlier statute affecting naval pay affords controlling precedents for this case.

Hawkins v. United States, 19 Ct. Cl. 611; *United States v. Rockwell*, 120 U. S. 60, 30 L. ed. 561, 7 Sup. Ct. Rep. 367; *United States v. Green*, 138 U. S. 293, 34 L. ed. 960, 11 Sup. Ct. Rep. 299; *United States v. Dunn*, 120 U. S. 250, 30 L. ed. 667, 7 Sup. Ct. Rep. 507; *United States v. Hendec*, 124 U. S. 309, 31 L. ed. 465, 8 Sup. Ct. Rep. 507; *Brown v. United States*, 32 Ct. Cl. 379; *United States v. Mullan*, 123 U. S. 186, 31 L. ed. 140, 8 Sup. Ct. Rep. 79; *United States v. Baker*, 125 U. S. 646, 31 L. ed. 824, 8 Sup. Ct. Rep. 1022.

The presumption against retroactive legislation does not apply to laws not affecting vested rights.

Black, Interpretation of Laws, p. 256; *Ex parte Buckley*, 53 Ala. 42; *Hine v. Pomerooy*, 39 Vt. 211; *Stoddart v. Smith*, 5 Binn. 355; *Bolton v. Jones*, 5 Pa. 145, 47 Am. Dec. 404.

There can be no presumption against a grant of back pay to officers or men in the military service.

Emory v. United States, 19 Ct. Cl. 254, 112 U. S. 510, 28 L. ed. 808, 5 Sup. Ct. Rep. 285; *United States v. Bowen*, 100 U. S. 508, 25 L. ed. 631; *United States v. Realty Co.* 163 U. S. 441, 41 L. ed. 220, 16 Sup. Ct. Rep. 1120.

The date in the opening clause cannot be brought into the clause under discussion.

Hadden v. The Collector, 5 Wall. 110, 18 L. ed. 519; *United States v. Ewing*, 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 181, 32 L. ed. 381, 9 Sup. Ct. Rep. 47.

Assistant Attorney General **Pradt** argued the cause, and, with Mr. John Q. Thompson, filed a brief for appellee:

It is the duty of the court to interpret the will and intention of the law-making power.

Sutherland, Stat. Constr. §§ 284, 292, 415.

In construing and interpreting laws the literal sense of the words used in the statute should not necessarily control.

Sutherland, Stat. Constr. § 246.

The office of a proviso is generally, either to except something from the enacting clause, or to qualify or restrain it generally. It is confined to that which precedes it, or to the section to which it is appended, unless clearly intended to have a wider scope.

Black, Interpretation of Laws, 273; *Minis v. United States*, 15 Pet. 423, 10 L. ed. 791; *Ryan v. Carter*, 93 U. S. 78, 23 L.

ed. 807; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253.

Statutes do not operate retrospectively unless it is explicitly so declared, or unless such intention appears so clearly as to leave no room for a reasonable doubt on the subject.

Underwood v. Lilly, 10 Serg. & R. 97; Cooley, Const. Lim. 6th ed. 455; Black, Interpretation of Laws, 252.

The doctrine of inconvenience is applicable.

Sutherland, Stat. Constr. §§ 322-324.

Mr. Justice **Day** delivered the opinion of the court:

This is an appeal from the judgment of the court of claims dismissing the petition of the claimant. Upon hearing, that court made the following findings of fact:

"I. The claimant, Ulysses S. G. White, was, on the 9th day of January, in the year 1877, appointed a civil engineer in the Navy from civil life. He remained such civil engineer and was such at the time of the passage of the Navy personnel act of March 3, 1899.

"II. The claimant, by reason of service in the Army, amounting to six years, seven months, and twenty-one days, previous to his entry into the Navy, reached the maximum pay of his grade, \$3,500, May 19, 1885, under Revised Statutes, §§ 1478, 1556 (U. S. Comp. Stat. 1901, pp. 1033, 1067). Thus the amount of pay received by him between the 9th of January, 1877, and the 19th of May, 1885, was as follows:

Three years and 130 days, at \$2,-

700 per annum.....	\$9,061 64
Five years, at \$3,000 per annum.....	15,000 00

Total	\$24,061 64
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"If he were, upon the date of his appointment, credited, for computing his pay, with five years' service, and entitled to be paid from that date, he would receive pay at the following rates:

Three years and 130 days, at \$3,-

000 per annum.....	\$10,068 49
Five years, at \$3,500 per annum.....	17,500 00

Total	\$27,568 49
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—or \$3,506.85 more than he has previously received."

The claim arises under the act of March 3, 1899, commonly *known as the Navy personnel act. The act is entitled "Chapter 413. An Act to Reorganize and Increase the Efficiency of the Personnel of the Navy and Marine Corps of the United States." 30 Stat.

at L. 1004 (U. S. Comp. Stat. 1901, p. 1072). Section 13 of the act provides:

"That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: *Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this act: *Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places: *Provided further*, That naval chaplains who do not possess relative rank shall have the rank of lieutenant in the Navy; and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service. And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed: *And provided further*, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law: *And provided further*, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy."

[550] The part of the statute particularly under consideration in *this case, and upon the interpretation of which the right of the claimant depends, is contained in the 3d paragraph: "And that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life, shall, on the date of appointment, be credited, for computing their pay, with five years' service."

It is the contention of the claimant that he comes within the terms of this proviso, and, as an officer appointed to the Navy from civil life, is entitled, as of the date of his appointment, to be credited with five years' service, having been appointed January 9, 1877, and by previous service in the Army entitled, under another statute (22

Stat. at L. 473, chap. 97, U. S. Comp. Stat. 1901, p. 1071), to a credit of six years, seven months, and twenty-one days, reaching the maximum pay of \$3,500.00 on May 19, 1885.

The reading of the statute is not altogether clear, and we are to arrive at the meaning of Congress by such aids as may be legitimately resorted to in order to determine the effect and purpose of the lawmaking power in the language used. The statute is part of a voluminous act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States. In the title, the language used looks to the future; it contemplates a readjustment of rank and pay. It is true that the title of the act may not control the plain language of the enacting clauses, but, nevertheless, we may look to the declared scope and purpose of the act as evidenced by its title whenever it becomes necessary, in view of the use of language incapable by itself of exact construction. *Church of Holy Trinity v. United States*, 143 U. S. 457, 462, 36 L. ed. 226-229, 12 Sup. Ct. Rep. 511.

Chief Justice Marshall, in *United States v. Fisher*, 2 Cranch, 358-386, 2 L. ed. 304-313, said:

"Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and, in such case, the title claims a degree of notice, and will have its due share of consideration." *Coosaw Min. Co. v. South Carolina*, 144 U. S. 563, 36 L. ed. 542, 12 Sup. Ct. Rep. 689; *Church of Holy Trinity v. United States*, 143 U. S. 462, 36 L. ed. 229, 12 Sup. Ct. Rep. 511.

*The part of the statute relied upon by the[551] claimant is incorporated by means of a proviso. Through the diligence of the learned counsel representing the claimant, it is exhibited in the appendix to their brief, that in this statute as originally reported, § 16 of the Navy personnel act (H. R. 10,403, 53d Congress, 3d session), there was no such proviso. As reported in the Senate, January 1, 1899, the first proviso was added. The other provisos were added as the bill was reported to the Senate, February 2, 1899, and included the one now under consideration; and it is argued that not only does this proviso contain independent matter, but that it was introduced into the bill and intended to be enacted as such. It is undoubtedly true that in congressional legislation provisos have been included in statutes which are really independent pieces of legislation; but this is a misuse of the usual purpose and effect of a proviso, which is to make exception from the enacting clause to restrain generality, and to prevent misinter-

pretation. *Minis v. United States*, 15 Pet. 423, 10 L. ed. 791. If possible, the act is to be given such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law. 1 Kent, Com. 463. The purview of the act and the words of the proviso must be reconciled if may be, and the operation of the proviso may be limited by the scope of the enacting clause. The object of interpretation being to ascertain the purpose of the lawmakers as expressed in the terms used in the law, we have a right to look to other laws upon the same subject-matter, and to consider the purpose intended to be carried into effect by the operation of the new law considered with the old, and as a part of a general provision. It is true that if the language used is free from ambiguity it is the best evidence of the thing intended, and it is the duty of the courts to find, if possible, within the four corners of the act, and from the language used, the scope and meaning of the law. *Lake County v. Rollins*, 130 U. S. 671, 32 L. ed. 1063, 9 Sup. Ct. Rep. 651. It is equally true that it is the business of [552] courts to decide what the law is, *and not, by consideration or surmises as to the policy of the government, have the effect to adjudge that to be law which has not been so enacted by the legislature. *Dewey v. United States*, 178 U. S. 521, 44 L. ed. 1174, 20 Sup. Ct. Rep. 981. But, after all, the main purpose of interpretation is to ascertain and carry into effect the object and purpose of the legislature in making the given law as expressed in the language used. Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only, and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past. While it is undoubtedly within the power of Congress to provide for bounties or gratuities to those in the naval or military service of the United States, we should hardly look for such legislation in an act having the declared purpose and scope of the one now under consideration. Retrospective legislation is not favored. *Cooley*, Const. Lim. 529. Retrospective laws which have been sustained in the courts have ordinarily had the effect to remedy irregularities in legal procedure, assessment of property for taxation, and the like. *Cooley*, Const. Lim. 530, 531.

But it is urged that the plain meaning of this statute includes officers in the situation of the claimant, and requires a readjustment

of their pay for years past. The language used is "all officers that have been or may be appointed to the Navy from civil life," and it is claimed that unless this construction is given to the act, violence is done to its terms, and to the rights intended to be conferred upon the claimant and other officers similarly situated. The proviso directs credit on the date of appointment. It is argued that this means as of the date of appointment. If this be true, it is in conflict with the first clause of the act, which makes increased pay begin on June 30th. The effect of this construction of the proviso, when read with the first clause of the act, is thus pertinently *pointed out in the ma-[553]jority opinion of the court of claims:

"The subject-matter of the proviso in question pertains to the rank of chaplains and to the basis for computing the pay of 'all officers, including warrant officers, who have been or may be appointed to the Navy from civil life;' and the purview or body of the section refers to the pay of 'commissioned officers of the line of the Navy and of the Medical and Pay Corps,' many of whom—nearly all from the Medical Corps—were appointed from civil life, while the chaplains, the majority of the professors of mathematics, nearly all the civil engineers, and other officers were appointed from civil life.

"So that the language of the proviso 'all officers . . . who have been or may be appointed to the Navy from civil life' clearly includes those officers mentioned in the body of the section who were appointed from civil life.

"If, therefore, the claimant's contention should prevail, those officers so appointed whose pay was increased after June 30, 1899, by assimilation to Army pay, would, in addition thereto, be entitled to receive from the date of appointment a gratuity of five years' additional pay, thereby fixing in the same section two distinct dates for the beginning of the pay of the same officers." [37 Ct. Cl. 381.]

But quite as important, in our view, is the declared purpose for which the credit is to be given "computing their pay." Does it not do violence to this expression of purpose to give the law a retrospective effect? The purpose for which the five years' service is to be credited cannot be ignored. It is thus that the object of the act is to be accomplished, and it is not declared to be with a view of readjusting the pay of officers within the classes named, or giving to them, as Congress might, a gratuity for past services, but the credit is solely given for the purpose of "computing their pay," and this is to be read in the light of the purview of the statute wherein its operation is declared to be

effective from the beginning of the coming fiscal year.

[554] *But it is said that the declared policy of the act includes not only those to be hereafter appointed, but also those who have been appointed to the Navy from civil life. It will be presumed that Congress, in passing this legislation, had in mind the law already in force regulating the subject, and we find in § 1556 (U. S. Comp. Stat. 1901, p. 1068), that civil engineers in the Navy are to be paid according to the length of their service, with increase of pay through three periods of five years each, and after fifteen years of service they are to receive the maximum amount of pay. If the act under consideration is to be read, as we think it should be, to have reference to the pay of naval officers beginning with the next fiscal year "on and after June thirtieth," it would increase the pay of those who had not reached the maximum pay by continuous service by giving to such officers, for the purpose of computing their pay thereafter, a credit for the five years' service or so much thereof as would enable such officer to reach the maximum pay. This construction gives force to the declared purpose of the act to begin its operation at the beginning of the coming fiscal year, and benefits those officers named in the proviso who have not already, by continuous service, been advanced in pay to the maximum compensation fixed by law. Congress must be presumed to have had before it, in framing this legislation, the statute already in force, fixing the pay of naval officers by advancing them every five years through three such periods to maximum pay. It enacted, in the statute under consideration, that the officers named, appointed or to be appointed from civil life, should have such credit on the date of appointment for one purpose,—“computing their pay.” In the light of the operation of the act as declared in the first clause to begin on the 30th of June following, we think this was meant, so far as it applied to officers theretofore appointed, and who were not receiving maximum pay, to give them a credit of the term of five years' advancement toward full pay for the purpose of computing compensation after the beginning of the coming fiscal year.

[555] *While the question is not free from difficulty, we cannot escape the conclusion that had Congress intended that this credit should be given not only for the purpose of computing future pay, but with a view to readjusting past compensation, and giving gratuities for years past, it would have declared its purpose in more distinct terms.

The construction here given is consistent with the declared purpose of the act; it
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gives to the law a future, not a retrospective, operation, and, in our judgment, carries out the expressed purpose of Congress in passing the law.

Judgment of the Court of Claims affirmed.

NORTHERN SECURITIES COMPANY *et al.*, Appts.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 555, 556.)

Amicus curiæ—leave to file briefs.

Leave to file briefs in a pending case as *amicus curiæ* will be denied where it does not appear that the applicant is interested in any other case which will be affected by the decision, and the parties are represented by competent counsel, whose consent has not been secured.

[No. 277.]

Submitted November 16, 1903. Decided November 30, 1903.

MOTION for leave to file briefs as *amicus curiæ* in a case pending on appeal from the United States Circuit Court for the District of Minnesota. *Denied.*

Mr. A. A. Hoehling, Jr., for the motion.

The Chief Justice: In support of this motion certain letters were presented showing that request was made of counsel for the respective parties for their consent to the application, and that they withheld direct consent, leaving the matter entirely to the court to determine. When the motion was submitted, objection to the granting of leave was made by counsel for appellees.

Where, in a pending case, application to file briefs is made by counsel not employed therein, but interested in some other *pend-[556] ing case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. And doubtless it is within our discretion to allow it in any case when justified by the circumstances. *Green v. Biddle*, 8 Wheat. 17, 5 L. ed. 551; *Florida v. Georgia*, 17 How. 491, 15 L. ed. 188; *The Gray Jack-ct*, 5 Wall. 370, 18 L. ed. 646. It does not appear that applicant is interested in any other case which will be affected by the decision of this case; as the parties are represented by competent counsel, the need of assistance cannot be assumed and consent has not been given.

Leave to file must, therefore, be *denied*.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[557]**DOUGLAS COMPANY, Appellant, v. A. F. STONE, Late Treasurer, etc.* [No. 10.]
Appeal from the Circuit Court of the United States for the Western District of Virginia.

Messrs. *Daniel Trigg* and *James H. Gilmore* for appellant.

Mr. *Wm. A. Anderson* for appellee.

October 19, 1903. *Decree affirmed*, with costs, on the authority of *Holt v. Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; *Fishback v. Western U. Teleg. Co.* 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506, and cases cited.

JAMES U. HUGHES, Plaintiff in Error, v. R. B. KEPLEY et al. [No. 11.]

In Error to the Supreme Court of the State of Kansas.

Mr. *T. F. Garver* for plaintiff in error.

Mr. *N. H. Loomis* for defendants in error.

October 19, 1903. *Dismissed* for want of jurisdiction, on the authority of *Turner v. Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. Rep. 375, and cases cited.

JAMES L. GATES, Plaintiff in Error, v. SAMUEL P. PARMLY et al., Executors, etc. [No. 37.]

In Error to the Circuit Court of Clark County, State of Wisconsin.

Mr. *Rublee A. Cole* for plaintiff in error.

Messrs. *A. B. Browne* and *Alexander Britton* for defendants in error.

October 26, 1903. *Dismissed* for want of jurisdiction. *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 338, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Louisville & N. R. Co. v. Louisville*, 166 U. S. 709, 41 L. ed. 1173, 17 Sup. Ct. Rep. 725; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

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Ex parte IN THE MATTER OF *CITY OF PALATKA, Petitioner.* [No. —, Original.]
Motion for Leave to File Petition for Writ of Certiorari.

Messrs. *H. Bisbee* and *George C. Bedell* for petitioner in support of motion.

Messrs. *Charles T. Cates, Jr., Henry Strunz*, and *R. E. L. Mountcastle* opposing.
November 2, 1903. *Denied.*

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Plaintiff in Error, v. BENJAMIN WEISBERG. [No. 226.]

In Error to the Circuit Court of the United States for the District of Rhode Island.

Mr. *David S. Baker* for plaintiff in error.

Mr. *Donald G. Perkins* for defendant in error.

November 2, 1903. *Dismissed* for want of jurisdiction. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *The Bayonne*, 159 U. S. 687, 692, 40 L. ed. 306, 309, 16 Sup. Ct. Rep. 185; *Chappell v. United States*, 160 U. S. 499, 507, 40 L. ed. 510, 512, 16 Sup. Ct. Rep. 397.

WOEY HO, Appellant, v. UNITED STATES. [No. 52.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. *Franklin H. Mackey* for appellant.

The Attorney General and *Assistant Attorney General McReynolds* for appellee.

November 9, 1903. *Dismissed* for want of jurisdiction. *Lau Ow Bew v. United States*, 144 U. S. 47, 48, 36 L. ed. 340, 341, 12 Sup. Ct. Rep. 517; *Cross v. Burke*, 146 U. S. 82, 88, 36 L. ed. 896, 898, 13 Sup. Ct. Rep. 22; *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; *Perrine v. Slack*, 164 U. S. 452, 41 L. ed. 510, 17 Sup. Ct. Rep. 79; *The Paquete Habana*, 175 U. S. 677, 683, 44 L. ed. 320, 322, 20 Sup. Ct. Rep. 290.

CLEMENS HEROLD *et al.*, Plaintiffs in Error,
v. JOSEPH FRANK *et al.* [No. 55.]

[559] In Error to the Court of Errors and Appeals of the State of New Jersey.

Mr. James G. Blauvelt for plaintiffs in error.

Messrs. John W. Griggs and John W. Harding for defendants in error.

November 9, 1903. *Dismissed* for the want of jurisdiction. *F. G. Oaxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Chapin v. Pye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. Rep. 375; *McKane v. Durston*, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913.

MOLLIE S. BATTLE, Plaintiff in Error, v. ROBERT G. ATKINSON. [No. 72.]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. John M. Taylor for plaintiff in error.
No counsel for defendant in error.

November 16, 1903. *Decree affirmed*, with costs. *Willis v. Eastern Trust & Bkg. Co.* 167 U. S. 76, 42 L. ed. 83, 17 Sup. Ct. Rep. 739; *Harris v. Barber*, 129 U. S. 366, 32 L. ed. 697, 9 Sup. Ct. Rep. 314; *McClung v. Penny*, 189 U. S. 143, 47 L. ed. 751, 23 Sup. Ct. Rep. 589.

Ex parte IN THE MATTER OF THE JOHNS-TOWN MINING COMPANY, Petitioner. [No. —, Original.]

Motion for Leave to File Petition for a Writ of Certiorari.

Messrs. Robert B. Smith, Frederick W. Whitridge, Willard Parker Butler, Edwin T. Rice, and Sanford Robinson for petitioner in support of motion.

Messrs. James M. Beck and John A. Garver opposing.

December 7, 1903. *Denied*.

CZARNIKOW, MACDOUGALL & Co., Limited, Plaintiff in Error, v. GEORGE R. BIDWELL, Collector, etc. [No. 14.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Messrs. Frederic R. Coudert, Jr., and Paul Fuller, for plaintiff in error.

Mr. H. M. Ward, The Attorney General, Solicitor General Richards, and Solicitor General Hoyt for defendant in error.

December 14, 1903. *Judgment affirmed*, with costs, on the authority of *Downes v. Bidwell*, 182 U. S. 244, 287, 45 L. ed. 1088, 1106, 21 Sup. Ct. Rep. 770.

The Chief Justice, Mr. Justice Harlan, Mr. [560] Justice *Brewer, and Mr. Justice Peckham dissent.

WARNER, BARNES & Co., Limited, Plaintiff in Error, v. NEVADA N. STRANAHAN. [No. 331.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Messrs. Frederic R. Coudert, Jr., Paul Fuller, and Henry M. Ward for plaintiff in error.

The Attorney General and Solicitor General Hoyt for defendant in error.

December 14, 1903. *Judgment affirmed*, with costs, on the authority of *Downes v. Bidwell*, 182 U. S. 244, 287, 45 L. ed. 1088, 1106, 21 Sup. Ct. Rep. 770. The Chief Justice, Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham dissent.

TOWN OF WESTON, Appellant, v. SALLIE E. TIERNEY. [No. 97.]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

Mr. E. A. Brannon for appellant.

No counsel for appellee.

December 21, 1903. *Decree reversed*, with costs, and cause remanded, with directions to dismiss the bill for want of jurisdiction. *Weston v. Tierney*, 184 U. S. 695, 46 L. ed. 763, 22 Sup. Ct. Rep. 938; *Holt v. Indiana Mfg. Co.* 176 U. S. 68, 73, 44 L. ed. 374, 377, 20 Sup. Ct. Rep. 272, and cases cited.

S. A. WELTMER *et al.*, Plaintiffs in Error, v. C. M. BISHOP. [No. 257.]

In Error to the Supreme Court of the State of Missouri.

Mr. James H. Harkless for plaintiffs in error.

Mr. Wm. C. Searritt for defendant in error.

December 21, 1903. *Dismissed* for the want of jurisdiction on the authority of **Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, [561] 17 Sup. Ct. Rep. 300; *New Orleans Water-works Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

JEUNG JUEN HO, Plaintiff in Error, v. UNITED STATES. [No. 439.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General and Solicitor General Hoyt for defendant in error.

No counsel for plaintiff in error.

October 13, 1903. *Docketed and dismissed*, on motion of Mr. Solicitor General Hoyt for the defendant in error.

T. WALTER BEAM *et al.*, Appellants, v. GUSTAV H. SCHWAB. [No. 1.]

On certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Edmund F. Richardson for appellants.

Messrs. Henry T. Rogers and L. M. Outhbert for appellee.

October 13, 1903. *Dismissed*.

WILLIAM VAN PELT, Plaintiff in Error, v. PEOPLE OF THE STATE OF MICHIGAN. [No. 131.]

In Error to the Supreme Court of the State of Michigan.

Mr. H. M. Duffield for plaintiff in error.

Mr. Horace M. Oren for defendant in error.

October 13, 1903. *Dismissed*, per stipulation.

FREIDA SCHRADSKY, Plaintiff in Error, v. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE. [No. 3.]

In Error to the Circuit Court of the United States for the District of Colorado. [562]

Mr. H. B. Johnson for plaintiff in error.

Messrs. C. S. Thomas, W. H. Bryant, and H. H. Lee for defendant in error.

October 13, 1903. *Dismissed*, with costs, on authority of counsel for plaintiff in error.

VEEDER B. PAINE, Appellant, v. JOHN FOSTER *et al.*, Trustees, etc. [No. 15.]

Appeal from the Supreme Court of the Territory of Oklahoma.

Messrs. James R. Keaton and S. D. Luckett, for appellant.

No counsel for appellees.

October 13, 1903. *Dismissed*, with costs pursuant to the tenth rule.

J. F. HARDEMAN *et al.*, Plaintiffs in Error, v. KATIE TURNER *et al.* [No. 22.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. W. H. Ledbetter and S. T. Bledsoe, for plaintiffs in error.

No counsel for defendants in error.

October 14, 1903. *Dismissed*, with costs, pursuant to the nineteenth rule.

ARSENE L. ARPIN *et al.*, Appellants, v. RAMON VALDEZ Y COBIAN *et al.* [No. 29.]

Appeal from the District Court of the United States for the District of Porto Rico.

Mr. N. T. M. Melliss for appellants.

Mr. A. A. Hoehling, Jr., for appellees.

October 19, 1903. *Dismissed*, with costs, on motion of counsel for the appellants

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UNITED STATES, Appellant, v. EDWARD G. PIERSON. [No. 40.]

Appeal from the Court of Claims.

The Attorney General and Solicitor General Hoyt, for appellant.

Messrs. Geo. A. King and William B. King, for appellee.

October 26, 1903. *Dismissed* on motion of Mr. Solicitor General Hoyt for the appellant.

H. L. KAHN, Trustee, Appellant, v. CONE EXPORT & COMMISSION COMPANY. [No. 563] 47.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Chas. D. Hill and W. H. Robeson for appellant.

Mr. Alex. C. King for appellee.

October 26, 1903. *Dismissed*, with costs per stipulation.

YEE NGOY, Appellant, v. UNITED STATES. [No. 114.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Lyman I. Mowry for appellant.

The Attorney General and Solicitor General Hoyt for appellee.

November 2, 1903. *Dismissed*, per stipulation, on motion of Mr. Solicitor General Hoyt for the appellee.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. WILLIAM L. SMITH. [No. 78.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Dillon, Winslow S. Pierce, and D. D. Duncan for plaintiff in error.

No counsel for defendant in error.

November 9, 1903. *Dismissed*, with costs, on motion of Mr. D. D. Duncan for the plaintiff in error.

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. ROBERT ECCLES *et al.* [No. 99.]

In Error to the Supreme Court of the State of Missouri.

Mr. Martin L. Clardy for plaintiff in error.

No counsel for defendants in error.

November 9, 1903. *Dismissed*, with costs, on motion of Mr. D. D. Duncan, in behalf of counsel for plaintiff in error.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. MRS. FRANK S. SMITH *et al.* [No. 69.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Dillon, Winslow S. Pierce and D. D. Duncan for plaintiff in error. [564]

Mr. F. E. Albright for defendants in error.

November 9, 1903. *Dismissed*, with costs, pursuant to the tenth rule.

ARMOUR PACKING COMPANY *et al.*, *Appellants*, *v.* B. T. ADAMS *et al.* [No. 70.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Marion W. Harris for appellants.

Mr. Olin J. Wimberly for appellees.

November 9, 1903. *Dismissed*, with costs, pursuant to the tenth rule.

JOHN M. CLAPP, *Appellant*, *v.* HENRY B. F. MACFARLAND *et al.*, Commissioners of the District of Columbia. [No. 82.]

Appeal from the Court of Appeals of the District of Columbia.

Mr. M. J. Colbert for appellant.

No counsel for appellees.

November 11, 1903. *Dismissed*, with costs pursuant to the tenth rule.

JAMES D. DEWELL *et al.*, *Plaintiffs in Error*, *v.* JOHN W. MIX. [No. 176.]

In Error to the Circuit Court of the United States for the District of Connecticut.

Mr. James D. Dewell, Jr., for plaintiffs in error.

The Attorney General and Solicitor General Hoyt for defendant in error.

November 30, 1903. *Dismissed*, with costs, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the defendant in error.

ENSENADA ESTATE, *Plaintiff in Error*, *v.* FRANCIS H. DEXTER. [No. 495.]

In Error to the District Court of the United States for the District of Porto Rico.

Mr. Frederic D. McKenney for defendant in error.

No counsel for plaintiff in error.

November 30, 1903. Docketed and *dismissed*, with costs, on motion of *Mr. Frederic D. McKenney* for the defendant in error.

EZRA ESHELBY *et al.*, *Plaintiffs in Error*, *v.* WILLIAM WATTS, Judge, etc., *et al.* [No. 123.]

[565] In Error to the Supreme *Court of the State of Minnesota.

Mr. Frank B. Kellogg for plaintiffs in error.

Mr. H. Steenerson for defendants in error.

November 30, 1903. *Dismissed*, with costs, on authority of counsel for plaintiffs in error.

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JEUNG LIN HEUNG, *Appellant*, *v.* UNITED STATES. [No. 113.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Lyman I. Moury for appellant.

The Attorney General and Solicitor General Hoyt for appellee.

December 3, 1903. *Dismissed*, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the appellee.

TRUSTEES OF MACALESTER COLLEGE, *Plaintiffs in Error*, *v.* STATE OF MINNESOTA. [No. 129.]

In Error to the Supreme Court of the State of Minnesota.

Mr. John E. Stryker for plaintiffs in error.

Mr. James E. Markham, for defendant in error.

December 7, 1903. *Dismissed*, per stipulation.

LINDLEY E. SINCLAIR, *Plaintiff in Error*, *v.* DISTRICT OF COLUMBIA. [No. 95.]

In Error to the Court of Appeals of the District of Columbia.

Messrs. C. C. Cole and J. J. Darlington for plaintiff in error.

Messrs. A. B. Duvall and E. H. Thomas for defendant in error.

December 14, 1903. *Dismissed*, with costs, on motion of *Mr. C. C. Cole* for plaintiff in error.

HAWAIIAN TRAMWAYS COMPANY, Limited, *Plaintiff in Error*, *v.* HONOLULU RAPID TRANSIT & LAND COMPANY, Limited. [No. 116.]

In Error to the Supreme Court of the Territory of Hawaii.

Messrs. J. J. Darlington and R. D. Silliman for plaintiff in error.

Messrs. A. B. Browne, Alex. Britton, T. M. Patterson, and E. F. Richardson for defendant in error.

December 14, 1903. *Dismissed*, with costs, on motion of *Mr. J. J. Darlington* for the plaintiff in *error.

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J. D. SPRECKELS, *Appellant*, *v.* GEORGE W. WITTMAN, Chief of Police, etc. [No. 105.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. J. C. Campbell, W. H. Metson and E. F. Preston for appellant.

Mr. Henry C. McPike for appellee.

December 14, 1903. *Dismissed*, with costs, on authority of counsel for appellant.

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W. S. LEAKE, *Appellant*, v. GEORGE W. WITTMAN, Chief of Police, etc. [No. 106.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. J. C. Campbell, W. H. Metson, and E. F. Preston for appellant.

Mr. Henry C. McPike for appellee.

December 14, 1903. *Dismissed*, with costs, on authority of counsel for appellant.

DONALD MCPHERSON, *Appellant*, v. HENRY B. F. MACFARLAND *et al.*, Commissioners of the District of Columbia. [No. 107.]
Appeal from the Court of Appeals of the District of Columbia.

Mr. Chapin Brown for appellant.

No counsel for appellees.

December 14, 1903. *Dismissed*, with costs, pursuant to the tenth rule.

PETER J. HEINZ, Substituted for Anna M. Heinz, Deceased, *Appellant*, v. HENRY B. F. MACFARLAND *et al.*, Commissioners of the District of Columbia. [No. 111.]
Appeal from the Court of Appeals of the District of Columbia.

Mr. Chapin Brown for appellant.

No counsel for appellees.

December 15, 1903. *Dismissed*, with costs, pursuant to the tenth rule.

[567]*EXCHANGE BANK OF MACON, *Petitioner*, v. E. L. CLAYTON *et al.*, Trustees. [No. 271.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Olin J. Wimberly and A. O. Bacon for petitioner.

Mr. Frederick C. Foster for respondents.

October 19, 1903. *Denied*.

J. OVERTON DICKINSON *et al.*, *Petitioners*, v. CONSOLIDATED TRACTION COMPANY *et al.* [No. 291.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. M. I. Southard, Joseph A. Duffy, and Charles J. Roe for petitioners.

Messrs. John G. Johnson and Joseph Coult for respondents.

October 19, 1903. *Denied*.

GAVIN REID *et al.*, *Petitioners*, v. KEENE FIVE CENT SAVINGS BANK *et al.* [No. 297.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. T. F. Garver for petitioners.

Mr. W. F. Guthrie for respondents.

October 19, 1903. *Denied*.

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H. F. WHITCOMB *et al.*, Receivers, etc., *Petitioners*, v. OHIO COAL COMPANY. [No. 300.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Wm. F. Vilas for petitioners.

Mr. P. J. McLaughlin for respondent.

October 19, 1903. *Denied*.

HENRY RAEDER *et al.*, *Petitioners*, v. JOHN W. KAUFFMAN. [No. 302.]

Petition for a Writ of Certiorari *to the [568] United States Circuit Court of Appeals for the Eighth Circuit.

Mr. William E. Garvin for petitioners.

Messrs. J. E. McKeighan, Shepard Barclay and M. F. Watts for respondent.

October 19, 1903. *Denied*.

ALFRED N. TREECE *et al.*, *Petitioners*, v. AMERICAN ASSOCIATION *et al.* [No. 304.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Jerome Templeton for petitioners.

Mr. Jesse L. Rogers for respondents.

October 19, 1903. *Denied*.

SUPREME COUNCIL AMERICAN LEGION OF HONOR, *Petitioner*, v. JOSEPH C. BLACK, Administrator, etc. [No. 363.] SUPREME COUNCIL AMERICAN LEGION OF HONOR, *Petitioner*, v. WILLIAM H. HENDERSON. [No. 364.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Frank P. Pritchard for petitioner.

Messrs. George Henderson and Charles H. Sayre for respondents.

October 19, 1903. *Denied*.

JOHN W. WARREN, *Petitioner*, v. CENTRAL TRUST COMPANY OF NEW YORK *et al.* [No. 391.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. T. J. Walsh for petitioner.

Messrs. Adrian H. Joline and Arthur H. Van Brunt, for respondents.

October 19, 1903. *Denied*.

WILLCOX & GIBBS SEWING MACHINE COMPANY, *Petitioner*, v. THOMAS B. SHERRBORNE, JR., *et al.* [Nos. 393, 394.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Hubert Howson, Preston K. Erdman, and *George Tucker Bispham for peti-[569] tioner.

Messrs. John G. Johnson and Frank P. Prichard for respondents.

October 19, 1903. *Denied*.

BERWIND-WHITE COAL MINING COMPANY, *Petitioner*, v. JOHN C. MARTIN. [No. 402.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Frank P. Prichard for petitioner.

Mr. Rudolph M. Schick for respondent.

October 19, 1903. *Denied*.

ALEXIS M. SALLIOTTE, *Petitioner*, v. KING BRIDGE COMPANY. [No. 403.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Geo. William Moore, and *Geo. Whitney Moore* for petitioner.

Messrs. John C. Donnelly and *M. Brennan* for respondent.

October 19, 1903. *Denied*.

GEORGE WHITNEY MOORE *et al.*, *Petitioners*, v. A. B. HAMMOND *et al.* [No. 404.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Geo. William Moore and *Geo. Whitney Moore* for petitioners.

Mr. John H. Mitchell for respondents.

October 19, 1903. *Denied*.

MUTUAL RESERVE LIFE INSURANCE COMPANY, *Petitioner*, v. THOMAS FERRENBACH, Executor, etc. [No. 411.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. James C. Jones for petitioner.

No counsel for respondent.

October 19, 1903. *Denied*.

JULIUS GEORGE HOCKE *et al.*, *Petitioners*, v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. [No. 416.]

[570] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Arthur V. Briesen for petitioners.

Mr. Robert J. Fisher for respondents.

October 19, 1903. *Denied*.

UNITED STATES *ex rel.* REGINA MUSIC BOX COMPANY, *Petitioner*, v. FREDERICK I. ALLEN, Commissioner of Patents. [No. 420.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Antonio Knauth for petitioner.

The Attorney General and *Solicitor General Hoyt* for respondent.

October 19, 1903. *Denied*.

CAROLINE G. ROTH, *Executrix, etc.*, *Petitioner*, v. MUTUAL RESERVE LIFE INSURANCE COMPANY. [No. 425.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Frederick H. Bacon and *J. E. McKeighan* for petitioner.

Mr. James C. Jones for respondent.

October 19, 1903. *Denied*.

READING COMPANY, *Petitioner*, v. WALTER D. MUNSON. [No. 430.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Robert M. Morse, *Henry M. Rogers*, and *Wm. M. Richardson* for petitioner.

Messrs. Eugene P. Carver and *Edward E. Blodgett* for respondent.

October 19, 1903. *Denied*.

JANE BRYSON, Administratrix, etc., *et al.*, *Petitioners*, v. OCEAN STEAMSHIP COMPANY. [No. 436.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Henry Galbraith Ward and *J. J. Macklin* for petitioners.

Mr. Julien T. Davies for respondent.

October 19, 1903. *Denied*.

JAMES ARTHUR, *Petitioner*, v. BARON DE HIRSCH *FUND. [No. 437.]

[571]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Henry Galbraith Ward for petitioner.

Messrs. Julius J. Frank and *Geo. W. Wickersham*, for respondent.

October 19, 1903. *Denied*.

HARRY DONOVAN *et al.*, *Petitioners*, v. PENNSYLVANIA COMPANY. [No. 417.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. James R. Ward for petitioners.

Messrs. Edgar A. Bancroft, *F. J. Locsch*, and *C. F. Loesch* for respondent.

October 19, 1903. *Granted*.

P. L. FLANIGAN, *Petitioner, v. COUNTY OF SIERRA* [No. 426]; D. E. WHEELER *et al., Petitioners, v. COUNTY OF PLUMAS.* [No. 427.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. J. C. Campbell and W. H. Metson for petitioners.

No appearance for respondent in No. 426.

Messrs. U. S. Webb and C. N. Post for respondent in No. 427.

October 19, 1903. *Granted.*

E. W. H. LAKE, *Petitioner, v. S. H. RUSH, Trustee, etc.* [No. 398.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. George Turner and W. T. Stoll for petitioner.

Mr. Adolph G. Wolf for respondent.

October 26, 1903. *Denied.*

PATRICK CLARK *et al., Petitioners, v. BUFFALO HUMP MINING COMPANY et al.* [No. 413.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. W. T. Stoll for petitioner.

Mr. W. B. Heyburn for respondents.

October 26, 1903. *Denied.*

[572] WILLIAM CRISHOLM *et al., Petitioners, v. MARY *H. HALL et al., Executors, etc.* [No. 431.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Harvey D. Goulder, S. H. Holding, and Frank S. Masten for petitioners.

Mr. T. E. Tarsney for respondents.

October 26, 1903. *Denied.*

BOSTON TOW BOAT COMPANY, *Petitioner, v. CHASE MACHINE COMPANY.* [No. 432.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Harvey D. Goulder for petitioner.

Messrs. Albert E. Lynch and T. W. Bakewell for respondent.

October 26, 1903. *Denied.*

SOUTHERN ELECTRIC RAILWAY COMPANY, *Petitioner, v. CORA HAGEMAN.* [No. 442.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. W. F. Boyle, F. W. Lehmann, and Walter H. Saunders for petitioner.

Mr. Seneca N. Taylor for respondent.

October 26, 1903. *Denied.*

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OCEANIC STEAM NAVIGATION COMPANY, Limited, *etc., Petitioner, v. JOHN W. AITKEN, et al., etc.* [No. 443.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Everett P. Wheeler for petitioner.

Messrs. Wilhelmus Mynderse and Edmund L. Baylies for respondent.

October 26, 1903. *Granted.*

ÆTNA LIFE INSURANCE COMPANY, *Petitioner, v. BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, KANSAS.* [No. 386.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Oliver J. Bailey and Frank P. Lindsay for petitioner.

Mr. George Getty for respondent.

November 16, 1903. *Denied.*

*NATIONAL SURETY COMPANY OF KANSAS [573] CITY, MISSOURI, *Petitioner, v. UNITED STATES.* [No. 423.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Heber J. May and Robert T. Hough for petitioner.

The Attorney General and Solicitor General Hoyt for respondent.

November 16, 1903. *Denied.*

JAMES HAGGART *et al., Petitioners, v. LUCETTA B. BOYNTON et al.* [No. 429.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Edward Mayes for petitioners.

Mr. G. B. Rose for respondents.

November 16, 1903. *Denied.*

HENRY W. WATSON, Owner, *etc., Petitioner, v. ST. CLAIR STEAMSHIP COMPANY, Owner, etc.* [No. 452.]

Petitions for a Writ and Cross Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. F. H. Canfield and Wm. J. Gray for petitioner.

Messrs. John C. Shaw, Harvey D. Goulder, and Harrington Putnam for respondents.

November 16, 1903. *Denied.*

FLORIDA MCGUIRE *et al.*, *Petitioners*, v. WILLIAM A. BLOUNT *et al.* [No. 449.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Hilary A. Herbert and Benjamin Mieou for petitioners.

Mr. W. A. Blount for respondent.

November 16, 1903. *Granted.*

HOWE SCALE COMPANY OF 1886 *et al.*, *Petitioners*, v. WYCKOFF, SEAMANS & BENEDICT. [No. 445.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. Austen G. Fox, James H. Peirce, [574] George P. Fisher, Jr., *and William Henry Dennis* for petitioners.

Messrs. Edmund Wetmore and Henry D. Donnelly for respondent.

November 30, 1903. *Granted.*

FIRST NATIONAL BANK OF CHICAGO *et al.*, *Petitioner*, v. CHICAGO TITLE & TRUST COMPANY, Trustee, etc. [No. 479.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Wallace Heckman and Henry S. Robbins for petitioners.

Messrs. Joseph E. Padden and Newton Wyeth for respondent.

November 30, 1903. *Granted.*

VACUUM OIL COMPANY, *Petitioner*, v. CLIMAX REFINING COMPANY. [No. 434.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Howard L. Osgood for petitioner.

Mr. Frederick L. Taft for respondent.

December 7, 1903. *Denied.*

WILLIAM H. SLAUGHTER *et al.*, *Petitioners*, v. LA COMPAGNIE FRANCAISE DES CABLES TELEGRAPHIQUES. [No. 492.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. C. Walter Artz for petitioner.

Mr. E. K. Jones for respondent.

December 7, 1903. *Denied.*

WINIFIELD S. GREGG, *Petitioner*, v. METROPOLITAN TRUST COMPANY *et al.* [No. 482.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Harlan Cleveland for petitioner.

Mr. Herbert Parsons for respondent.

December 7, 1903. *Granted.*

WALTER N. DIMMICK, *Petitioner*, v. UNITED STATES. [No. 498.]

Petition for a Writ of Certiorari *to the [575] United States Circuit Court of Appeals for the Ninth Circuit.

Mr. George D. Collins for petitioner.

No opposition.

December 14, 1903. *Denied.*

EUGENE HUGHES *et al.*, *Petitioners*, v. A. HARRISON, Master, etc. [No. 500.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Anthony Higgins and Henry Galbraith Ward for petitioners.

Mr. John F. Lewis for respondent.

December 14, 1903. *Denied.*

AMERICAN BONDING & TRUST COMPANY, *Petitioner*, v. BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY. [No. 502.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Walter L. Granger and Wm. L. Marbury for petitioner.

Mr. Judson Harmon for respondent.

December 14, 1903. *Denied.*

JACOB E. JACOBSEN, *et al.*, *Petitioners*, v. DALLES, PORTLAND, & ASTORIA NAVIGATION COMPANY. [No. 477.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. W. W. Collon and T. J. Geisler for petitioners.

Messrs. Rufus Mallory and Franklin P. Mays for respondent.

December 21, 1903. *Denied.*

J. D. NORDLINGER, *Petitioner*, v. UNITED STATES. [No. 494.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Wheeler H. Peckham and Albert Comstock for petitioner.

Attorney General and Solicitor General Hoyt for respondent.

December 21, 1903. *Denied.*

CITY OF WOOSTER, *Petitioner*, v. EASTERN TRUST & BANKING COMPANY. [No. 505.]

*Petition for a Writ of Certiorari to the [576] United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. O. W. Aldrich and Alfred J. Thomas for petitioner.

Mr. Wm. B. Sanders for respondent.

December 21, 1903. *Denied.*

ISAAC N. KINNEY *et al.*, *Petitioners*, v. EASTERN TRUST & BANKING COMPANY. [No. 506.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. O. W. Aldrich and Alfred J. Thomas for petitioners.

Mr. Wm. B. Sanders for respondent.

December 21, 1903. *Denied*.

JOHN BRISLIN *et al.*, *Petitioners*, v. CARNEGIE STEEL COMPANY, Limited. [No. 509.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. James I. Kay, J. N. Cooke, and James S. Young for petitioners.

Mr. John R. Bennett for respondent.

December 21, 1903. *Denied*.

FRANK A. POUPPIRT, *Petitioner*, v. ELDER DEMPSTER SHIPPING, Limited. [No. 510.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Floyd Hughes and James B. Stubbs for petitioner.

Mr. Robert M. Hughes for respondent.

December 21, 1903. *Denied*.

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IDA MCCLUNG, *Plaintiff in Error*, v. WILLIAM A. PENNY. [No. 206.]

In Error to the Supreme Court of the Territory of Oklahoma.

Mr. S. H. Harris for plaintiff in error.

Mr. A. G. C. Bierer for defendant in error.

June 27, 1903. *Dismissed*, pursuant to the twenty-eighth rule.

*WESTERN ELECTRIC SUPPLY COMPANY, [577]

Plaintiff in Error, v. ABBEVILLE ELECTRIC LIGHT & POWER COMPANY. [No. 359.]

In Error to the Supreme Court of the State of South Carolina.

Mr. W. N. Graydon for defendant in error.

No counsel opposing.

July 15, 1903. Docketed and *dismissed*, on motion of Mr. W. N. Graydon for defendant in error.

UNION PACIFIC RAILROAD COMPANY, *Plaintiff in Error*, v. COLORADO POSTAL TELEGRAPH-CABLE COMPANY. [No. 130.]

In Error to the Supreme Court of the State of Colorado.

Messrs. Winslow S. Pierce, Willard Teller, and W. R. Kelly for plaintiff in error.

Mr. J. R. McIntosh for defendant in error.

August 31, 1903. *Dismissed* pursuant to the twenty-eighth rule.

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ARGUED AND DECIDED

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S U P R E M E C O U R T

OF THE

U N I T E D S T A T E S

OCTOBER TERM, 1903.

Vol. 192.

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THE DECISIONS
OF THE
Supreme Court of the United States
AT
OCTOBER TERM, 1903.

[1] *ISABELLA GONZALES, *Appt.*,
v.

WILLIAM WILLIAMS, United States Commissioner of Immigration at the Port of New York.

(See S. C. Reporter's ed. 1-16.)

Immigration—Porto Rican not an alien.

A native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States by the treaty of April 11, 1899 (30 Stat. at L. 1754), with Spain, is not, upon her arrival at the port of New York, an alien immigrant, within the meaning of the act of Congress of March 3, 1891 (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, pp. 1294, 1296), providing for the detention and deportation of alien immigrants likely to become public charges.

[No. 225.]

Argued December 4, 7, 1903. Decided January, 4, 1904.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order dismissing a writ of habeas corpus to inquire into the detention by the immigration commissioner of a native of Porto Rico at the port of New York as an alien immigrant. *Reversed* and remanded, with directions to discharge the immigrant.

See same case below, 118 Fed. 941.

The facts are stated in the opinion.

McSSRS. **Frederic R. Coudert, Jr.**, and **Paul Fuller** argued the cause, and, with **Mr. Charles E. LeBarbier**, filed a brief for appellant:
192 U. S.

The cession of Porto Rico definitely transferred the allegiance of the native inhabitants from Spain to the United States.

De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743.

Aliens are merely foreigners residing or sojourning in the United States. An alien is necessarily a foreigner, and must owe allegiance to another country.

2 Am. & Eng. Enc. Law, 2d ed. *Aliens*, p. 64; Webster, *International Dict.*; 2 Kent, Com. 50; *Spratt v. Spratt*, 1 Pet. 343, 7 L. ed. 343; Burrill, *Law Dict.*

The nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise as may be provided.

Boyd v. Nebraska, 143 U. S. 162, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

The sole requisite necessary to constitute a British subject is allegiance or subjection.

1 Pollock, *History of English Law*, pp. 441, 443.

By the common law a change of sovereignty from a foreign domination makes the inhabitants, both *ante nati* and *post nati*, British subjects.

Lawrence's *Wharton, International Law*, Appx. p. 894; *Campbell v. Hall*, 1 Cowp. 204.

The converse of this proposition is equally true.

Westlake, *Private International Law*, 203; *Doe ex dem. Thomas v. Acklam*, 2 Barn. & C. 779; *Re Stepney Election*, L. R. 17 Q. B. Div. 54.

The question as to the meaning of the term "citizen," and what constitutes citizenship under the United States Constitution and laws, must be examined in the light of the English law.

United States v. Wong Kim Ark, 169 U. S. 655, 42 L. ed. 893, 18 Sup. Ct. Rep. 456; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346.

The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.

Smith v. Alabama, 124 U. S. 478, 31 L. ed. 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

The terms "citizen" and "subject" are at present identical in meaning.

United States v. Wong Kim Ark, 169 U. S. 657, 42 L. ed. 894, 18 Sup. Ct. Rep. 456; *Hennessy v. Richardson Drug Co.* 189 U. S. 34, 47 L. ed. 698, 23 Sup. Ct. Rep. 532; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Smith*, Enc. Political Science & U. S. History, article *Nationality*.

Most of the rights of citizenship are under the protection of the states themselves. Civil liberty was not nationalized by the 14th Amendment, and only such rights as are expressly secured by the Constitution of the United States belong to the citizen. For the vindication of all others he must look to the state.

Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

The general right to life, liberty, and property provided for by the Constitution, and more specifically by the ten amendments in favor of civil liberty, applies to all men alike, whether citizens or aliens.

Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Wilson*, *The State*, p. 498, § 917.

Subjects may possess varying degrees of civil or political rights.

Cogordan, *La. Nationalité*, pp. 7, 8; Bluntschli, *Theory of the State*, p. 203.

The famous case of *Scott v. Sandford*, 19 How. 399, 15 L. ed. 698, held that subjection and citizenship were not necessarily identical, and that there existed a class of persons in the United States who, although not aliens, were nevertheless not citizens.

It was for the purpose of removing from our jurisprudence this class of persons who owed the United States allegiance, and yet were not citizens, that the 14th Amendment defined citizenship.

United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; *Elk v. Wilkins*, 112 U. S. 101, 28 L. ed. 646, 5 Sup. Ct. Rep. 41.

The only other instance in the history of the United States in which subjection and citizenship have not been identical is that of the status of the Indian living apart from his tribe, and who has assumed the habits of civilization.

Elk v. Wilkins, 112 U. S. 101, 28 L. ed. 646, 5 Sup. Ct. Rep. 41.

The cession of the territory, its becoming domestic territory with the transfer of the allegiance of its inhabitants, naturalized the natives in the sense that they became passive citizens of the United States, entitled to all the rights, privileges, and immunities of such.

Boyd v. Nebraska, 143 U. S. 162, 36 L. ed. 110, 12 Sup. Ct. Rep. 375.

Mr. Federico Degetau by special leave also argued the cause and filed a brief for appellant.

Solicitor General Hoyt argued the cause and filed a brief for appellee:

Porto Ricans have not left their alienage by birth so far and so fully that they may be held to escape our alien prohibitions.

United States v. Laverty, 3 Mart. (La.) 733; *American Ins. Co. v. Canter*, 1 Pet. 542, 7 L. ed. 255; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 7 L. ed. 617; *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41; *United States v. Osborn*, 2 Fed. 58; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

There may be a class of persons who are not citizens of any country.

Caignet v. Pettit, 2 Dall. 234, 1 L. ed. 362.

Nothing is predicated of the effect of cession beyond the general change of nationality and the general results of practice under treaties like our early ones.

Calvo, *Droit International*, t. 2, pp. 124, 125; *Halleck*, *International Law*, pp. 813 *et seq.*

In the view of a majority of the court in *Downs v. Bidwell*, 182 U. S. 312, 45 L. ed. 1116, 21 Sup. Ct. Rep. 770, there was, upon general principles, no incorporation of native inhabitants into our body politic; and, in view of the express reservation by the treaty recognized by subsequent legislation, it was and is necessary for Congress to determine what the exact status and rights of these inhabitants shall be.

The court has sustained in the broadest

terms the sovereign right of the nation to exclude aliens, the authority of Congress to enact such laws to carry into effect this sovereign right and the national will and policy, and has noted the purpose and motive of the laws.

Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Japanese Immigrant Case*, 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an appeal by Isabella Gonzales from an order of the circuit court of the United States for the southern district of New York, dismissing a writ of habeas corpus issued on her behalf, and remanding her to the custody of the United States Commissioner of Immigration at the Port of New York. 118 Fed. 941.

Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant thereof on April 11, 1899, the date of the proclamation of the Treaty of Paris (30 Stat. at L. 1754). She arrived at the Port of New York from Porto Rico August 24, 1902, when she was prevented from landing, and detained by the Immigration Commissioner at that port as an "alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge.

If she was not an alien immigrant within the intent and meaning of the act of Congress entitled "An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens under Contract or Agreement to Perform Labor," approved March 3, 1891 (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, pp. 1294, 1296), the commissioner had no power to detain or deport her, and the final order of the circuit court must be reversed.

The act referred to contains these provisions:

"That the following classes of aliens shall be excluded from admission into the United States, in accordance with the *existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers, or persons likely to become a public charge. . . .

"Sec. 8. That, upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers. . . . All de-

cisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land, or permit to land, any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor. . . ."

"Sec. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. . . ."

"Sec. 11. That any alien who shall come into the United States in violation of law may be returned as by law provided, . . ."

The treaty ceding Porto Rico to the United States was ratified by the Senate February 6, 1899; Congress passed an act to carry out its obligations March 2, 1899 (30 Stat. at L. 993, chap. 376), and the ratifications were exchanged and the treaty proclaimed April 11, 1899 (30 Stat. at L. 1754). Then followed the act entitled "An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes," approved April 12, 1900. 31 Stat. at L. 77, chap. 191. The treaty provided:

*"Article II.

[9]

"Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

"Article III.

"Spain cedes to the United States the archipelago known as the Philippine islands, and comprehending the islands lying within the following line. . . ."

"Article IX.

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds;

and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it, and to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

By the Constitution of the Spanish monarchy and the Spanish Civil Code, in force in Porto Rico when the treaty was proclaimed, persons born in Spanish territory were declared to be Spaniards, but Porto Ricans who were not natives of the Peninsula, remaining in Porto Rico, could not, according to the terms of the treaty, elect to retain their allegiance to Spain. By the cession their allegiance became due to [10] the United States, which was in possession and had assumed the government, and they became entitled to its protection. The nationality of the island became American instead of Spanish, and, by the treaty, Peninsulars, not deciding to preserve their allegiance to Spain, were to be "held to have renounced it, and to have adopted the nationality of the territory in which they may reside."

Thereupon Congress passed the act of April 12, 1900. That act created a civil government for Porto Rico, with a governor, secretary, attorney general, and other officers, appointed by the President, by and with the advice and consent of the Senate, who, together with five other persons, likewise so appointed and confirmed, were constituted an executive council, at least five of whom should be "native inhabitants of Porto Rico;" and local legislative powers were vested in a legislative assembly, consisting of the executive council and a house of delegates to be elected.

The attorney general, the treasurer, the auditor, the commissioner of the interior, the commissioner of education were to make report through the governor to the Attorney General of the United States, the Secretary of the Treasury of the United States, and so on, to be transmitted to Congress; and all laws enacted by the legislative assembly were to be reported to Congress, which reserved the power to annul the same.

Courts were provided for, and, among oth-

er things, Porto Rico was constituted a judicial district, with a district judge, attorney, and marshal, to be appointed by the President for the term of four years. The district court was to be called the district court of the United States for Porto Rico, and to possess, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in the circuit courts of the United States. And writs of error and appeals might be brought and taken from and to the Supreme Court of the United States.

Provision was also made for the election of a commissioner to the United States, to be paid a salary by the United States, *but [11] no person was eligible to such election "who is not a bona fide citizen of Porto Rico, who is not thirty years of age, and who does not read and write the English language."

By § 9 regulations were to be made "for the nationalization of all vessels owned by the inhabitants of Porto Rico;" by § 14 the statutes of the United States were generally put in force in the island; by § 16 judicial process was to run in the name of the President of the United States.

By § 7 the inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula who had not elected to preserve their allegiance to the Spanish Crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of The People of Porto Rico.†

*Gonzales was a native inhabitant of Porto Rico and a Spanish subject, though not [12]

†Sections 7, 9, 14, and 16 were as follows:

"Sec. 7. That all inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the 11th day of April, 1900, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the 11th day of April, 1899; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of the The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

"Sec. 9. That the Commissioner of Navigation shall make such regulations, subject to the approval of the Secretary of the Treasury, as he may deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico on the 11th day of April, 1899, and which continued to be so owned up to the date of such nationalization, and for the admission

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of the Peninsula, when the cession transferred her allegiance to the United States, and she was a citizen of Porto Rico under the act. And there was nothing expressed in the act, nor reasonably to be implied therefrom, to indicate the intention of Congress that citizens of Porto Rico should be considered as aliens, and the right of free access denied to them.

Counsel for the government contends that the test of Gonzales' rights was citizenship of the United States, and not alienage. We do not think so, and, on the contrary, are of opinion that, if Gonzales were not an alien within the act of 1891, the order below was erroneous.

Conceding to counsel that the general terms "alien," "citizen," "subject," are not absolutely inclusive, or completely comprehensive, and that, therefore, neither of the numerous definitions of the term "alien" is necessarily controlling, we, nevertheless, cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word "alien," as used in the act of 1891, embraces the citizens of Porto Rico.

We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau, in his excellent argument as *amicus curiæ*, that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891.

[13] *The act excludes from admission into the United States, "in accordance with the existing acts regulating immigration other than those concerning Chinese laborers," certain classes of "aliens" or "alien immigrants" arriving at any place within the United States, in respect of all of whom it is required that the commanding officer and agents of the vessel by which they come shall report the name, nationality, last residence and destination before any are landed.

The decisions of the inspection officers adverse to the right to land are made final

unless an appeal is taken to the Superintendent of Immigration, whose action is subject to review by the Secretary of the Treasury; and all aliens who unlawfully come into the United States in violation of law shall be immediately, if practicable, sent back, or may be returned as by law provided.

We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States,— are not "aliens," and upon their arrival by water at the ports of our mainland are not "alien immigrants," within the intent and meaning of the act of 1891.

Indeed, instead of the immigration laws operating externally and adversely to the citizens of Porto Rico, they were themselves put in force and effect there by § 14 of the act of April 12, 1900, as the Secretary of the Treasury was advised by the acting Attorney General, July 15, 1902, in respect of the act "to Regulate Immigration," approved August 3, 1882 (22 Stat. at L. 214, chap. 376, U. S. Comp. Stat. 1901, p. 1288); 24 Ops. Atty. Gen. 86. The act provided for the collection of "a duty of 50 cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States. . . ."[14]

The money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration under this act. . . ."

By § 2 inspection was provided for, "and if, on such examination, there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in

of the same to all the benefits of the coasting trade of the United States; and the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States."

"Sec. 14. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the

provisions of § 3, shall not have force and effect in Porto Rico."

"Sec. 16. That all judicial process shall run in the name of 'United States of America, ss.: The President of the United States,' and all criminal or penal prosecutions in the local courts shall be conducted in the name and by the authority of 'The People of Porto Rico;' and all officials authorized by this act shall before entering upon the duties of their respective offices take an oath to support the Constitution of the United States and the laws of Porto Rico."

writing to the collector of such port, and such persons shall not be permitted to land."

The department held that the duty collected in Porto Rican ports should be accounted for and credited to the "immigrant fund," as is done with collections upon alien passengers arriving at ports in the United States.

In *Huus v. New York & P. R. S. S. Co.* 182 U. S. 392, 396, 45 L. ed. 1146, 1151, 21 Sup. Ct. Rep. 827, 829, we held that, by § 9 of the act of April 12, 1900, "it was evidently intended, not only to nationalize all Porto Rican vessels as vessels of the United States, and to admit them to the benefits of their coasting trade, but to place Porto Rico substantially upon the coast of the United States, and vessels engaged in trade between that island and the continent, as engaged in the coasting trade."

Again, in respect of § 703 of the tariff act of July 24, 1897 (30 Stat. at L. 203, chap. 11), exempting "works of art, the production of American artists residing temporarily abroad," the Department of Justice held that Mr. Molinas, a native of Porto Rico, and an artist, temporarily living in Biarritz, France, and there on April 11, 1899, became, under § 7 of the act of April 12, 1900, a citizen of Porto Rico, and as such an American artist entitled to the privileges of that paragraph. 24 Ops. Atty. Gen. 40.

The Attorney General, in his communication to the Secretary of the Treasury, among other things, said: "It will be observed that § 703, above quoted, does not mention citizenship, but uses the phrase 'American artists.' It is clearly not incon-
[15]ceivable *for a man to be an American artist within the meaning of such a statute and yet not a citizen of the United States." And after commenting on the effect of the temporary absence of Mr. Molinas at the time the treaty was proclaimed, the Attorney General concluded his opinion thus: "But even in supposing that a native Porto Rican like Mr. Molinas, temporarily absent at the date of the treaty, has been unintentionally omitted from § 7, he is undoubtedly one of those turned over to the United States by article 9 of the treaty to belong to our nationality. He is also clearly a Porto Rican; that is to say, a permanent inhabitant of that island, which was also turned over by Spain to the United States. As his country became a domestic country, and ceased to be a foreign country within the meaning of the tariff act above referred to, and has now been fully organized as a country of the United States by the Foraker act, it seems to me that he has become

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an American, notwithstanding such supposed omission."

The Attorney General applied the ruling in *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743, that "with the ratification of the treaty of peace between the United States and Spain, April 11, 1899, the island of Porto Rico ceased to be a 'foreign country' within the meaning of the tariff laws."

In that case we were all of opinion that the action was properly brought, because, as the question was whether the goods were imported at all, the case did not fall within the customs administrative act. *Re Fassel*, 142 U. S. 479, 35 L. ed. 1087, 12 Sup. Ct. Rep. 295.

And in the present case, as Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary.

Our conclusion is not affected by the provision in the sundry civil act of August 18, 1894 (28 Stat. at L. 372, 390, chap. 301, U. S. Comp. Stat. 1901, p. 1363), in relation to the finality of the decisions of the appropriate immigration or custom officers, or the similar provision in the act "to Regulate the Immigration of Aliens into the United States," *approved March 3, 1903[16] (32 Stat. at L. 1213, chap. 1012, U. S. Comp. Stat. Supp. 1903, p. 170). The latter act was approved after the Gonzales litigation was moved, but it is worthy of notice that the words "United States" as used in the title and throughout the act were required to be construed to mean "the United States and any waters, territory, or other place now subject to the jurisdiction thereof." § 33. The definition indicates the view of Congress on the general subject.

Gonzales was not a passenger from a foreign port, and was a passenger "from territory or other place" subject to the jurisdiction of the United States.

In order to dispose of the case in hand, we do not find it necessary to review the Chinese exclusion acts and the decisions of this court thereunder.

Final order reversed, and cause remanded with a direction to discharge Gonzales.

LINDLEY E. SINCLAIR, *Plff. in Err.*,
v.

DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 16-21.)

Error to court of appeals of District of Columbia—does not lie in criminal case.

A judgment in a criminal case cannot be re-
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viewed on writ of error from the Federal Supreme Court to the court of appeals of the District of Columbia, under the act of Congress of March 3, 1901 (31 Stat. at L. 1189, chap. 854), § 233, providing for a review of judgments of that court in the Federal Supreme Court upon writ of error or appeal, without regard to the amount in dispute, in cases in which the validity of any patent or copyright is involved, or in which is drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States.

[No. 94.]

*Argued and submitted December 15, 1903.
Decided January 4, 1904.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Police Court of that District, imposing a fine as a punishment for the violation of an act of Congress to prevent smoke in the District. *Dismissed.*

See same case below, 20 App. D. C. 336.

The facts are stated in the opinion.

Messrs. C. C. Cole and J. J. Darlington argued the cause and filed a brief for plaintiff in error:

This court has determined that it has jurisdiction in all cases where the validity of Federal statutes or authority is drawn in question.

Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

Messrs. Andrew B. Duvall and E. H. Thomas submitted the cause for defendant in error:

The fine is a punishment for the offense committed, and is not a matter in dispute; and, in cases such as this, criminal in character, the question is the guilt or innocence of the accused.

United States v. More, 3 Cranch, 159, 2 L. ed. 397.

Section 8 of the act of February 9, 1893, and § 233 of the Code of the District of Columbia, are substantially alike.

The former act referred to cases only where there was a pecuniary matter in dispute, measureable by some sum or value, and referred neither to criminal cases nor to cases where the question was of the guilt or innocence of the accused.

Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; *Chapman v. United States*, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76.

[17] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

Plaintiff in error was prosecuted by information in the police court of the District of 192 U. S.

Columbia for a violation of an act of Congress, approved February 2, 1899, entitled "An Act for the Prevention of Smoke in the District of Columbia, and for Other Purposes" (30 Stat. at L. 812, chap. 79), and was found and adjudged guilty, and sentenced "to pay a fine of \$50 and in default to be committed to the workhouse for the term of ninety days." The judgment was affirmed by the court of appeals of the District of Columbia, 20 App. D. C. 336, brought here on error, and argued on the merits and on motion to dismiss.

The court of appeals of the District of Columbia was established by an act of Congress, approved February 9, 1893 (27 Stat. at L. 434, chap. 74, U. S. Comp. Stat. 1901, p. 573), § 8 of which was as follows:

"That any final judgment or decree of the said court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

On March 3, 1901, an act "To Establish a Code of Law for the District of Columbia" (31 Stat. at L. 1189, chap. 854), was approved (and subsequently amended by acts approved January 31 and June 30, 1902 [32 Stat. at L. 2, chap. 5; 32 Stat. at L. 520, chap. 1329]), § 233 of which provides that—

"Any final judgment or decree of the court of appeals may be re-examined and affirmed, [18] reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

It will be perceived that § 8 of the one act and § 233 of the other are in substance the same, and they must bear the same construction. And the ruling in *Chapman v. United States*, 164 U. S. 436, 41 L. ed. 504, 17 Sup. Ct. Rep. 76, in respect of § 8, is decisive to the point that this writ of error cannot be maintained.

That case, as stated by the court, was this:

"Chapman was indicted in the supreme court of the District of Columbia for an alleged violation of § 102 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 55) in refusing to answer certain questions propounded to him by a special committee of the Senate of the United States, appointed to investigate charges in connection with proposed legislation then pending in the Senate. To this indictment the defendant demurred on the ground, among others, that § 102 of the Revised Statutes was unconstitutional, and that, therefore, the court was without jurisdiction in the premises. This demurrer was overruled by the trial court, and its judgment thereon affirmed by the court of appeals of the District. 5 App. D. C. 122. Defendant was thereupon tried and convicted, and motions for new trial and in arrest of judgment having been made and overruled (the question of the constitutionality of § 102 being raised throughout the proceedings), was sentenced to be imprisoned for one month in jail, and [19] to pay a fine of \$100 *which judgment was affirmed on appeal. 8 App. D. C. 302, 24 Wash. L. Rep. 251. A writ of error from this court was then allowed, 8 App. D. C. 320, 24 Wash. L. Rep. 297, which the United States moved to dismiss."

It was held that this court had no jurisdiction to review on writ of error a judgment of the court of appeals of the District of Columbia in a criminal case under § 8 of the act of February 9, 1893; and the writ of error was accordingly dismissed. Attention was called to the fact that it had been previously decided that the court had no jurisdiction to grant a writ of error to review the judgments of the supreme court of the District of Columbia in criminal cases, either under the judiciary act of March 3, 1891, chap. 517, 26 Stat. at L. 826 (*Re Heath*, 144 U. S. 92, 36 L. ed. 358, 12 Sup. Ct. Rep. 615); or under the act of Feb. 6, 1889, chap. 113, 25 Stat. at L. 655 (*Cross v. United States*, 145 U. S. 571, 36 L. ed. 821, 12 Sup. Ct. Rep. 842), or on habeas corpus (*Cross v. Burke*, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22). And although the validity of any patent or copyright, or of a treaty or statute of, or an authority exercised under, the United States, was not

drawn in question in those cases, it was distinctly ruled in reaching the conclusions announced that neither of the sections of the act of March 3, 1885 [23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572] applied to any criminal case; and *Farnsworth v. Montana*, 129 U. S. 104, 32 L. ed. 616, 9 Sup. Ct. Rep. 253; *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609, and *United States v. More*, 3 Cranch, 159, 2 L. ed. 397, were cited with approval.

We were of opinion that § 8 of the act establishing the court of appeals of the District of Columbia, and the act of March 3, 1885 (chap. 355, 23 Stat. at L. 443, U. S. Comp. Stat. 1901, p. 572), were the same in their meaning and legal effect. The 1st section of the act of 1885 prohibited appeals or writs of error unless the matter in dispute exceeded the sum of \$5,000, but the 2d section provided that the restriction should not apply to cases wherein the validity of any patent or copyright was involved, or where the validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question, and that in all such cases an appeal or writ of error might be brought without regard to the sum or value in dispute. And it was *ruled that [20] the last clause of § 8 of the act of 1893 must receive the same construction as had been given to the 2d section of the act of 1885. We said: "The meaning of both statutes is that, in the cases enumerated, the limitation on the amount is removed, but both alike refer to cases where there is pecuniary matter in dispute, measurable by some sum or value, and they alike have no application to criminal cases."

United States v. More, 3 Cranch, 159, 2 L. ed. 397, was cited to the main proposition, and was quoted from in respect of the suggestion that because the punishment on conviction by the statute under which plaintiff in error was indicted, tried, and convicted embraced a fine, there was, therefore, a sum of money in dispute. The case involved § 8 of the act of February 27, 1801, chap. 15, entitled "An Act Concerning the District of Columbia" (2 Stat. at L. 103, U. S. Comp. Stat. 1901, p. 573), and creating a circuit court for the District of Columbia, which provided "that any final judgment, order, or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal. . . ." It was held that this court had no jurisdiction under that section over the judgments

of the circuit court of the District of Columbia in criminal cases, and Chief Justice Marshall said: "On examining the act 'Concerning the District of Columbia,' the court is of opinion that the appellate jurisdiction granted by that act is confined to civil cases. The words, 'matter in dispute,' seem appropriated to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But, in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of \$100, yet that is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit."

And the previous ruling that § 5 of the judiciary act of 1891 had no application was repeated.

[21] **Chapman's Case* was decided November 30, 1896, and on the 3d of March, 1897, an act was approved which authorized this court to issue writs of certiorari in cases made final in that court, to bring them up for review and determination. 29 Stat. at L. 692, chap. 390, U. S. Comp. Stat. 1901, p. 574. This was carried forward into § 234 of the District Code, and in the meantime we had reviewed the judgment of the court of appeals in certain criminal cases on certiorari granted under the act. *Winston v. United States*, 172 U. S. 303, 43 L. ed. 456, 19 Sup. Ct. Rep. 212, 171 U. S. 690, 19 Sup. Ct. Rep. 887.

The rule that applies to capital cases and infamous crimes applies to the criminal offenses over which the police court of the District of Columbia exercises jurisdiction, and under that rule *this writ of error must be dismissed*.

PEOPLE OF THE STATE OF NEW YORK
on the Relation of the PENNSYLVANIA
RAILROAD COMPANY, *Plff. in Err.*,
v.

ERASTUS C. KNIGHT, Comptroller of the
State of New York.

(See S. C. Reporter's ed. 21-28.)

Commerce—state tax on cab service furnished by railroad company.

A franchise tax imposed under appropriate statutes of the state of New York upon the Pennsylvania Railroad Company for carrying on a cab service wholly within the state, for the purpose of conveying its passengers to and from its ferry landing in New York city, the

NOTE.—On corporate taxation in the United States as affected by the commerce clause in the Federal Constitution—see note to *Sandford v. Poe*, 60 L. R. A. 641.

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charges for which are entirely separate from those for other transportation, is not an unconstitutional burden on interstate commerce, but is a tax upon an independent local service, preliminary or subsequent to any interstate transportation.

[No. 91.]

Argued December 11, 1903. Decided January 4, 1904.

IN ERROR to the Supreme Court of the State of New York to review a judgment sustaining an assessment by the state comptroller of a franchise tax on a cab service furnished by a railroad company, entered in pursuance of an affirmance by the New York Court of Appeals of an order of the Appellate Division of the Supreme Court of that State, confirming, on a writ of certiorari, the determination of the comptroller. *Affirmed*.

See same case below in Appellate Division of Supreme Court, 67 App. Div. 398, 73 N. Y. Supp. 790, and in Court of Appeals, 171 N. Y. 354, 64 N. E. 152.

Statement by Mr. Justice **Brewer**:

This is a writ of error to the supreme court of the state of New York to review a judgment of that court affirming the *as-[22] assessment by the comptroller of the state of New York of a certain tax against the relator, the Pennsylvania Railroad Company. The contention of the plaintiff in error is that the tax, which is a franchise tax imposed under appropriate statutes of New York upon the company for carrying on the business of running cabs and carriages for hire between points entirely within the state of New York, is invalid under the interstate commerce clause of the Constitution of the United States, article I., § 8, subdivision 3.

The facts are undisputed. In 1897 the company established a cab stand on its own premises at the Twenty-third street ferry in the city of New York, and has since maintained a service of cabs and coaches under special licenses from the city of New York, whereby they can stand on those premises only. The sole business done by those cabs and coaches is to bring the company's passengers to and from the Twenty-third street ferry. The charges for this service are separate from those of the company for further transportation, and no part of its receipts from the cab service is received as compensation for any service outside the state of New York. As a separate business, this cab service has not been profitable to the company, but has been operated at a loss. The validity of this tax was sustained both by the supreme court and the court of appeals of New York.

67 App. Div. 398, 73 N. Y. Supp. 790, 171 N. Y. 354, 64 N. E. 152.

Mr. Henry Galbraith Ward argued the cause, and, with **Mr. A. Leo Everett** and **Messrs. Robinson, Biddle, & Ward**, filed a brief for plaintiff in error:

The taxes in question are laid upon the privilege of doing business.

People ex rel. Pennsylvania R. Co. v. Wemple, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720.

The taxes cannot, therefore, be justified as if they were taxes upon property, or taxes upon a franchise regarded as part of the corporation's property, as in the following cases:

State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Pullman's Palace Car. Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Picklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Pittsburgh, C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 59 L. ed. 1043, 15 Sup. Ct. Rep. 896; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; *Adams Exp. Co. v. Ohio*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

Adopting the careful and exhaustive classification given in the case last cited, this case is in the category of those in which the tax has been held to be upon the privilege of engaging in commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Fargo v. Michigan*, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S.*

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Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 10 Sup. Ct. Rep. 881; *Cratcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

In the operation of its cab service the Pennsylvania Railroad Company is wholly engaged in interstate commerce.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *Foster v. Davenport*, 22 How. 244, 16 L. ed. 248; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259.

These decisions show that the court does not employ any arbitrary tests or distinctions which may be good for one case but not for another, but investigates each one upon its facts; and, if the transportation is interstate commerce in point of fact, though no contract is made for through transportation, it will be protected from state interference.

We see the same regard for the substance, rather than form, of the transaction in—

Cutting v. Florida R. & Nav. Co. 46 Fed. 641, 3 Inters. Com. Rep. 665; *Galveston, H. & S. A. R. Co. v. Armstrong* (Tex. Civ. App.) 43 S. W. 614; *State v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 44 S. W. 542.

Mr. John Cunneen argued the cause and filed a brief for defendant in error:

The cab service maintained in the city of New York by the plaintiff in error is not interstate commerce, and the tax imposed upon it is valid.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266.

Mr. Justice Brewer delivered the opinion of the court:

The contention of the company is that this cab service is merely an extension, and therefore a part of, its interstate transportation; that it is not carrying on a cab business generally in the city of New York, but is merely furnishing the service to those who seek to take over its lines some interstate transportation, thus commencing the transportation from their houses instead of from the ferry landing, or like service to those who have already received such interstate transportation, thus completing the transportation to their places of destina-

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tion; that the character of the business remains unchanged, although individuals may avail themselves of this service who do not intend or have not received any interstate transportation, for they who thus use the service do so wrongfully and against the wish of the company. In other words, the company, to promote its general business, seeks only to complete the continuous transportation of interstate passengers to or from their residences or hotels in New York city instead of commencing and ending such transportation at the ferry landing at Twenty-third street; the character of the service depends not on the action of the passenger, but on the purpose of the company in providing it, and the omission to include the charge for the cab service in the charges for other transportation arises from the practical difficulty of making such inclusion, and does not alter the fact that such cab service is a part of the interstate transportation.

[26] *To hold the even balance between the nation and the states in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life and business conditions. Into many relations and transactions there enter elements of a national as well as those of a state character, and to determine in a given case which elements dominate, and assign the relation or transaction to the control of the nation or of the state, is often most perplexing. And this case fully illustrates the perplexities.

It is true that a passenger over the Pennsylvania Railroad to the city of New York does not, in one sense, fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state, and be subject to national, control. The state may not tax for the privilege of doing an interstate commerce business. *Atlantic & P. Tel. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 95, 23 Sup. Ct. Rep. 817. On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.

Undoubtedly, a single act of carriage or transportation wholly within a state may be part of a continuous interstate carriage or transportation. Goods shipped

from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is in interstate carriage. By reason thereof the nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from state regulation and state taxation, for a part of its work is carriage and transportation begun and ended within the state. So the Pennsylvania company, which is engaged largely in interstate *transportation, is amenable[27] to state regulation and state taxation as to any of its service which is wholly performed within the state, and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the state and that of the nation. *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494.

As we have seen, the cab service is rendered wholly within the state, and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside, the state; and unless the interstate character is established, locality determines the question of jurisdiction. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, though not in all respects similar, is very closely in point. In that case spruce logs had been drawn down from Wentworth's Location in New Hampshire, and placed in Clear Stream, also in New Hampshire, to be from thence floated down the Androscoggin river to the state of Maine, there to be manufactured and sold. After they had thus been drawn down and placed in Clear Stream, a tax was imposed upon them by the state of New Hampshire. The validity of that tax was challenged on the ground that the logs were in process of transportation from Wentworth's Location in New Hampshire to the state of Maine. It was sustained by the supreme court of New Hampshire, and also by this court. In the course of the opinion of Mr. Justice Bradley are these pertinent observations (p. 528, L. ed. p. 719, Sup. Ct. Rep. p. 479):

"It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565, 19 L. ed. 999, 1002: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the [28]articles have been *shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; *Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803, 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986.

As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?

We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York was correct, and it is affirmed.

*WABASH RAILROAD COMPANY, *Plff.* [29]
in *Err.*,
v.
ALEXANDER FLANNIGAN and Virgil Rule.

(See S. C. Reporter's ed. 29-38.)

Error to state court—Federal question.

1. A Federal question is raised too late to confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court when asserted for the first time in the petition for the allowance of a writ of error from the former court.
2. A writ of error from the Federal Supreme Court to a state court will be dismissed where the Federal question relied upon to confer such jurisdiction manifestly lacks all color of merit.

[No. 115.]

Submitted December 18, 1903. Decided January 4, 1904.

IN ERROR to the St. Louis Court of Appeals of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court for the City of St. Louis, denying the relief sought by the plaintiff against the enforcement of certain judgments. *Dismissed* for want of jurisdiction.

See same case below (Mo. App.) 75 S. W. 691.

Statement by Mr. Justice **White**:

The action wherein was entered the judgment which is sought to be reviewed by this writ of error was begun on December 20, 1900, by the filing in the circuit court of the city of St. Louis of a petition on behalf of the Wabash Railroad Company, the plaintiff in error in this court. The defendants named in the petition were Alexander Flannigan and Virgil Rule, the present defendants in error. The cause of action was ultimately embodied in a third amended petition, filed, by leave of court, on April 15, 1901. From a recital made in the opinion of the St. Louis court of appeals the following summary of the allegations of that pleading is made:

After asserting its existence as a consolidated corporation from a named date, plaintiff alleged that it was indebted, on June 10, 1891, to one Tourville, for wages, in the sum of \$81.98; that an action to recover such indebtedness was instituted by Tourville in a court of the state of Missouri on the date named, and that a judgment was rendered

NOTE.—On writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884

[30] in favor of *Tourville, which had been finally affirmed by this court; that in April, 1895, the defendant Flannigan recovered judgment against Tourville and the railroad company in a court of the state of Illinois, the railroad company being made garnishee in the action on account of the original indebtedness of \$81.98 to Tourville, above mentioned; that Tourville had assigned the judgment obtained by him in the Missouri court to the defendant Virgil Rule, and that both the defendants Flannigan and Rule were undertaking to collect their respective judgments from the railroad company. The court was asked to permit a deposit in court of the sum of \$81.98 and interest, and to require the defendants to interplead and to have determined their rights in respect to such deposited sum. The defendant Rule was served with summons, and a written appearance was filed on behalf of Flannigan, who was a nonresident.

In stating the subsequent steps in the litigation we shall omit reference to the facts which clearly have no relevancy to the alleged Federal questions.

Following the filing of the third amended petition an application was made for the allowance of a temporary injunction against the defendants, prohibiting them from attempting to enforce their respective judgments pending the determination of the action. An order was thereupon made, temporarily restraining the defendants, and requiring them "to show cause, if any they have, why a temporary injunction should not be issued herein, and the relief prayed for in said third amended petition should not be granted." A "return" to this order to show cause was filed on behalf of the defendant Rule, and therein was set forth numerous reasons why a temporary injunction should not issue and the relief prayed in the third amended petition should not be granted. Flannigan answered, admitting each and every allegation therein, and claiming priority of lien and right of payment out of the so-called fund of \$81.98. Thereafter, on April 22, 1901, the plaintiff filed a motion for the relief prayed for, not-

[31] withstanding *the aforesaid return of Virgil Rule, and numerous reasons were stated in support of the motion. On April 29, 1901, the court entered the following order:

"Now at this day come the parties herein by their respective attorneys, and the order issued herein on April 15, 1901, commanding the defendants to show cause why a temporary injunction should not be granted against them, coming on for hearing upon the pleadings, affidavits, and proofs adduced, and the court having duly considered the same, and being sufficiently advised of and concerning the premises, doth order

that the prayer of plaintiff's bill be and is denied. It is further ordered by the court that the restraining order granted against defendants on April 15, 1901, be and is hereby dissolved."

A motion for rehearing was filed and overruled. The motion was based upon the assumption that the order in question operated as a judgment dismissing the petition. The fifteenth and last ground of the motion and the first and only specific reference made to the Constitution of the United States in the proceedings up to that time was as follows:

"Fifteenth. Because the court erred in refusing to give full faith and credit to the judgment of a sister state, as required by the Constitution and laws of the United States."

On appeal the St. Louis court of appeals entered a judgment affirming in all things the "judgment" of the trial court. 75 S. W. 691. No allusion was made in the opinion to any constitutional question. Application was then made to transfer the cause to the supreme court of Missouri, upon the claim that it involved "a construction of § 1 of article 4 of the Constitution of the United States." The application was denied. A petition was next presented to the presiding judge of the St. Louis court of appeals, praying the allowance of a writ of error from this court. The petition was overruled, for the following stated reasons:

"In *Wabash R. Co. v. Tourville*, 179 U. S. 322, 45 L. ed. 210, 21 Sup. Ct. Rep. 113, the judgment herein involved came under review. The validity of the Tourville judgment, as we understand the opinion, *was [32] sustained, and its priority over that of Flannigan was adjudged. In the face of this decision we deny the writ."

A writ of error was afterwards allowed by a justice of this court. The error assigned embraced the following alleged Federal questions:

"19. Your petitioner charges and avers that in said suit, while the same was pending in said circuit court and in said court of appeals, the construction of the following clauses of the Constitution of the United States was drawn in question, viz.:

"The following clause of § 1, article IV.: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.'

"Section 11, article IV.: 'The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.'

"The following clause of § 1, article XIV., of amendments to the Constitution: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall

any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

"Your petitioner says that the decisions of courts on said clauses of the Constitution in said cause were against the rights, title, privilege, and exemption specially set up and claimed under said clauses of said Constitution by your petitioner."

Mr. Wells H. Blodgett submitted the cause for plaintiff in error. **Mr. George S. Grover** was with him on the brief:

This court has ample jurisdiction to hear and determine this controversy by reason of the constitutional question apparent upon the face of the record.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 269, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 36 L. ed. 360, 12 Sup. Ct. Rep. 657; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Powell v. Brunswick County*, 150 U. S. 440, 37 L. ed. 1137, 14 Sup. Ct. Rep. 166; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

When a suit in a state court involves in any manner a judgment of a sister state, and one of the parties to the suit sets up or claims that such judgment, under the law and usage of the state where rendered, gives him certain rights, or entitles him to certain remedies, and the state court denies such claim, a Federal question is presented of which this court will take jurisdiction by writ of error.

Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

Mr. John D. Johnson submitted the

cause for defendants in error. **Mr. Virgil Rule** was with him on the brief:

The decision of the St. Louis court of appeals was upon the ground that all the parties to the bill of interpleader had had their day in court, and that the questions raised were *res judicata*. This is not a Federal question, and this court is, therefore, without jurisdiction.

Northern P. R. Co. v. Ellis, 144 U. S. 464, 36 L. ed. 506, 12 Sup. Ct. Rep. 724; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; *Hickman v. Ft. Scott*, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518; *Clark v. Keith*, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; *Peck v. Sanderson*, 18 How. 42, 15 L. ed. 262.

In order to give this court power to revise the judgment of a state court, it must appear upon the transcript that the constitutional question was raised by the pleadings, and decided against plaintiff in error.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 657, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Hoyt v. Shelden*, 1 Black, 518, 17 L. ed. 65; *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The opinion of this court, upholding the correctness of the judgment entered by the circuit court of Missouri in favor of Tourville, referred to in the preceding statement, was announced on December 3, 1900. *Wabash R. Co. v. Tourville*, 179 U. S. 322, 45 L. ed. 210, 21 Sup. Ct. Rep. 113. The action now under review was begun seventeen days later. In the action which was under review in 179 U. S. the contention on behalf of the railroad company was that, despite the fact that on March 26, 1895, the supreme court of Missouri, on appeal by Tourville, had entered a judgment directing the St. Louis court of appeals to render judgment in favor of Tourville for the full amount of wages earned by him, the railroad company was yet entitled, after the filing in the St. Louis court of appeals of the mandate of the higher court, to offset against the amount of the judgment directed to be entered in favor of Tourville, the sum of the judgment recovered by Flannigan in the attachment suit which had been instituted in Illinois subsequently to the decision of the supreme court of Missouri in Tourville's action. The claim of jurisdiction in this court to review the judgment of the supreme court of Missouri, just referred to, was based upon the contention that the refusal of the Missouri courts to give to the Illinois judg-

ment in favor of Flannigan the effect claimed for it by the railroad company was a denial of the full faith and credit to which that judgment was entitled by virtue of § 1 of article IV. of the Constitution of the [37] United States. *As already stated, the present action was begun after the opinion reported in 179 U. S. 322, 45 L. ed. 210, 21 Sup. Ct. Rep. 113, affirming the judgment of the supreme court of Missouri, was delivered.

The controversy in the present action relates to the same judgments which were under consideration in this court in the prior action, and the purpose of the railroad company in this, as in the previous case, was to limit the amount which might be collected by the holders of the respective judgments against it to a sum which in the aggregate would not be in excess of the indebtedness to Tourville upon his original claim. In substance, therefore, the present action is but an attempt by indirection to do that which the supreme court of Missouri and this court has held in the prior action could not be done.

The constitutional questions now urged on behalf of plaintiff in error are that the dismissal of its petition for interpleader was a denial of full faith and credit to the garnishment judgment rendered by the Illinois court, and that the denial of the relief prayed for also violated the due process clause of the 14th Amendment to the Constitution of the United States.

The objection, last stated, need not be further noticed, as it was asserted for the first time in the petition for the allowance of a writ of error from this court. We think it unavoidably results also that the claim of the protection of the due faith and credit clause of the Constitution of the United States here relied on is without merit. Nowhere in its petition for interpleader or in the proceedings had thereunder in the Missouri courts did the railroad company set up rights specifically based upon the Illinois judgment, claim for that judgment an effect which, if denied to it, would have impaired its force and effect, nor did the railroad company predicate any right to the relief demanded upon the effect due to the Illinois judgment. The relief asked by the railroad company in substance tended, on the contrary, to lessen the force and effect both of the Missouri and Illinois judgments. It was sought to change the status of the company from that of a general debtor for [38] the amount due upon each judgment, and to engraft upon the judgments a limitation to a single satisfaction out of a specific fund. In its petition the railroad company expressly alleged its inability to determine whether the Illinois or the Missouri judgment possessed a priority of right to payment out of the so-called fund. Clearly, also, even the owner and holder of the Illinois judgment could not, in reason, contend that the judgment of the Missouri court complained of had the effect of denying full faith and credit to the judgment of a sister state. As the settled rule in this court is that where the Federal question asserted to be contained in a record is manifestly lacking all color of merit, the writ of error must be dismissed (*Swafford v. Templeton*, 185 U. S. 487, 493, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783, and cases cited), it results that the writ of error in this case must be dismissed for want of jurisdiction.

Writ of error dismissed.

NICHOLAS C. BENZIGER *et al.*, *Petitioners*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 38-55.)

Tariff—casts of sculpture.

1. The omission from the tariff act of 1897, § 638 (30 Stat. at L. 200, chap. 11, U. S. Comp. Stat. 1901, p. 1686), of the provisions of prior tariff acts for the free entry of casts, was not intended to prevent the free entry of such casts as also come within the designation of "casts of sculpture" which, under § 649, are entitled to free entry where specially imported, in good faith, for the use and by the order of any society incorporated or established solely for religious, philosophical, scientific, educational, or literary purposes.
2. Plaster casts of clay models, though painted and gilded and produced in unlimited quantities, are "casts of sculpture" which, under the tariff act of 1897, § 649 (30 Stat. at L. 151, 201, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1687), are entitled to free entry where specially imported, in good faith, for the use and by the order of any society incorporated or established solely for religious, philosophical, scientific, educational, or literary purposes.

[No. 54.]

Argued December 10, 11, 1903. Decided January 4, 1904.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, which

in turn had affirmed the decision of a board of general appraisers and the collector of the port of New York, assessing duties on plaster casts. *Reversed* with directions to the Circuit Court to reverse the decision of the board of general appraisers and of the collector, and to direct the latter to admit the casts to free entry.

See same case below, 51 C. C. A. 587, 113 Fed. 1016.

Statement by Mr. Justice Peckham:

Certain figures representing various saints, and also two figures of adoring angels, as specified in the collector's letter to the board of general appraisers, were, in [39] March, 1899, specially *imported into the port of New York in good faith, for the use and by the order of societies incorporated or established solely for religious purposes. The importers claimed the figures were entitled to free entry under paragraph 649 of the tariff act of 1897. (30 Stat. at L. 151, 201, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1687.) The appraiser returned them as "church statues, composed of plaster of Paris, decorated," or as "articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for," and the collector assessed upon them a duty of 45 and 35 per cent ad valorem under paragraphs 97 and 450 of the same act (pages 156, 193). If dutiable, no question is made as to the correctness of the decision of the collector in assessing the duties as he did. The contention is that these figures were "specially provided for" in this act under the paragraph above mentioned, 649.

The importers protested against the decision of the collector, and the case went to the board of general appraisers. Testimony was taken by the board and it found as a fact the manner in which the figures were made, which was as follows:

"The clay model of the subject, of desired size, is covered by a workman with a coating some two inches thick of plaster of Paris. When this coating has 'set' or hardened sufficiently, the clay figure inside is broken up and removed, and a plaster of Paris mould thereof thus obtained. Plaster is then carefully forced into this mould, and when dry is taken out in the form of the original clay figure. This plaster figure, after having been carefully gone over by an artist or skilled workman to cure any defects in the moulding, is in turn thoroughly covered with specially prepared plaster for the final mould. This is made in sections, which when dry are removed, and together form a perfect mould, and this composite mould becomes the manufacturer's substitute for the artist's clay or plaster cast model from which he (the manufacturer)

produces his moulded statues in unlimited numbers. In the moulding process the several sections of the mould are in turn laid with the concave side upward, and have a lining of 'carton pierre,' *one-half inch or [40] more in thickness, carefully laid and pressed into them by the moulder's hands with the aid of suitable tools. The extended arms, fingers, and other slender parts are strengthened by pieces of iron wire laid in the 'carton pierre,' which is then lined either with heavy paper or coarse woven vegetable fiber cloth secured with glue. After the 'carton pierre' has dried sufficiently, the several sections of the mould are removed and their contents joined together around a framework of wood, and a figure is thus formed, the counterpart of the original model. The statue then goes to a skilled workman called a 'finisher,' who, with knife or other instrument removes any roughness resulting from the joining of the sections, cures any other defects in the moulding, and smooths it down generally. It is then passed to the painter and decorator, who completes it in the style desired. The statues in 'carton romain' and in 'stone composition' are made in the same manner, except that the latter are uniformly lined with coarse cloth. The stations of the cross in 'carton pierre' and in terra cotta are produced in substantially the same way (those in terra cotta, however, being kiln dried or baked after moulding), and are painted and decorated in quite the same manner as the statues, the foreground and other landscape or perspective effects being painted in suitable tints or hues."

The protest was overruled by the board, and a petition for a review was duly filed by the importers (petitioners) and the case heard in the circuit court, southern district of New York, and that court affirmed the decision of the board. 107 Fed. 257. An appeal was taken to the circuit court of appeals, where the decision of the circuit court was affirmed on the opinion of the court below. Upon petition of the importers a writ of certiorari was issued from this court, and the case brought here for review.

Mr. W. Wickham Smith argued the cause, and, with *Mr. Charles Curie*, filed a brief for petitioners.

Assistant Attorney General McReynolds argued the cause and filed a brief for respondent.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court:

The petitioners claim that the figures in

question here are entitled to free entry under the provision of paragraph 649 of the tariff act of 1897 (30 Stat. at L. 151, 201, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1687), as being "casts of sculpture, where specially imported, in good faith, for the use and by order of any society incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes," etc. The board of appraisers thought that on July 24, 1897, the day of the passage of the tariff act, and for many years prior thereto, those figures belonged to a class which was known in commerce, in art, and to the classifying officers of customs of the United States as "statuary," and specifically as "church statuary." In the opinion of the board it was stated:

[43] **"It is the practice of professional sculptors to have their original creations in clay reproduced in plaster of Paris for permanent use as models from which the objects are sculptured in marble, stone or other material. The sculptor invariably goes over his plaster cast with utmost care, not only repairing any defects in the moulding, but defining more accurately the hair, finger nails, folds of the drapery, and outline generally, and, above all, perfecting the facial and general expression. These plaster of Paris models are known in commerce and in art as 'casts of sculpture.' They represent the artist's right and title to his creation, and unlike the merchandise in question here, are not painted and decorated, nor dealt in as ordinary commercial articles. Casts in plaster of Paris are likewise produced from rare objects of sculpture, generally for use in museums or art institutions, but sometimes for reproduction by sculptors in marble, stone, etc., and are also called 'casts of sculpture,' but are in strict sense 'casts from sculpture,' being cast from plaster of Paris from sculptural objects, such, for example, as the high relief frieze of the Parthenon at Athens, the facade of the guild of the Butchers house at Hildesheim, the tomb of Englebert, and other works in the Metropolitan Museum of Art mentioned in the testimony of Messrs. Stoltzenberg and Trueg."*

The board was of opinion that these figures were what is known in commerce, in art, and in common speech as "statuary," and were not "specimens or casts of sculpture," and were therefore assessed, as stated.

If these figures were to be entered as statuary, they would come in free under paragraph 649 of the act of 1897, but for the limitation contained in paragraph 454, which limits the term "statuary," as used in the act, so as to "include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass

of marble, stone, or alabaster or from metal, and as is the professional production of a statuary or sculptor only." The circuit court did not regard it necessary in the disposition of the case to determine whether these particular *figures would come in free[44] as casts of sculpture under paragraph 649, if imported in the crude state, but held that as the figures had been painted and gilded, they were not thereafter casts of sculpture within the meaning of the act.

Upon the argument of this case at bar frequent reference was made by counsel to the provisions in former tariff acts upon this subject, as bearing upon the proper construction of the one under consideration. For convenience these provisions are reproduced in the margin as they existed in the act of 1861 (12 Stat. at L. 178, 193, chap. 68, U. S. Comp. Stat. 1901, p. 1625); the Rev. Stat. (§ 2505, pp. 482, 487, 488, U. S. Comp. Stat. 1901, p. 1625); the act of 1883 (22 Stat. at L. 488, 514, 520, chap. 121); the act of 1890 (26 Stat. at L. 567, 608, 609, chap. 1244); the act of 1894 (28 Stat. at L. 509, 543, 544, chap. 349); and in the present act of 1897 (30 Stat. at L. 151, 201, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1687.)†

†Act of March 2, 1861, sec. 23. (12 Stat. at L. 178, chap. 68, U. S. Comp. Stat. 1901, p. 1625.)

All philosophical apparatus, instruments, books, maps, and charts, statutes, statuary, busts, and casts of marble, bronze, alabaster, plaster of Paris; paintings and drawings, etchings, specimens of sculpture, cabinets of coins, medals, regalia, gems, and all collections of antiquities: *Provided*, The same be specially imported, in good faith, for the use of any society incorporated or established for philosophical, literary, or religious purposes, or for the encouragement of the fine arts, or for the use or by the order of any college, academy, school, or seminary of learning in the United States.

Revised Statutes of 1874, Sec. 2505, Paragraphs 1708 and 1726, pp. 482, 487, U. S. Comp. Stat. 1901, p. 1625 (16 Stat. at L. 256, 268, chap. 255).

1708. Philosophical and scientific apparatus, instruments, and preparations, statuary, casts of marble, bronze, alabaster, or plaster of Paris; paintings, drawings, and etchings, specially imported, in good faith, for the use of any society or institution incorporated or established for philosophical, educational, scientific, or literary purposes, or encouragement of the fine arts, and not intended for sale.

1726. Regalia and gems, and statues and specimens of sculpture, where specially imported, in good faith, for the use of any society incorporated or established for philosophical, literary, or religious purposes, or for the encouragement of the fine arts, or for the use or by the order of any college, academy, school, or seminary of learning in the United States.

Act of March 3, 1883. (22 Stat. at L. pp. 488, 514, 520, chap. 121.)

(P. 514.) Paintings, in oil or water colors, and statuary not otherwise provided for, thir-

[45] *An examination of the provisions of the various statutes shows a somewhat uniform purpose on the part of Congress to provide free entry to casts of marble, bronze, alabaster, or plaster of Paris, and also statuary and specimens of sculpture, when specially imported, in good faith, for the societies enumerated in the acts. It is also seen that under the language used in these different paragraphs, which may be described as the "philosophical and scientific," [46] and the "regalia and gems" *paragraphs, some article might be admitted under either paragraph. There is no doubt that under the tariff acts prior to that of 1897, these figures could have been admitted free of duty, as "casts of plaster of Paris." Indeed, the Treasury Department had so de-

cided in a case hereafter cited. Those words, "casts of marble, bronze, alabaster, or plaster of Paris," which appear in all the statutes cited prior to 1897, in the philosophical apparatus paragraphs, are left out in the *act of 1897, paragraph 638, and [47] it is therefore urged that the figures are not entitled to free entry, as they are not casts of sculpture, provided for in paragraph 649. The question is, therefore, whether the omission of those words in paragraph 638 prevents the free entry of these figures, or are they properly described as casts of sculpture, and therefore entitled to free entry under paragraph 649.

We do not attach any very great importance, as evidence of the intention of Congress, to the omission in the act of 1897

ty per centum ad valorem. But the term "statuary," as used in the laws now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or of a sculptor only.

(P. 520.) (Free list.) Par. 759. Philosophical and scientific apparatus, instruments, preparatious, statuary, casts of marble, bronze, alabaster, or plaster of Paris, paintings, drawings, and etchings, specially imported, in good faith, for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or encouragement of the fine arts, and not intended for sale.

(P. 526.) (Free list.) Par. 771. Regalia and gems, statues, statuary, and specimens of sculpture, where specially imported, in good faith, for the use of any society incorporated or established for philosophical, literary, or religious purposes.

Act of October 1, 1890. (26 Stat. at L. pp. 567, 608, 609, chap. 1244.)

(P. 602.) Par. 465. Paintings, in oil or water colors, and statuary, not otherwise provided for in this act, fifteen per centum ad valorem; but the term "statuary," as herein used, shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only.

(P. 608.) (Free list.) Par. 677. Philosophical and scientific apparatus, instruments, and preparations; statuary, casts of marble, bronze, alabaster, or plaster of Paris; paintings, drawings, and etchings, specially imported, in good faith, for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or for encouragement of the fine arts, and not intended for sale.

(P. 609.) (Free list.) Par. 692. Regalia and gems, statues, statuary, and specimens of sculpture, where specially imported, in good faith, for the use of any society incorporated or established solely for educational, philosophical, literary, or religious purposes.

Act of August 27, 1894. (28 Stat. at L. pp. 509, 543, 544, chap. 349.)

(P. 542.) (Free list.) Par. 575. Paintings, . . . and statuary, not otherwise provided for in this act, but the term "statuary" as here-

in used shall be understood to include only professional productions, whether round or in relief, in marble, stone, alabaster, wood, or metal, of a statuary or sculptor.

(P. 543.) (Free list.) Par. 585. Philosophical and scientific apparatus, . . . statuary, casts of marble, bronze, alabaster, or plaster of Paris, paintings, drawings, and etchings, specially imported, in good faith, for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or for encouragement of the fine arts, and not intended for sale.

(P. 544.) (Free list.) Par. 603. Regalia and gems, statues, statuary, and specimens or casts of sculpture, where especially imported, in good faith, for the use of any society incorporated or established solely for educational, philosophical, literary, or religious purposes.

Act of July 24, 1897 (the present act). (30 Stat. at L. pp. 151, 201, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1687.)

(P. 194.) Par. 454. Paintings, . . . and statuary, not especially provided for in this act, twenty per centum ad valorem; but the term "statuary" as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only.

(P. 200.) (Free list.) Par. 638. Philosophical and scientific apparatus, utensils, instruments, and preparations, including bottles and boxes containing the same, specially imported, in good faith, for the use and by order of any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use or by order of any college, academy, school, or seminary of learning in the United States, or any state or public library, and not for sale, subject to such regulations as the Secretary of the Treasury shall prescribe.

(P. 201.) (Free list.) Par. 649. Regalia and gems, statuary, and specimens or casts of sculpture, where specially imported, in good faith, for the use and by order of any society incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, . . . and not for sale;

above referred to. The language used in paragraph 649 is very broad, including all casts of sculpture, as well those heretofore mentioned in paragraphs in prior statutes similar to paragraph 638 as others. The omission in the latter paragraph was, therefore, immaterial if these figures are casts of sculpture. Although they might heretofore have come in under the designation of "casts of plaster of Paris" as contained in former paragraphs, we think they also might have come in under the designation "casts of sculpture" contained in the act of 1894 as well as in the act of 1897, and that it was not intended by Congress, in omitting the words in the latter act as to casts of plaster of Paris, in paragraph 638, to prevent their free entry under paragraph 649. The language in paragraph 638 was simply unnecessary in a case where the same articles were entitled to free entry under another paragraph.

In attempting to understand the true construction of the words used in the act of 1897 we are not very greatly aided by the opinions given by various artists called by the government and contained in this record, as to what was the proper designation of the figures. These opinions varied, although based upon conceded facts as to the manner and process by which the figures were produced. According to some of them there were but two kinds of "casts of sculpture;" one where professional sculptures have their own original creations of clay reproduced in plaster of Paris for permanent use as models, and from which objects are sculptured in marble, stone, or other material; and the other, where casts in plaster of Paris are *produced from rare objects of sculpture, generally for use in museums or art institutes. Some regarded the term "sculpture so wide that it was difficult to define definitely," although they thought that the figures in question were not casts of sculpture, while some regarded casts of sculpture "as such classes of plaster casts or clay or marble or bronze as are to stand singly and alone, and not be sold in endless numbers, and to be exhibited temporarily in some exhibition." We think the last definition is inaccurate and inadmissible. Under this view, whether a figure is a cast of sculpture or not, does not in the least depend upon how it is made. It is the use to which it is destined which is to determine what it is in fact. If there are to be a great many of them, to be "sold in endless numbers," they are not casts of sculpture, no matter how they are made, and if they are to "stand singly" and "be exhibited temporarily" then they are such casts. We are not satisfied as to the correctness or completeness of this definition. Whether

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in one case the cast is for the use of the sculptor only or in the other is destined to be reproduced indefinitely, we think is not material. They are made in the same manner, reproduced from clay, and the same means or process is taken or employed in obtaining the result. Whether the clay model is the work of the superior genius of a great sculptor or is the result of the efforts of one who could not be classed as a genius at all, they are both fashioned in the same way and the same process is followed with regard to both, and we do not think that in this statute there was any intention to confine the meaning to casts of those clay figures which were fashioned by the hand of genius, while excluding those of inferior artists or workmen. The witnesses are not, however, all of one mind, even upon the meaning of the term. Some thought that these were casts of sculpture in a certain sense as long as they remained simply plaster casts, but just as soon as additional touches were given to the casts, in the way of paint or ornamentation, the casts lost their original character as plaster casts and became statuary in wood or alabaster or bronze. *At any rate, it would cease to be an article of clay and would become a finished thing. Just as soon as a cast of sculpture was painted it would, in the opinion of some of the witnesses, cease to be a cast of sculpture. [49]

Some of the artists said that you might take a cast of old sculpture, such as the *Venus de Milo*, and different antiques, and reproduce them in plaster, and they would be casts of old sculpture. But whether the figures in question here were casts of sculpture, some of the witnesses were not sure.

One witness for the government gave as his opinion that the figures in question were casts or specimens because they are sculpture. As to whether they were cast or moulded, he replied that he could not state definitely, but presumably they were casts.

Another witness for the government was not willing to swear that the figures were not casts of sculpture, while still another said that in his judgment the figures in question were plaster casts in sculpture. He also thought that they might be termed casts of sculpture. Another witness for the government thought they might be called casts of bad sculpture, and that they were such articles as he had heard artists call casts of sculpture.

This brief review of some of the evidence shows the difference of opinion among the artists themselves as to what would come within their understanding of the definition of the term "casts of sculpture." The artists evidently had a contempt for the figures as specimens of art, and very probably

that contempt was well founded; but, as we have said, the opinions really give no aid in considering whether the figures are or are not casts of sculpture. The description of the manner in which they are made, as set forth in the foregoing statement of facts, and also the evidence of the witnesses for the government, showing the unity of the method and process with that followed in the case of an admitted cast of sculpture, furnish us better means of determining the question in dispute than may be found in the opinions set forth in the record, and yet [50] some of *the witnesses do in fact, as we have seen, admit that the figures are casts of sculpture, bad though they may be.

The government also examined one or two witnesses who were agents or salesmen for manufacturers in this country of what they stated to be substantially the same class of figures as the ones under discussion, and in their catalogues describing the various articles for sale, figures such as these were generally designated as "statuary," and when taking orders for such goods they were called "statuary" or "composition statues."

One of the customs examiners also testified that for the last few years articles of the nature here in question had been returned on invoices to the collector as "church statuary composed of plaster, decorated, or pulverized cement and plaster." The witness used the expression "church statuary composed of" as having been given him by some superior officer, and it was accepted by him as such.

It will be observed that there is nothing in the tariff act which speaks of "church statuary" by name. We are not satisfied from this evidence that these figures are not casts of sculpture within the meaning of the statute, nor are we impressed with the statement of some of the witnesses that if, in what is termed their crude state, these figures might or would be described as casts of sculpture, they would cease to be such when painted or decorated. They are still, in substance, the same thing, whether painted or not. How does the mere gilding or painting alter their original character? Some little value has, perhaps, been added to them, but they yet remain what they were before the painting was done. Painting a marble statue does not alter its original substance, or give the subject a new definition or meaning. Some marble statues, the work of a great sculptor, have been slightly painted, under his own direction, for the purpose, as supposed, of imparting a more lifelike appearance to the statue, and of possibly thereby enhancing its value. But the statue remained a statue nevertheless.

It is so, as we think, in this case. The [51] painting or gilding *was done to render the

figures more fit for the only purpose of their importation,—that is, for use in a religious society. And it was the object, as we believe, of the statute to admit such works free of duty.

In case No. 5,549, Synopsis of Decisions of the Treasury Department, 1883, p. 41, it was said that the case related to certain images made of earthen substances which, on importation, were subjected to duty at the rate of forty per centum ad valorem, but were claimed in the protest filed to be dutiable at the rate of ten per centum ad valorem, under the provisions for "statuary" contained in schedule M, Revised Statutes, p. 478, § 2504, under heading "Paintings and Statuary;" the word "statuary," being defined as limited "to include professional productions of a statuary, or of a sculptor only." It appeared on the trial that the images were made at Munich by persons who professed to have made a study of the art of sculpture for many years, and who acted under the general supervision of an acknowledged sculptor. Several copies were made from one model, and in ordering them the importer designated which he wanted by the number of the article in a catalogue, and the price of the images varied from five to a hundred dollars.

The circuit court for the southern district of New York held that the articles were entitled to admission as statuary under the provision above mentioned, and the Department acquiesced in the opinion of the court. In that case the Department was of opinion that the works were obviously made by skilful men, and might come in even under the limitation of the word "statuary" as defined in the act.

It cannot be and is not claimed that the figures in question here could come in under the term "statuary," as that term is defined in the statute of 1897, paragraph 454, which is much more narrow than that of the Revised Statutes. The case shows, however, the tendency of the Department to a liberal construction of the tariff act in this regard.

On December 22, 1885 (Synopsis of Decisions of the Treasury Department, 1885, p. 513, No. 7,274), the question was submitted *as to whether figures similar to those under [52] consideration were entitled to free admission under the act of 1883. The Department held that they could not be regarded as "statuary" because of the limitation of the meaning of the word "statuary," as used in that act (22 Stat. at. L. 513, chap. 121), which provided that the word "statuary" "should be understood to include professional productions of a statuary or of a sculptor only," but that they might be admitted as casts of plaster of Paris under paragraph

759 of the free list. Paragraph 771 did not contain the words "casts of sculpture."

In Synopsis of Decisions, Treasury Department, July to December, 1891, vol. 2, p. 1164, there is contained a reply to the naval officer of New York relative to the proper classification of certain figures imported and claimed to be free of duty as statuary or as casts of plaster of Paris, imported for a church under paragraph 677, or as statues, statuary, or specimens of sculpture, under paragraph 692 of the tariff act of 1890. The Acting Secretary referred to the fact that the board of general appraisers had held that the restrictive definition in regard to "statuary" under paragraph 465 did not apply to such statuary as is specified in the free list. The language of that paragraph (465) the board held limited its definition of the term "statuary" to that paragraph alone. Continuing, the Secretary said:

"The Department believes that the crude or inartistic character of the figures under consideration cannot be urged as a reason for their exclusion from the benefits of free entry. It is fair to infer a liberal intention on the part of Congress from the fact of its inclusion of religious institutions among those to which the privilege of free entry is extended. Religious institutions are not schools of art, nor can congregations without adequate means always consult esthetic rules in regard to the equipment of their churches. It is the sentiment of pious associations which gives the figure its efficiency as an aid to religious worship, and the plaster cast may, in this way, be as servicable to the humble worshiper as the more costly work of genius."

- [53] *The subject was again before the Treasury Department on April 26, 1893. (Synopsis of Decisions, Treasury Department, 1893, p. 340.) As appears upon its face, the letter of the Secretary was in reply to a communication from the board of general appraisers, protesting against the free entry of articles of this nature under the act of 1890, because of the advantages thus given to the foreign dealer in these figures, some of whom had a store in Montreal, although the figures were manufactured in Munich, and the order was supplied from the Montreal store, and the board insisted that the figures were not entitled to such entry by the true construction of the statute. The Secretary, in reply, referred to what the board stated to have been the evident intention of Congress in the act that the "objects exempted from duty should be of such high order as to inspire admiration and devotional feeling," etc., and held that the views of the board might "apply to paragraphs 692 and 465, but not to paragraph 677,
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which provides (with the restriction enumerated in paragraph 465 and implied in paragraph 692) for the exemption from duty of all casts of plaster of Paris imported in good faith for the use of any society or institution incorporated or established for religious purposes."

It was further stated that "the Department cannot interpret the provisions of paragraph 677 as establishing in any respect the esthetic standard for such importations, and, without discussing the propriety of such standard, must administer the law according to its apparent intent." Also: "Under the last-named paragraph (677) it would appear that any plaster cast which should be regarded by a religious society as a desirable acquisition, and shall be classified by the collector as coming within the terms of that paragraph, may be imported free of all duty, without regard to its artistic character."

Looking at the various provisions in the tariff statutes, from and including 1861 to and including that of 1897, and taking into consideration the evidence in the record in this case, together with the action of the Treasury Department, as above referred to, the answer to the question of what is the *true meaning or construction of the words [54] "casts of sculpture," as used in the statute of 1897, is not perfectly clear. Some fair reason might, perhaps, be given for a construction which refuses free entry to these figures, but we think that the purpose of Congress was to permit their introduction free of duty as casts of sculpture, when specially imported, in good faith, for the use and by the order of any of the institutions named in the act. The paragraph in question (649) makes it necessary not only that the casts of sculpture should be specially imported, in good faith, for the use of a society, but it must be so imported *by the order* of such society. Here for the first time it is made necessary that the importation must have been *by order* of the society, which words are a still further limitation of the conditions upon the existence of which free entry is permitted.

It may well be that when the act of 1897 was drawn, its framers had in mind the objections above mentioned, made by the board of general appraisers, and therefore further limited the right of free entry to a special importation in good faith for the use *and by order* of the society, and to that extent protecting the interests of the "regular importers who sell from stock," while at the same time recognizing the policy of permitting a free entry to those societies who, in good faith, ordered the articles for their own special use.

We are of opinion that the evidence does

not justify the assertion that the articles in question were simply known in a commercial sense as "statuary," or "church statuary." The fact that figures of this nature were designated as statuary in a catalogue of a manufacturer in this country does not clearly or conclusively establish such commercial designation. They were also designated composition statues by the salesman when taking orders for them. If the articles were also known as "casts of sculpture," and such language correctly described them, then they would come within the statute, although some manufacturers in this country should, for purposes of a short and easy description, describe them in the [55] catalogues as "statuary," *or "composition statues." It seems to us they answer the description of casts of sculpture, and are properly described as such in the act.

This provision of the statute should be liberally construed in favor of the importer, and if there were any fair doubt as to the true construction of the provision in question, the courts should resolve the doubt in his favor. *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *Rice v. United States*, 4 C. C. A. 104, 10 U. S. App. 670, 53 Fed. 910.

The judgments of the Circuit Court of Appeals of the Second Circuit and of the Circuit Court in the Southern District of New York are reversed, with directions to the Circuit Court to reverse the decision of the board of general appraisers and of the collector, and to direct the collector to admit the figures to free entry.

So ordered.

POSTAL TELEGRAPH-CABLE COMPANY, *Plff. in Err.*,
v.

BOROUGH OF NEW HOPE.

(See S. C. Reporter's ed. 55-64.)

Commerce—validity of state tax on telegraph poles and wires.

A judgment of a state court in an action to recover license fees on poles and wires of an interstate telegraph company, which awards to a municipality a considerably less sum than was due if the ordinance imposing such fees was valid, being for the same sum found

to be due by the verdict of the jury to whom the question of the reasonableness of the ordinance had been submitted for the court's guidance, with directions to give a verdict for the full sum if they thought the ordinance was reasonable, otherwise to find for defendant,—will, on writ of error from the Supreme Court of the United States, be held illegal and void because based upon an exercise of the police power which the court and jury by their action must be deemed to have determined to be unreasonable, and therefore invalid.

[No. 92.]

Argued December 11, 1903. Decided January 4, 1904.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Superior Court of that State, which had affirmed a judgment of the Court of Common Pleas of Bucks County, awarding to a municipality, in an action to recover license fees on the poles and wires of an interstate telegraph company, a less sum than was due if the ordinance imposing such fees was valid. *Reversed* and remanded for further proceedings.

See same case below, 202 Pa. 532, 52 Atl. 127.

Statement by Mr. Justice **Peckham**:

The borough of New Hope in January, 1899, commenced an action against the telegraph company, the plaintiff in error herein, to recover from it the sum of \$552, with interest from the respective times in which portions of the amounts became due, the total charges being due from the defendant, as alleged, on account of a license fee taxed by the borough (by virtue of an ordinance to that effect) of \$1 for each pole and of \$2.50 for each mile of wire used in the borough by the company, the license to be applied for and the fee to be paid annually.

The company made what is termed in the record an affidavit of defense, which, among other things, averred that it was a corporation organized under the laws of the state of New York, and had accepted the act of Congress, approved July 24, 1866 (14 Stat. at L. 221, chap. 230, relating to the construction of telegraph lines over any post road of the United States), and that its poles and wires through the borough of New Hope were employed and operated in the transmission of messages between the different states, and were therefore instruments of commerce; that the amount of the charges claimed to be due from the defendant under the ordinance was unreasonable, unjust, and excessive; that the fee was sought to be justified as a license merely, but that the amount thereof was wholly disproportionate to the usual, ordinary, and

NOTE.—On corporate taxation in the United States as affected by the commerce clause in the Federal Constitution—see note to *Sandford v. Poe*, 60 L. R. A. 641.

As to the validity of charges on telegraph and telephone poles and wires—see note to *Western U. Tele. Co. v. New Hope*, 47 L. ed. U. S. 240.

necessary expenses of inspecting and supervising the poles and wires imposed upon the borough of New Hope, and was largely in excess thereof, and the fee was also largely in excess of any additional liability of that kind and character imposed upon the borough in looking after the safety of the poles and wires and to see that they were properly maintained, and was also in excess of any further liability which might or could arise to the borough by reason of any [57] injuries *to persons or property which might arise, or may have arisen, by reason of the erection of the poles and the stringing of the wires within the limits of the borough. It was further stated that the charges were more than ten times the amount of all kinds and character of expenses and liability which might have been incurred by the borough by reason of these poles and wires, and that, in view of those circumstances, the assessing of the license tax upon the telegraph company was for the purpose of raising and producing revenue, and was therefore void.

The company averred that it had paid the commonwealth of Pennsylvania all taxes upon the value of its poles and wires, as included in and represented by its capital and upon the gross receipts derived from the use thereof, and it had paid its taxes upon its property in the borough of New Hope. That the expenses incurred by the borough during the period covered by the claim practically amounted to nothing, so far as regarded inspection and supervision.

The parties proceeded to trial, and the borough having proved the passage of the ordinance, and the number of poles and the number of miles of wire as claimed in the complaint, thereupon rested.

The defendant proved that the only work done by the employees of the borough in regard to the poles and wires of the company during the four years included in the claim was to count the poles each year for the purpose of assessing the tax; that no other service on the part of the borough was performed under its police powers, or at all, in regard to inspection. The defendant also showed that it was an interstate telegraph company; that it had no public office in the borough, nor had there been any commercial office therein during the time in question; that there was no office in which business was received for which tolls were charged.

It was proved, also, that the entire value of the line of the company in the borough of New Hope (that is, the cost of the material and construction) amounted to less [58] than \$800, and *that the claim of the borough, graduated by the number of poles in the borough and the number of miles of

wire strung on them, amounted to \$138 per year, or to 17 per centum of the cost of the line in the borough.

The company also proved that it employed servants, whose duty it was to erect the poles, and string the wires, and inspect and watch them, and keep them in proper repair and in safe condition; that the authorities of the borough did nothing whatever in the way of inspection of the lines.

The trial judge charged the jury, among other things, that the question which arose in the evidence in the case was that of the validity of the ordinance, to be determined by the amount and character of the charges against the company; that the borough had the right to enact such police regulations as might be necessary and reasonable in the government of the town, but in regard to the taxing question it had no right to go beyond the exercise of what was termed its police power; that if the ordinance was unreasonable in amount, it was void; that the power to demand the license fee must be exercised as a means of regulation, and cannot be used as a source of revenue, and that, when exacted as a police power, it must be limited to the necessary and proper expenses of issuing the license and of inspecting and regulating the business the license covers; that the borough had the right to impose such conditions and regulations as are necessary for the general protection of the streets and the uses of the same in the borough; that in doing this the borough could not be questioned, provided the license fee was a reasonable and just one, and a proper one under the circumstances, and commensurate with the probable requirements and exercise of the police or supervisory power of the borough. The court then said that it had a great deal of doubt as matter of fact and law as to whether this was a reasonable subjection or not, and it was frank to say:

"That we are inclined to the view that this is an arbitrary imposition of a license or tax rate. But it appears that our *brethren [59] upon the bench in other localities have adjudged that similar rates are not unreasonable or unnecessary; but it is argued upon the part of the defense that in those cases there was not the same proof as has been developed here. There was not shown as clearly as there is here that the amount of money received as the result of the license was a clear revenue, irrespective of any requirement for police regulation. In other words, that this borough seems to have imposed a license fee to be expended and used in the exercise of a power and a duty which it has failed to exercise at all. Now then, gentlemen, while the question as to whether an ordinance is reasonable or not

is for the court, and the court does not propose to evade that question, yet I have concluded to obtain the assistance and judgment of this jury as to whether an assessment, such as this is, under the circumstances of this case, is reasonable or unreasonable under the law, as I have laid it down, for this surely involves the facts. Now, if you believe that it is unreasonable according to the facts, you will render a verdict for the defendant; if you believe that it is reasonable and should be paid in the full amount, you will render a verdict for the plaintiff for the amount of its claim, and the court hereafter will regulate judgment in accordance with such views, either upon a motion for a new trial or otherwise, as we shall entertain after having this opinion from you, in aid of its judgment, and to determine the doubt on the facts."

The court further stated:

"The borough of New Hope had no right to impose any charge for the privilege of erecting and maintaining said poles and wires in said borough except only such sum as will reasonably cover and reimburse to it the expense to it which it may be subjected in consequence of the erection and maintenance of said poles and wires, and if the license fees sued for in this case exceed said sum, your verdict shall be for the defendant."

Instead of finding a verdict for the amount due under the ordinance, or else a verdict for the defendant, as directed by [60] the court, the jury on October 17, 1899, found a verdict for \$466.40. The trial judge directed judgment to be entered for the borough for the amount of the verdict. From that judgment an appeal was taken by the company to the superior court of Pennsylvania, which affirmed the same, that court holding that, the facts being undisputed, the question of the validity of the ordinance was for the court to decide, and that if, on the undisputed facts, the court would not have been warranted in declaring the ordinance void, the submission of the question of its reasonableness to the jury was an error of which the defendant had no just right to complain, and the court held that it would not have been justified by the precedents in declaring the ordinance void.

The supreme court affirmed the judgment of the superior court, and upon the question that the verdict of the jury was for a less sum than the ordinance called for, said that was a matter of which, under the view of the law taken by the court (that the question of reasonableness was for it), the plaintiff might complain, but that it was such good luck for the defendant that

it might well rest satisfied. The company thereupon sued out this writ of error.

Mr. Frank R. Shattuck argued the cause and filed a brief for plaintiff in error.

Mr. William C. Ryan argued the cause and filed a brief for defendant in error.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court:

The ground upon which an ordinance of this nature may be upheld is stated in the two cases of *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204, and *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

The trial court held that the question whether the ordinance in this case was reasonable or not was one for the court, but he submitted it to the jury for their aid, and as advisory only, the court stating to the [61] jury that it would thereafter regulate the judgment to be entered in accordance with such views as the court might entertain as to the reasonableness of the ordinance, and after having the benefit of the assistance of the jury upon that question.

The direction to the jury was to give a verdict for the full sum, if they thought that the ordinance was reasonable, and if not,—that is, if the jury thought that the ordinance was not reasonable,—then the verdict should be for the defendant. The jury did not obey that direction. It returned a verdict for a considerably less sum than was due if the ordinance were valid, and by such verdict (regard being had to the charge of the judge) it necessarily found the license fee provided for in the ordinance was unreasonable and the ordinance itself invalid. The verdict is, therefore, simply evidence of what the jury conceived to be a reasonable sum, which it thereupon proceeded to assess by its verdict, and being much less than the ordinance called for. It made itself a taxing body, the verdict being the result of its own views as to what the fees should have been. When the verdict was rendered, and the court directed judgment to be entered thereon, it must have thereby concurred with the jury, and held the ordinance unreasonable and therefore void. Otherwise, if the ordinance was valid, the court would have directed judgment for the full sum, without reference to the verdict. Finding, therefore, that the ordinance was void, instead of directing judgment for the defendant, the court followed the jury, and directed judgment for the sum which the court regarded as reasonable, being the same

sum found by the jury. This follows, because the court had theretofore stated that, in its view, this ordinance was an arbitrary imposition of a license tax, and the court also announced that the verdict of the jury was not conclusive, and would be acted upon by him in accordance with such views as he might entertain after the verdict was rendered. But neither the court nor the jury had any power whatever to give judgment for what either might regard a reasonable sum, if that *sum were less than the amount provided for in the ordinance. The source of jurisdiction to give any verdict or judgment for the plaintiff was the ordinance. If the amount of the license fee provided for therein was unreasonable, the ordinance was void, and there was no power in either jury or court to substitute its own judgment as to what was reasonable, and to give a verdict or direct a judgment to be entered for that sum. Finding the sum named in the ordinance unreasonable, the verdict or judgment should have been for the defendant.

The argument that plaintiff alone can complain that the verdict is too small is not well founded in this instance. It is undoubtedly the general rule that a verdict or judgment for a less sum for the plaintiff than he is entitled to under the evidence is matter of complaint for him alone, and if acquiesced in by him the defendant has no cause to complain that he is charged for a less sum than he ought to have been. On grounds already stated the reasons do not apply in a case like this.

Both the superior and the supreme courts of Pennsylvania proceeded in their decisions upon the theory that the question was for the court, and that the ordinance was valid; but as the jury had found a less sum than provided for by the ordinance, the judgment might stand, and the defendant could not in such event complain that the judgment was too small. Those courts in effect reverse the finding of the jury that the ordinance was unreasonable and void, while at the same time maintaining a judgment based upon such finding.

In *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204, the question of the reasonableness of the license fee exacted was left to the jury, and the jury found a verdict in favor of the plaintiff, and judgment was rendered thereon, which was affirmed by the state courts upon appeal. Upon writ of error from this court the case was reviewed here, and it was held that, as the jury and the court of common pleas, the superior court, and the supreme court of Pennsylvania had all held the ordinance reasonable, this court would *not say it was so

manifestly wrong as to justify our interpolation.

There is a difference, however, between such a case and one like this, where the jury and the trial court have, in effect, held the ordinance void, and a judgment has been entered which is unauthorized in any event, and which should have been for the defendant. Where it is a question of amount in an ordinance in a case like this, we have held that it is not improper to submit that question to a jury, although in general the reasonableness of an ordinance is matter of law for the court. *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

In the case cited it was stated by Mr. Justice Brewer, speaking for the court, at page 166, L. ed. p. 1001, Sup. Ct. Rep. p. 819, as follows:

"It may be conceded that, generally speaking, whether an ordinance be reasonable is a question for the court. As said by Judge Dillon, in his work on Municipal Corporations, 4th ed. vol. 1, § 327: 'Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury, and evidence to the latter on this subject is inadmissible.' While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed, and in respect to which there is contradictory testimony."

We think that in this case, like that just cited, it was not improper to submit the question to the jury, and that the verdict necessarily found the license fee exacted by the ordinance unreasonable, and the ordinance itself was therefore void. The jury could not itself assess a tax and render verdict for the amount it might judge reasonable. A judgment entered upon such a verdict for the amount thereof was improper and illegal, as it should have been for the defendant, the ordinance being void.

*The judgment of the Supreme Court of [64] Pennsylvania should be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Harlan and Mr. Justice Brewer dissented.

POSTAL TELEGRAPH-CABLE COMPANY, *Plff. in Err.*,

v.

BOROUGH OF TAYLOR.

(See S. C. Reporter's ed. 64-73.)

Commerce—validity of state tax on telegraph poles and wires.

An ordinance imposing a license fee on the poles and wires of an interstate telegraph company is not a valid exercise of the police power, where the municipality has made no inspection, and has neither paid out any money nor incurred any expense for that purpose, and the fee is twenty times the amount of any expense that might have been reasonably and fairly incurred to make the most careful, thorough, and efficient inspection and supervision possible, and for all measures and precautions that possibly could be required to be taken by the municipality for the safety of its citizens and the public.

[No. 93.]

Argued December 11, 1903. Decided January 4, 1904.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Superior Court of that State, which had affirmed the judgment of the Court of Common Pleas of Lackawanna County, awarding to a municipality the amount of a license fee imposed by it upon the poles and wires of an interstate telegraph company. *Reversed* and remanded for further proceedings.

See same case below, 202 Pa. 583, 52 Atl. 128.

Statement by Mr. Justice Peckham:

The plaintiff in error seeks to review the judgment of the supreme court of Pennsylvania, which affirmed the judgment of the superior court of that state, which in its turn affirmed the judgment of the court of common pleas of Lackawanna county, in favor of the defendant in error in an action brought by it to recover the amount of a license fee imposed upon all telegraph, telephone, and electric light companies having poles and wires in the borough. The ordinance was of the same nature as that mentioned in the immediately preceding case of *Postal Teleg. Cable Co. v. New Hope*, 192 U. S. 55, *ante*, 338, 24 Sup. Ct. Rep. 204.

NOTE.—On corporate taxation in the United States as affected by the commerce clause in the Federal Constitution—see note to *Sandford v. Poe*, 60 L. R. A. 641.

As to the validity of charges on telegraph and telephone poles and wires—see note to *Western U. Teleg. Co. v. New Hope*, 47 L. ed. U. S. 240.

By the plaintiff's statement of its claim against the defendant, the telegraph company, it sought to recover from the company the sum of \$220.50, including interest from January 31, 1898.

*The defendant is a corporation engaged [65] in interstate commerce by transmitting telegraphic communications among the several states, and by its affidavit of defense it averred that it was a company engaged in forwarding telegraphic dispatches among the several states, and was a corporation organized under the laws of the state of New York; that it had paid the commonwealth of Pennsylvania all taxes which had by legislative enactment been levied upon the value of its poles and wires erected and maintained in the borough of Taylor and elsewhere in the state; that it had accepted the act of Congress (14 Stat. at L. 221, chap. 230), providing for the construction of telegraph lines over any post road of the United States; that it had never maintained, and does not now maintain, any office whatever in the borough of Taylor, and that no telegraphic business of any kind is done or transacted by the defendant in that borough, except the maintenance of the telegraphic lines and the transmission of telegraphic messages over the same from other places; that the ordinance in question is unreasonable, unjust, and excessive, and is illegal and void, because it is designed and intended to provide revenue by taxation for the general expenses of the borough, and that no other object than this exists, or has at any time existed, for the regulations imposed by the ordinance; that the borough is under no expense whatever in issuing the license required by the ordinance, and has not been at any time before, during, or after the period mentioned in the plaintiff's statement for which it makes demand, under any expense or charge of any kind whatsoever in inspecting and regulating the poles and wires; that the license fees imposed by the ordinance are not based upon the cost and expense to the borough for inspection and supervision or regulation of the defendant's lines and business, but the fees are imposed notwithstanding they are more than twenty times the amount that might have been or could possibly be incidental to such inspection, supervision, and regulation, together with all reasonable measures and precautions that might have been or possibly could be required to be taken by *the said borough for the safety of [66] its citizens and the public, or which might have been or possibly could be incurred as expenses for the most careful, thorough, and efficient inspection and supervision that might have been made of the poles and wires of the defendant, although the plaintiff has

not and does not maintain any inspection and supervision or care whatsoever over the poles and wires of the defendant, and has incurred no expense whatever on account thereof; that the borough is a sparsely populated district, and the land therein of small value, and most of the land along the highway on which the telegraph lines are constructed is not adapted to building purposes nor commercial use, and the highway is little traveled; that the borough is a coal-mining community and the buildings therein consist for the most part of the coal miners' cabins or houses of one or two stories, and the business buildings are scattered and consist mostly of small shops or stores; that the poles and wires thereon are located on the side of the highway and do not interfere in the slightest degree or to any extent with its use for all highway purposes, and do not interfere with any kind of traffic or with the operation of men or apparatus in extinguishing fires; that the line is not old, decayed, or worn out, but, on the contrary, is comparatively new and sound, and there is no danger of accident from the decay or breaking down of the poles and wires; that the license fees imposed by the ordinance are twenty times more than could be imposed under any power existing in the borough to make charges for all legal purposes; that the amount of the license fees imposed under the ordinance for each year largely exceeds the entire cost to the defendant itself of maintaining said line, including all repairs, reconstruction, cost of labor and material, and traveling expenses of the employees, and all expenses incurred by the defendant by a careful and efficient inspection and maintenance of such poles and wires; that the fees imposed by the ordinance are so excessive that if every borough in the state of Pennsylvania in which defendant has a telegraph system should pass similar ordinances the total amount collected *would exceed \$100,000 per annum, and if the same kind of an ordinance should be passed in the other states by the municipalities in which the poles and lines of the company are placed it could not pay the amount, but would become insolvent by reason of the fact that the expenses of operation, including the license fees, would be far in excess of the receipts of the defendant.

[67] To this affidavit of defense the plaintiff excepted on the ground that it did not state any sufficient defense to plaintiff's cause of action, and also on the ground of *res judicata*, in that the same questions had been theretofore decided between the same parties in the courts of the state.

A rule for judgment was taken by the
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plaintiff for want of a sufficient affidavit of defense, and, upon hearing, the rule was made absolute (the facts set forth in the affidavit of defense being thereby assumed), and judgment for the plaintiff being entered, it was affirmed by the superior and supreme courts of Pennsylvania.

Mr. Frank R. Shattuck argued the cause and filed a brief for plaintiff in error:

What is reasonable in one municipality may be oppressive and unreasonable in another. In determining this question the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be obtained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country.

Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

It has been repeatedly held in the state of Pennsylvania that all of the averments contained in an affidavit of defense must be treated as established facts.

Smyth v. Miller, 174 Pa. 639, 34 Atl. 210.

Mr. John M. Harris argued the cause, and, with *Mr. E. O. Wagenhorst*, filed a brief for defendant in error:

A borough in Pennsylvania may, by ordinance, impose upon telegraph companies a reasonable license fee for the poles and wires maintained by them in the limits of the borough.

McKeesport v. McKeesport & R. Pass. R. Co. 2 Pa. Super. Ct. 242; *Millerstown v. Bell*, 123 Pa. 151, 16 Atl. 612; *Frankford & P. Pass. R. Co. v. Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242; *Taylor v. Postal Tel. & Cable Co.* 16 Pa. Super. Ct. 345; *Johnson v. Philadelphia*, 60 Pa. 445.

The provisions of the ordinance do not obstruct commerce; they aid it.

Adams Exp. Co. v. Ohio, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The power to enact laws regulating the internal commerce of a state, and those which respect turnpike roads, has never been surrendered to the general government.

Gibbons v. Ogden, 9 Wheat. 203, 6 L. ed. 23.

A license tax is not a regulation of commerce.

Osborne v. Mobile, 16 Wall. 479, 21 L. ed. 470; *License Tax Cases*, 5 Wall. 462, 18

L. ed. 497; *License Cases*, 5 How. 504, 12 L. ed. 256.

The collection of revenue is not the object of the ordinance. It is therefore a proper police regulation.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

A telegraph company may not, relying on the post-roads act, occupy the streets of a municipality without compensation to the municipality.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

Telegraph companies enjoying the privileges of the act of July 24, 1866, do so in subordination to the due exercise of the police power of the state in which their lines are situated.

Richmond v. Southern Bell Teleph. & Teleg. Co. 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778.

There is no arbiter in such case, beyond the state itself, to determine what legislation is just.

Potter's Dwarr. Stat. ed. 1871, pp. 445-456.

The 14th Amendment to the Federal Constitution did not take from the states the police power reserved to them at the time of the adoption of the Constitution.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Cooley*, Const. Lim. p. 239.

The ordinance is uniform and operates alike on all, and is, therefore, a proper state regulation.

Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

Every phase of the matter here presented has been passed upon and finally adjudicated in this court.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, Reaffirmed in *Postal Teleg. Cable Co. v. Baltimore*, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 356; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The grounds of our jurisdiction to review the judgment in this and the preceding case are similar to those which sustained it in the two cases of *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23

Sup. Ct. Rep. 204, and *Atlantic & Pacific Teleg. Co. v. Philadelphia*, 190 U. S. 160, 45 L. ed. 995, 23 Sup. Ct. Rep. 817. By reference to the opinions delivered in the state courts in this case it is apparent that it was not decided upon any question of *res judicata*, as set forth in the plaintiff's exceptions to defendant's affidavit of defense.

*In the opinion of the superior court of [68] Pennsylvania it was stated:

"Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts, and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise, and the expense of the same. Such a decision becomes a precedent which is to be regarded in other cases similarly situated. Were it to be held otherwise, the law upon the subject would be in hopeless confusion and uncertainty. We make these remarks because we cannot escape the conclusion that some of the averments of the affidavit of defense are, in reality, but the opinion of the defendant, undoubtedly honestly entertained, as to these matters. They are not stronger than the averments in *Philadelphia v. American U. Teleg. Co.* 167 Pa. 406, 31 Atl. 628, and the other facts averred do not distinguish the case from others in which a similar fee in boroughs has been held to be not so obviously excessive as to warrant the courts in declaring the ordinance void. The cases are collected in the opinion filed herewith in the case of *New Hope v. Western U. Teleg. Co.* 202 Pa. 532, 52 Atl. 127." [Reported in 202 Pa. 583, 52 Atl. 128.]

The opinion referred to by the superior court is also contained in the record, and cases were cited in that opinion from the state courts holding that they would not declare an ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities. The court further remarked:

"In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportionate *to the burden imposed upon [69] the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a

police regulation. None of the cases laid down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case with the facts of some of the cases above cited, we have been led to the conclusion that the court would not have been justified by the precedents in declaring the ordinance void."

Upon the averments in the affidavit of defense, which in this proceeding must be taken to be true, we can come to no other conclusion than that the ordinance was void because of the unreasonable amount of the license fee provided for therein.

It was urged on the argument that this ordinance was a proper police regulation, and that the collection of revenue was not its object; that it was the duty of the borough officials to protect the lives and property of its citizens, and that in the discharge of such duty it had the right to constantly inspect the poles and wires for the purpose of seeing that they were safe.

There is no doubt that, for the purpose mentioned, the borough had the right claimed by its counsel. The averments of the affidavit of defense, however, show that no such duty has been discharged or attempted to be discharged by the borough. It has done absolutely nothing to protect the lives or property of its citizens by inspecting the poles and wires of the defendant.

In *Atlantic & Pacific Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817, it was held that the testimony in a case like this might be such as to compel a decision one way or the other, and the court might then be justified in directing a verdict. We think this is one of those cases. We assume that a tax of this kind ought to be large enough to cover all expenses of police supervision of the property and instrumentalities used by the company in the borough, and that it is not [70] bound to furnish such supervision *for nothing, but may, in addition to ordinary property taxation, subject the corporation to a charge for the expenses of the supervision. The borough is also not compelled to make its expenditures for these purposes in advance of demanding the tax from the defendant, but it must be remembered that such a tax is authorized only in support of police supervision; and, if it were possible to prove in advance the exact cost, that sum would be the limit of the law. As, in the nature of things, this is ordinarily impossible, the municipality is at liberty to make the charge enough to cover any reasonably anticipated expenses, and the payment of the fee cannot be avoided because it may subsequently appear that it was

somewhat in excess of the actual expense of the supervision, nor can the company then recover the difference between the amount of the license fee and such cost. These observations are substantially reproduced from the opinion of the court in *Atlantic & Pacific Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817, delivered by Mr. Justice Brewer.

We come, then, to an examination of the question whether this fee, in the light of the admitted facts set forth in the affidavit of defense, can, by the widest stretch of imagination, be regarded as reasonable. The borough is, where the poles are planted and the wires stretched, sparsely settled, and the danger to be apprehended from neglect in regard to the poles and wires is reduced to a minimum. The borough has in fact done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any such purpose. It has incurred no liability to pay any expenses arising from inspection or supervision on its behalf. The fee itself is twenty times the amount of expense that might have been reasonably and fairly incurred to make the most careful, thorough, and efficient inspection and supervision that might have been made of such poles and wires, and for all reasonable measures and precautions that possibly could be required to be taken by the borough for the safety of its citizens and the public. This is not a mere expression *of opinion. It is the averment of [71] a fact. The company knows the amount it costs for the inspection, which it avers is made by its own servants, and which it avers is a most careful and efficient inspection, one intended to place and maintain the poles and wires in a perfectly safe and satisfactory condition. Knowing that cost, and comparing it with the amount demanded under the ordinance, it is enabled to state as a fact, and not as a mere opinion, that the amount of the license fee exacted under the ordinance is, as stated, twenty times more than it ought to be to secure a reasonable, efficient, and most careful inspection, as set forth in the affidavit mentioned.

In *Chester City v. Western U. Teleg. Co.* 154 Pa. 464, 25 Atl. 1134, cited in *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 425, 47 L. ed. 240, 244, 23 Sup. Ct. Rep. 204, it was said that the affidavit in that case averred that the rates charged were at least five times the amount of the expenses involved in the supervision exercised by the municipality. The supreme court held that while that averment must be admitted to be true, it did not go far enough, because it referred only to the usual, ordinary, and necessary expenses of the municipal officers

in issuing the license and other expenses thereby imposed upon the municipality, and that it made no reference to the liability imposed upon the city by the erection of the telegraph poles. It was also stated by the court that it is the duty of the city to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of the neglect of such duty an action might lie against the city for the consequences of such neglect. The court said it was a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city in a particular year to the particular purposes specified in the affidavit.

The affidavit in this case goes much further. It includes not only the expenses that might have been incurred for an ordinary inspection, supervision, and regulation, but takes into account the very matters [72] that are spoken of in the extract from *the opinion of the supreme court of Pennsylvania (*supra*). Instead of the averment that the license fee charged was at least five times the amount of the expense involved in the supervision exercised by the municipality, it is stated that it is more than twenty times the amount that would reasonably be expended for the purposes stated in the affidavit.

The liability to pay for injuries that might arise from the bad condition of the poles and wires, arising from the neglect of the company to inspect and supervise the same, is not a liability which the municipality is entitled to recover from the company in advance of its happening, but it is simply one of the reasons for an inspection by the borough, which shall be most carefully and continuously performed, in order that injuries may not arise from the neglect of such supervision.

When we come to an examination of the grounds upon which this kind of a tax is justifiable, and when we find that, in this case, each one of those grounds is absent, how is it possible to uphold the validity of such an ordinance? To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet, because it is said to be an inspection measure, the court must take it as such and hold it valid, although resulting in a rate of taxation which, if carried out throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is

thus to be declared legal upon a basis and for a reason that do not exist in fact.

We think the court is not bound to acknowledge an ordinance such as this to be valid in face of the facts stated in the affidavit of defense. Confessedly there has been here no inspection, no expense incurred to provide for one even though not made, and all expenses and liabilities that might fairly and reasonably be incurred on the part of the borough are not one twentieth of the amount it exacts for an inspection which it has not made. *Under such facts it would [73] seem to be plain that the ordinance was adopted as a means for the raising of revenue, and not to repay expenses for inspection.

Judging the intention of the borough by its action, it did not intend to expend anything for an inspection of the poles and wires, and did intend to raise revenue under the ordinance. Courts are not to be deceived by the mere phrasology in which the ordinance is couched, when the action of the borough, in the light of the facts set forth in the affidavit, shows conclusively that it was not passed to repay the expenses or provide for the liabilities incurred in the way of inspection or for proper supervision.

We are of opinion that, upon the averments contained in the defendant's statement of defense, the defendant was entitled to judgment. *The judgment of the Supreme Court of Pennsylvania is, therefore, reversed*, and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice Harlan and Mr. Justice Brewer dissented.

CITIZENS' BANK OF LOUISIANA, *Plff.*
in *Err.*,
v.

CALEB H. PARKER, Tax Collector of the
First District of the City of New Orleans.

(See S. C. Reporter's ed. 73-93.)

*Error to state court — Federal question—
taxation — contract exemption.*

1. The jurisdiction of the Supreme Court of

NOTE.—On writs of error from United States Supreme Court to state courts—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998, and Re Buchanan, 39 L. ed. U. S. 884.

On taxation of capital stock of corporations in the United States—see note to State Bd. of Equalization v. People, 58 L. R. A. 513.

As to the effect of the contract clause in the Federal Constitution upon corporate taxation in the United States—see note to Adams v. Yazoo & M. Valley R. Co. 60 L. R. A. 33.

the United States to review a judgment of the highest court of a state sustaining a license tax imposed on a banking business cannot be defeated on the theory that such judgment rests upon non-Federal grounds sufficient to sustain it, even assuming that the state court rests its decision upon the grounds that by reason of the bank's acceptance of a certain state statute, and by virtue of an act extending its charter, it became subject to certain constitutional provisions authorizing or requiring the payment of such a tax, where the bank pleaded that at the time of the imposition of the tax it had a contract exemption from taxation.

2. The contract exemption from any tax on the capital stock of the Citizens' Bank of Louisiana, created by the provisions of its charter as amended by La. act January 30, 1836, § 4, that "the capital of said bank shall be exempt from any tax," must be deemed to include an exemption from the imposition of a license tax for the carrying on of the banking business,—especially since the bank was incorporated to aid the agricultural interests of the state, and the state assisted by a loan of its credit, and retained partial control of the bank's directorate.

[No. 2.]

Argued October 15, 1902. Ordered for re-argument December 8, 1902. Reargued October 28, 1903. Decided January 4, 1904.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which reversed a judgment of the Civil District Court for the Parish of Orleans sustaining the defense of a bank to a suit for the recovery of a license tax, based upon a claim of a contract exemption from taxation. *Reversed* and remanded for further proceedings.

See same case below, 52 La. Ann. 1086, 27 So. 709.

Statement by Mr. Justice **McKenna**:

This suit was instituted in the civil district court for the parish of Orleans for the recovery of the sum of \$2,400, claimed to be due from the bank for the year 1894 as a license tax for carrying on a banking business. The license is claimed to have been authorized by the following provision of act No. 150 of the general assembly of Louisiana of 1890: "That for each business of carrying on a bank, banking company, association, corporation, or agency, the license shall be based on the declared or nominal capital and surplus, whether said capital and surplus is owned, or in use, or on deposit in the state or elsewhere, as follows, to wit: . . . Ninth class. When the said declared or nominal capital and surplus is four hundred thousand dollars or more, and under six hundred thousand dol-

lars, the license shall be four hundred and fifty dollars (\$450.)" [La. Rev. Laws, p. 835.]

The bank pleaded the general issue and that it was exempt from paying such license by the provisions of its charter, granted in 1833, and by § 4 of the act of January 30, 1836, amending the charter, by which it was provided that "the capital of said bank shall be exempt from any tax laid by the state, or by any parish or body politic, under the authority of the state, during the continuance of its charter." It was alleged that the charter of 1833 and the amendment of 1836 were granted for a valuable consideration, and constituted a contract between the state and the bank, and that the act imposing the license impaired the obligation of the contract, and was therefore violative of the Constitution of the United States. Certain judgments were also plead-^[75] ed as *res judicata* and introduced in evidence, one of which was the decree of this court in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

The trial court sustained the defense of the bank, based on its claim under its charter, but did not pass on the plea of *res judicata*. The court observed: "I pass only on the main issue raised, without reference to the defendant's plea of *res judicata*, inasmuch as it does not appear that the issue of exemption from a license tax has been presented in any of the cases and judgments relied on to support the plea."

Judgment was entered, dismissing the demand of the state. It was reversed on appeal to the supreme court, the court, however, dividing. 52 La. Ann. 1086, 27 So. 709. Elaborate opinions were delivered both by the majority and minority of the court. All of the contentions of the bank were held to be untenable, but the members of the majority did not agree upon the grounds. Mr. Justice Monroe, with whom concurred the Chief Justice, placed his decision on three grounds: (1) The plea of *res judicata* could not be sustained, because the validity of a license tax was not involved in the decrees or judgments pleaded. (2) License taxes were distinguishable from taxes on property, and the bank was not exempt from the former by its charter. (3) The act of 1874, extending the charter from 1884 to 1911, was to take effect in 1884, from which it was deduced: "First, that the extension thus granted could add nothing not authorized by the constitution of 1868, under the dominion of which the act was passed, and which required the payment of a license; second, that the grant, to take effect in 1884, became subject to the constitution adopted in 1879, which also re-

quired, or authorized the legislature to require, the payment of the license." (4) Even if this were not so, the acceptance by the bank of the act No. 79 of 1880 "specifically and in terms subjected it to the Constitution of 1879, and thereby placed it out of the power of the legislature to exempt it from the payment of the license imposed on other institutions of the same class."

[76] *Mr. Justice Watkins delivered a separate opinion, and placed his concurrence on the distinction between a license tax and a property tax, and said that "the conclusion is perfectly clear that a property tax was only in contemplation of the legislature in framing that exemption." And also said that the license law under which the state proceeded "does not conflict with the contract clause of the Federal Constitution by impairing the contract rights of the defendant bank under its charter." Concluding his opinion, the learned justice observed:

"In my view, it is unnecessary for this court to go into any discussion of the constitutional questions raised and adverted to in the opinion of the majority, for the reason that, on the face of the charter exemption, which the bank pleads, its liability is apparent.

"It is my view, also, that the better course of decision is, and one more in harmony with the general jurisprudence of this court, to avoid discussion of Federal questions which only arise incidentally, and are unnecessary to the decision of the principal question at issue.

"Entertaining this view, I think it is preferable to pass the constitutional question under consideration, and reverse the judgment of the district court, and sustain the license on the face of the charter and the law."

Mr. Justice Breau and Mr. Justice Blanchard dissented, each filing an opinion.

Mr. Henry Denis argued the cause on the original argument, and, with **Mr. Murphy J. Foster**, filed a brief for plaintiff in error:

The charter exemption from taxation of the bank's capital *co nomine* has been recognized by this court.

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

When a state enters into a contract with an individual she waives her sovereignty, and places herself on a footing of perfect equality with the other contracting party.

Davis v. Gray, 16 Wall. 232, 21 L. ed. 457; *Tennessee v. Whitworth*, 117 U. S. 137, 29 L. ed. 832, 6 Sup. Ct. Rep. 645; *Penrose v. Chaffraix*, 106 La. 250, 30 So. 718.

A rule of interpretation of contracts is to

seek the intention of the parties by the contemporaneous construction put upon the contract by those charged with its execution.

United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306.

The omission of the Citizens' Bank from the list of banks subject to license taxation was a clear recognition of the fact that, in the opinion of all the state officials who were concerned in the assessment, collection, and receipt of the state taxes, the Citizens' Bank was not liable to a license tax.

State v. Comptoir Nat. D'Escompte de Paris, 51 La. Ann. 1272, 26 So. 91.

Mr. Henry Denis also argued the cause on reargument and filed a brief for plaintiff in error:

It is judicially established by this court and by the courts of Louisiana that the bank did not, in accepting the act of 1880, waive its right of exemption.

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Penrose v. Chaffraix*, 106 La. 250, 30 So. 718.

The judgment of the supreme court of Louisiana in the case now before this court does not rest in any way upon a non-Federal ground, but exclusively upon the Federal question whether the imposition of a license tax upon the capital of the bank is in violation of its contractual exemption from all taxes.

Central R. & B. Co. v. Wright, 164 U. S. 333, 41 L. ed. 457, 17 Sup. Ct. Rep. 80.

What was irrevocably decided by the courts of Louisiana and by this court is that by contract between the state and the bank its capital is exempted from taxation during the continuance of its charter.

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Southern P. R. Co. v. United States*, 168 U. S. 52, 42 L. ed. 378, 18 Sup. Ct. Rep. 18.

The clause of the charter of the bank which provides that the capital of such bank shall be exempt from any tax laid by the state, or by a parish or body politic under the authority of the state, during the continuance of its charter, includes license taxes in the general exemption.

License Tax Cases, 5 Wall. 471, 18 L. ed. 501; *Royall v. Virginia*, 116 U. S. 580, 29 L. ed. 737, 6 Sup. Ct. Rep. 510; *Vashon v. Greenhow*, 135 U. S. 713, 34 L. ed. 319, 10 Sup. Ct. Rep. 972; *East Feliciana v. Levy*, 40 La. Ann. 332, 4 So. 309; *Morehouse v. Brigham*, 41 La. Ann. 665, 6 So. 257; *Cooley, Const. Lim.* 4th ed. p. 598.

Mr. Eugene D. Saunders also argued the cause for plaintiff in error on reargument.

Messrs. Henry Denis and Branch K. Mil-

ler filed a brief for plaintiff in error on motion to dismiss or affirm.

Mr. E. Howard McCaleb, Jr., argued the cause on original argument, and, with Mr. E. Howard McCaleb, filed a brief for defendant in error:

Jurisdiction to review a final judgment rendered by the highest court of a state is dependent upon a Federal issue necessarily involved and decided adversely to plaintiff in error. If, however, it appears that the decision rests upon two independent grounds, one Federal and the other non-Federal, and the latter is broad enough to support the judgment, the writ of error will be dismissed for want of jurisdiction, without reference to, or consideration of, the Federal issue.

Hale v. Lewis, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Lowry v. Silver City Gold & S. Min. Co.* 179 U. S. 196, 45 L. ed. 151, 21 Sup. Ct. Rep. 104; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Wade v. Lawder*, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425; *White v. Leovy*, 174 U. S. 95, 43 L. ed. 909, 19 Sup. Ct. Rep. 604; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *California v. Holladay*, 159 U. S. 415, 40 L. ed. 202, 16 Sup. Ct. Rep. 53; *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

An abandonment and waiver by the bank of its right to an exemption from license taxation, if any it had under the asserted contract, constituted independent non-Federal grounds upon which the judgment is based, sufficient to sustain the judgment.

Hale v. Lewis, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

The acceptance by the bank of La. act 1880, No. 79, is a ground for the decision broad enough to dispose of the case without reference to any Federal question.

Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114.

When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction.

New Orleans Waterworks Co. v. Louisiana
192 U. S.

Sugar Ref. Co. 125 U. S. 38, 31 L. ed. 615, 8 Sup. Ct. Rep. 741.

The construction given by the state court to the extended exemption in view of the jurisprudence, Constitution of 1879, and license tax laws enacted prior to the time when the alleged contract took effect cannot be reviewed, because on this ground of decision the state court gives no effect to the subsequent law, but decides on grounds, independent of that law that the right claimed was not conferred by the contract, and the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction.

New Orleans Waterworks Co. v. Louisiana
Sugar Ref. Co. 125 U. S. 38, 31 L. ed. 615, 8 Sup. Ct. Rep. 741; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *St. Paul, M. & M. R. Co. v. Todd*, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. Rep. 958; *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

An immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken.

Chicago, B. & K. C. R. Co. v. Guffey, 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626, 6 Sup. Ct. Rep. 375; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 461.

A grant to a corporation authorizing it to carry on business does not import permission to do so without contributing to the support of the government in like manner with natural persons pursuing the same business.

New Orleans v. State Nat. Bank, 34 La. Ann. 892; *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. ed. 825; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 695, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Western U. Teleg. Co. v. Charleston*, 56 Fed. 419.

This license is not a condition upon which the right to do business depends, but is a tax.

Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825.

Whether the license is exacted under the power to regulate or the power to tax is a matter of indifference if the power to do either exists.

Wiggins Ferry Co. v. East St. Louis, 197 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Morehouse v. Brigham*, 41 La. Ann. 665, 6 So. 257.

There is a marked distinction between capital stock and capital.

Farrington v. Tennessee, 95 U. S. 687, 24 L. ed. 561; *State ex rel. Citizens' Bank v. Bd. of Assessors*, 48 La. Ann. 35, 18 So. 753, Affirmed in 167 U. S. 407, 42 L. ed. 215, 17 Sup. Ct. Rep. 1000; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

Mr. E. Howard McCaleb, Jr., also argued the cause on reargument and filed a brief for defendant in error:

An exemption from license taxation is a personal privilege, and, even if possessed by the old property bank, which is denied, it certainly did not pass as a continuing franchise, unless such an intention is expressed in terms too plain to be mistaken.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626, 6 Sup. Ct. Rep. 375; *Mercantile Bank v. Tennessee*, 161 U. S. 172, 40 L. ed. 660, 16 Sup. Ct. Rep. 461; *Chicago, E. & K. C. R. Co. v. Guffey*, 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 296, 36 L. ed. 979, 13 Sup. Ct. Rep. 72; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Trask v. McGuire*, 18 Wall. 391, 21 L. ed. 938; *Picard v. East Tennessee, V. & G. R. Co.* 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640.

The objection of the unconstitutionality of a statute must be made by one having a right to make it, not by a stranger to its grievance.

Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368.

No better reason existed for an exemption from license than one from property taxation.

State ex rel. Citizens' Bank v. Bd. of Assessors, 48 La. Ann. 35, 18 So. 753, Affirmed in 167 U. S. 407, 42 L. ed. 215, 17 Sup. Ct. Rep. 1000; *Second Municipality v. Commercial Bank*, 5 Rob. (La.) 151; *Morehouse v. Brigham*, 41 La. Ann. 665, 6 So. 257; *Re New Orleans Improv. & Bkg. Co.* 4 La. Ann. 471; *Barataria & L. Canal Co. v. Soniat*, 6 La. Ann. 65.

A charter exemption of a bank's capital should not be extended beyond the subject of the tax, and is restricted to an ad valorem or a specific direct tax upon the capital *eo nomine*, and no farther.

Second Municipality v. Commercial Bank, 5 Rob. (La.) 151; *Re New Orleans Improv. & Bkg. Co.* 4 La. Ann. 471; *Barataria & L. Canal Co. v. Soniat*, 6 La. Ann. 65.

This construction of the Louisiana revenue laws enacted prior to 1852 is entitled to weight, forms part of the restored charter, and should be followed by this court.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; *Bank of Commerce v. Tennessee*, 161 U. S. 147, 40 L. ed. 650, 16 Sup. Ct. Rep. 456.

For thirty years it has been fixed law in Louisiana, uniformly maintained by the highest court, that the legislature of 1874 was without power to exempt any particular bank or corporation from the payment of a license tax under the Constitution of 1868.

New Orleans v. New Orleans Canal & Bkg. Co. 32 La. Ann. 104; *New Orleans v. Louisiana Sav. Bank*, 31 La. Ann. 637; *State v. Southern Bank*, 31 La. Ann. 519; *New Orleans v. State Nat. Bank*, 34 La. Ann. 892; *New Orleans v. Bank of Lafayette*, 27 La. Ann. 376; *New Orleans v. People's Bank*, 27 La. Ann. 646; *New Orleans v. Metropolitan Loan, Sav. & Pledge Bank*, 27 La. Ann. 648; *New Orleans v. St. Patrick's Hall Asso.* 28 La. Ann. 512; *New Orleans v. Lafayette Ins. Co.* 28 La. Ann. 756.

The exemption may be of a class.

New Orleans v. People's Bank, 32 La. Ann. 82.

The contention of plaintiff in error applies to free banks organized under the free banking law of 1853.

New Orleans v. Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328; *New Orleans v. Davidson*, 30 La. Ann. 554, 31 Am. Rep. 223.

The obligation of the contract of renewal of the exemption of 1874 cannot be said to be impaired by the Constitution of 1868 in force when the contract was made.

Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 137, 23 Sup. Ct. Rep. 64; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277.

Even if the act of 1874 be considered as a renewal of the exemption, such renewal would be subordinated to the Constitution of 1879, adopted before the act took effect.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; *Gosselin v. Gosselin*, 7 Mart. N. S. 470; *New Orleans v. Ripley*, 2 La. 345.

The earlier act exempted both capital and property from the payment of all taxes; the later one only the capital. This manifestly indicates a legislative intent to restrict the exemption to capital stock *eo nomine*, and to no other property.

Tennessee v. Whitforth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645.

Even if this were not so, and conceding, *arguendo*, that the exemption of the capital stock carried, as it only could carry, with it, the property and no other in which that stock was invested, under no system of re-

soning could it cover the privilege unless expressed in unmistakable terms.

State Railroad Tax Cases, 92 U. S. 603, 23 L. ed. 670; *Society for Savings v. Coite*, 6 Wall. 607, 18 L. ed. 903; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 367.

It is a matter of public history which this court cannot refuse to notice that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies or other corporations is drawn originally by the parties who are personally interested in obtaining the charter.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 435, 14 L. ed. 1005; *New Orleans & C. R. Co. v. New Orleans*, 34 La. Ann. 444.

Nothing is exempted from taxation but the capital of the bank.

Second Municipality v. Commercial Bank, 5 Rob. (La.) 151; *Barataria & L. Canal Co. v. Soniat*, 6 La. Ann. 65; *Re New Orleans Improv. & Bkg. Co.* 4 La. Ann. 471.

There is no merit in the contention that, because of the loan of the state's credit, because of her voluntary act of suretyship, thereby facilitating the bank in obtaining its charter capital, because of the state's one-twelfth interest in the profits, and her participation in the administration of the bank's affairs through two directors appointed by the governor, impliedly an irrepealable contract not to impose licenses exists.

Providence Bank v. Billings, 4 Pet. 560, 7 L. ed. 955; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 22 L. ed. 287; *Tucker v. Ferguson*, 22 Wall. 573, 22 L. ed. 816; *Bank of Commerce v. Tennessee*, 161 U. S. 147, 40 L. ed. 650, 16 Sup. Ct. Rep. 456; *Memphis Gaslight Co. v. Shelby County Taxing Dist.* 109 U. S. 400, 27 L. ed. 977, 3 Sup. Ct. Rep. 205.

If the bank accepts the boon it must bear the burden.

Memphis Gaslight Co. v. Shelby County Taxing Dist. 109 U. S. 400, 27 L. ed. 977, 3 Sup. Ct. Rep. 205.

On the one hand, if it should be held that these profits were taxes, nothing prevents the imposition of additional taxes.

Delaware Railroad Tax, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888.

If, on the other hand, these profits are to be regarded as a bonus for the franchise, the claim is equally unfounded.

New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *New Orleans v. Orleans R. Co.* 42 La. Ann. 4, 7 So. 59; *New Orleans v. Crappel*, 18 La. Ann. 725.

It does not follow that, where the right to tax other subjects exists, a tax founded

on that right necessarily affects the particular subject, although it may, perhaps, have some indirect bearing upon it.

Nathan v. Louisiana, 8 How. 73, 12 L. ed. 993; *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; *Maine v. Grand Trunk R. Co.* 142 U. S. 227, 35 L. ed. 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163.

The whole proposition, when accurately stated, denies the power to tax everything not covered by the exemption, and, hence, denies the rule indissolubly connected with grants of this character.

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

This is not a tax upon the capital.

State ex rel. Citizens' Bank v. Bd. of Assessors, 48 La. Ann. 35, 18 So. 753, Affirmed in 167 U. S. 407, 42 L. ed. 215, 17 Sup. Ct. Rep. 1000.

In determining whether or not the tax is upon the exempted capital or upon the corporate business, the true test is, Does the tax affect the exempted capital directly or incidentally? If directly, it is objectionable; if incidentally, it is not. It has been said that incidental effects are common to all forms of taxation.

This is recognized in a long line of cases involving the concurrent power of both Federal and state governments to impose death duties.

United States v. Laws, 163 U. S. 265, 41 L. ed. 154, 16 Sup. Ct. Rep. 998; *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Snyder v. Bettman*, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803.

And in cases of franchise taxes upon a corporation measured by the deposits invested in government securities.

Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904.

And in cases of taxes imposed upon shares of the capital stock of national banks in the hands of the shareholders.

Van Allen v. The Assessors, 3 Wall. 573, 18 L. ed. 229.

And finally in cases where a corporate franchise or business tax was levied against corporations measured by their capital stock composed of government bonds and their dividends, although the dividends were derived from interest on these same securities.

Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

These principles have also been applied

to privilege taxes upon the franchise of corporations engaged in interstate commerce.

State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494.

The state, in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenues of the state. If it accepts the boon it must bear the burden.

Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

A tax upon a corporate franchise, or upon the privilege of taking under the statute of wills and of descents, is a tax, not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the state.

Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774.

A license tax is neither a direct, nor an indirect, tax upon the exempted capital.

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904; *Maine v. Grand Trunk R. Co.* 142 U. S. 227, 35 L. ed. 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *California v. Central P. R. Co.* 127 U. S. 41, 32 L. ed. 158, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Memphis Gaslight Co. v. Shelby County Taxing Dist.* 109 U. S. 400, 27 L. ed. 977, 3 Sup. Ct. Rep. 205; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 367; *State Railroad Tax Cases*, 92 U. S. 603, 23 L. ed. 670; *Gulf & S. I. R. Co. v. Heves*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; *Central P. R. Co. v. California*, 162 U. S. 127, 40 L. ed. 915, 16 Sup. Ct. Rep. 766; *New Orleans v. New Orleans City & Lake R. Co.* 40 La. Ann. 588, 4 So. 512; *New Orleans v. Orleans R. Co.* 42 La. Ann. 4, 7 So. 59.

From the express exclusion of the words "and property which it may acquire by virtue of any of the provisions of the act,"

in the modified contract of 1836, the conclusion is inevitable that the parties intended the exemption to cover capital stock *eo nomine*, and no other property.

Chitty, Contr. 7th Am. ed. 1848, pp. 89, 90; *Strickland v. Maxwell*, 2 Car. & M. 539; *Warren v. Merrifield*, 8 Met. 93; *Sawyer v. Hammatt*, 15 Me. 40; *Hadley v. Perks*, L. R. 1 Q. B. 457; *Lawrence v. King*, L. R. 3 Q. B. 345; *Eliot v. Himrod*, 108 Pa. 569; *Reg. v. Price*, L. R. 6 Q. B. 411; *West v. Francis*, 5 Barn. & Ald. 737; *Viterbo v. Friedlander*, 120 U. S. 725, 30 L. ed. 782, 7 Sup. Ct. Rep. 962; *Bank for Savings v. The Collector*, 3 Wall. 495, 18 L. ed. 207; *Ex parte Crow Dog*, 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

The doctrine of contemporaneous and practical construction does not extend to laches or inaction of the executive department.

Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 670, 29 L. ed. 772, 6 Sup. Ct. Rep. 625; *Hibernian Benev. Soc. v. Kelly*, 28 Or. 173, 30 L. R. A. 167, 42 Pac. 3; *Citizens' Bank v. Bouny*, 32 La. Ann. 239; *United States v. Insley*, 130 U. S. 266, 32 L. ed. 969, 9 Sup. Ct. Rep. 485; *United States v. Beebe*, 127 U. S. 344, 32 L. ed. 124, 8 Sup. Ct. Rep. 1083; *Wisconsin C. R. Co. v. United States*, 164 U. S. 210, 41 L. ed. 406, 17 Sup. Ct. Rep. 45; *New Orleans v. New Orleans Canal & Bkg. Co.* 32 La. Ann. 104; *State ex rel. New Orleans Canal & Bkg. Co. v. Heard*, 47 La. Ann. 1679, 47 L. R. A. 512, 18 So. 746.

Mr. E. Howard McCaleb filed a separate brief for defendant in error on the motion to dismiss or affirm.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court:

1. A motion is made to dismiss. The ground of it is that, even *if the charter of [77] 1833 and the amendment of 1836 exempted the bank from license taxes, the bank, by accepting the act of 1880, which enabled the bank to make compromises with its mortgage creditors, became subject to the Constitution of 1879, which, it is contended, authorized or required the legislature to impose a license tax. And, besides, the act of 1874, extending the charter, was subject to the constitution of 1868, and that required the payment of a license. Upon those grounds *Mr. Justice Monroe* based his opinion, and they, it is urged, involved state questions sufficient to sustain the judgment. But those grounds only had the concurrence of the Chief Justice. *Mr. Justice Watkins* did not assent to them and *Justices Breaux* and *Blanchard* dissented from them. The judgment of the court, therefore, does not

rest upon them. The judgment rests upon the construction of the original charter,—that is, upon the contract between the state and the bank,—but to construe that is also our function.

But assuming that the judgment rests upon the grounds stated, we nevertheless have the power of review. The Federal question presented is, Did the bank, at the time of the imposition of the license tax sued for, have a contract with the state exempting it (the bank) from such tax? The elements of that question are the original contract and all subsequent legislation relating to the contract and which it is claimed modifies or changes it. The motion to dismiss is, therefore, denied.

2. The question presented on the merits has been simplified by the case of *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905. The origin and history of the bank are there detailed, its charter and its exemptions are construed, its litigations with the city are recited, and their effect declared. We need only apply and extend the reasoning of that case to decide this.

[78] It came here from the circuit court of the United States. It was brought in that court by a bill in equity to enjoin the taxing officers of the state and of the city of New Orleans from taxing the bank under certain provisions of a statute of the *state for the assessment of the capital of banks. Under the statute the capital stock of banks which were represented by shares were not assessed by that name, but the shares were required to be assessed to the stockholders at their actual valuation as shown by the books of the bank, and the taxes assessed were required to be paid by the bank, which was given the power to collect the amount from the shareholders or their transferees. The real estate owned by the bank was directed to be assessed directly to it and the tax "proportioned to each share of capital stock" and deducted from the amount of taxes of that share under the statute. The statute also contained provisions for its administration, and required property which had been omitted from the assessment rolls to be assessed for the current year and for three years back. The court adjudged the bank to be exempt from the taxation, and granted an injunction against the collection of the taxes for the designated years by the state of Louisiana, and the city of New Orleans, "upon the capital, property, or shares of stock of the shareholders of said bank, whether assessed against the bank or its shareholders."

The writ also enjoined the demanding or collecting from the bank of any state or city

license tax. Commenting on the decree, this court said:

"The exemptions to which the decree below held the bank to be entitled related, therefore, to distinct objects of taxation, one not necessarily connected with or dependent upon the other, and may be summarized as follows: First. That the bank was not subject to taxation on its capital shares of stock or real estate, and furniture actually used for the carrying on of its banking business, and that the bank could not be lawfully obliged to pay the sum of any tax assessed on its shareholders. Second. That the stockholders of the bank were not liable for assessment on their shares of stock. Third. That the bank was also not subject to taxation on any real estate held by it which had been mortgaged to secure stock subscriptions and had become the property of the bank under foreclosure proceedings, *because property so acquired be-[79] came, by virtue of the purchase, a part of its capital stock. Fourth. That the nonliability of the bank to taxation embraced also immunity from the payment of a license tax to either the state of Louisiana or the city of New Orleans."

The decree was affirmed as to the objects of taxation embraced in the 1st subdivision, and reversed as to those embraced in the 2d, 3d, and 4th subdivisions. Of the objects in the 4th subdivision it was said:

"We are at a loss to understand by what process of reasoning the decree was made to cover the question of the nonliability of the bank for license. It was not presented by the pleadings, and was entirely *dehors* the issue in the case."

In sustaining the decree of the circuit court as to the objects in the first subdivision, necessarily there was involved the decision that the charter of the bank, both as originally granted and as extended, exempted the capital of the bank from taxation, and the exemption was not taken away by the constitutions of 1868 and 1879 by the acceptance of the act of 1874 by the bank, nor by the act of 1880. Many considerations were referred to which might have justified this as an independent conclusion, but the decision was mainly rested upon the judgments of the courts of Louisiana which had been pleaded as *res judicata*, and which judgments, it was decided, had concluded the controversies. There was a clear adjudication, therefore, of the right of exemption of the bank from a tax on its capital.

The ruling in *New Orleans v. Citizens' Bank* has been followed by the supreme court of Louisiana. In *Penrose v. Chaffraix*, 106 La. 250, 256, 30 So. 718, 720, the same questions were raised on the statutes of 1874 and 1880 and the constitutions of

1868 and 1879, as are raised in the case at bar. The court, replying to them, said:

"Both these contentions were passed upon and negatived in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905, and the effect of that decision of the Supreme Court of the United States [80] is *to maintain and carry the exemption into the extended period of the bank's charter."

It is true that in a subsequent case (*State v. American Sugar Ref. Co.* 108 La. 603, 32 So. 965) *New Orleans v. Citizens' Bank* is criticized and its views are not concurred in as to what constitutes the thing adjudged and an estoppel in tax cases. But the thing claimed to have been adjudged was not a right claimed under the Constitution of the United States, and there was no intimation of disapproval of *Penrose v. Chaffraix*.

But if it can be contended that there is conflict between the state cases, *New Orleans v. Citizens' Bank* is, nevertheless, decisive of the questions adjudged by it. *Deposit Bank v. Frankfort*, 191 U. S. 499, ante, 276, 24 Sup. Ct. Rep. 154. And all the questions in the case at bar were adjudged by it except the question of the exemption of the bank from the payment of license taxes. That question is now presented, and we think the exemption exists. We deduce this not only from the words of the charter, but from the purpose of its enactment and of its extension. The bank was made an agency of the state. To have fostered it with aid and to have burdened it with taxation of any kind would have been inconsistent, considering the provisions of the act incorporating it, and it was immaterial whether it was constituted a quasi public corporation or entirely a private one. It was created to accomplish purposes in which the state took an interest, and the expectations which were entertained of it may be regarded in the interpretation of its charter. With the wisdom or folly of the charter we have nothing to do. Our sole function is to interpret it. It may seem, in 1903, to have been imprudent legislation. But how did it appear in 1833 and 1836? We must contemplate it as of that time. States act through men, and, of course, cannot have a greater appreciation or prophecy of things than men. Events may disappoint or baffle their purposes, but they cannot, for that reason, be relieved from their obligations. Nor can they necessarily be accused of folly. There are limits to the power of government, and the wisest provisions may be frustrated or turned to [81] *detriment by causes which no prescience can foresee. It is, therefore, to 1833 and 1836 we must turn, to the conditions and purposes of then.

The chief industry of Louisiana was agriculture, and it seemed to the state a wise

policy to encourage and expand that industry, and the means selected was a bank which could make loans to the planters upon the security of their lands. Capital was necessary. Private persons were to be induced to subscribe, and the state aided by an issue and pledge of its bonds. It was careful to make provision for control. No act of administration could be undertaken without its consent. It was represented by six members on a board of twelve directors. It, besides, contemplated the probability of profits, and made provision to share them. The scheme was large and hazardous. Private capital had to be tempted to it, and the state, besides contributing its credit, offered the inducement of a relief from burdens. There is no doubt of this, and the dispute is only as to the degree, and, on an ambiguity which may be asserted upon a distinction in the form of taxation, a limitation is attempted to be put upon the comprehensive and expressive words of the bank's charter. This seems to us not justified. The words of the charter are "the capital of the bank shall be exempt from any tax." The word *any* excludes selection or distinction. It declares the exemption without limitation. And why should there have been limitation? What purpose was there to serve by making a distinction between the forms of taxation? The state did not intend to so limit its aid. It did not mean to help the bank to do business and then tax the business when done,—relieve it and burden it at the same time. Retain the right to impose as an occupation tax that which it gave up as a right to impose as a property tax.

This view is sustained by contemporaneous construction of the bank's charter. It was not only the immediate sense of the officers of the state, but their continued sense through a number of years, that the bank was exempt from all taxation, *and when the [82] right of taxation was asserted a license tax was not included. And we have authority for saying that a license tax was not demanded during a period of fifty-eight years, notwithstanding the many changes in the administrative officers of the state; that during all that time, "even from and inclusive of the very first revenue act (that of 1813), adopted after the admission of the state into the Union, license taxation as a means of revenue was provided for and enforced," and for a portion of the time (from 1869) license taxes were imposed upon banks.

Stress is put in the argument at bar upon the distinction between taxes on property and taxes on occupations. The distinction exists and counsel have cited Louisiana decisions in which that distinction has been held

to justify license taxes, notwithstanding clauses in charters exempting capital stock from taxation. A review of those cases is not necessary. They were all rendered subsequently to 1836, and they depended upon the application of the constitution of 1868 or 1879, or special circumstances not applicable to the charter of the Citizens' Bank. And those cases did not embarrass the court in defining the scope of the charter of the Citizens' Bank in the decisions presently to be considered.

That the distinction between property taxes and license taxes was recognized in Louisiana in 1833 or 1836 is not very clear, but subsequently the distinction was certainly not always considered as justifying a power to impose license taxes. In *New Orleans v. Southern Bank*, 11 La. Ann. 41, the general law of the state, approved April 30, 1853, called the free banking law, was considered. The law provided "that bankers and banking companies, doing business under this act, shall be taxed upon their *capital stock* (italics ours) at the same rate as other personal property under the laws of the state." It was held that the provision was a contract with the individual corporations formed under the act, and a license tax imposed by the common council of the city under an act passed in 1842 (Session Acts [83] of 1842, p. 17), which *empowered the city to levy a license tax on certain enumerated occupations and "all other callings, professions, or business," was illegal.

The same question was presented again in *State v. Southern Bank*, 23 La. Ann. 271, upon a license tax imposed by the revenue laws of 1889. The court was urged to overrule *New Orleans v. Southern Bank*. The court refused to do so and affirmed the doctrine of that case, and held the act "violative of § 10, article 1, of the Constitution of the United States." The supreme court of Louisiana, therefore, as early as 1853, construed a provision exempting the capital stock of a bank from taxation except at a particular rate as exempting the bank from a license tax. In other words, it was held that a license tax was virtually a tax on the capital of the banks, and, we think, that must be held of the tax in the case at bar. Whatever the tax may be called,—one on property or one on occupations,—if its final incidence is on the capital, it is comprehended in the exemption contained in the charter. As we have already pointed out, the language of the charter is universal; and it was said in *Citizens' Bank v. Bouny*, 32 La. Ann. 239, "That language is broad enough to cover everything which, during its existence, should enter into and make part of the capital of said bank." If the language is broad enough to preclude a tax

upon that which may become part of the capital of the bank, it is broad enough to preclude a tax which may become a burden upon the capital. Whatever diminishes the income of a bank diminishes its capital under the provisions of the charter of 1833. It was said in the *Bouny Case*: "By the 29th section of the original charter, 'all the profits made by said corporation shall be added to and made a part of its capital,' except a certain fraction of any excess of profits over what was necessary to pay the bonds issued by the bank." And the sum of \$159,238.62 accumulated profits were held not to be liable to taxation. And fully as significant was the exemption declared of the sum of \$636,450, assessed to the shareholders of the bank as "value of capital *stock." It was said: "Even if the share-[84] holders be liable to taxation on their shares (upon which we express no opinion), under the peculiar and exceptionable nature of the charter of the Citizens' Bank, we think it cannot be forced to pay the taxes assessed to its shareholders." In other words, the burden of tax could not be put upon the bank, however it could be imposed upon the stockholders.

We may recur to *Penrose v. Chaffraix*. It was a proceeding to recover the payment of a tax for the year 1899, imposed upon a certain number of shares of the capital stock of the Citizens' Bank held by Chaffraix. Exemption was asserted under the clause of the bank's charter which we have quoted. This was one of the questions left open by this court in *New Orleans v. Citizens Bank*, and left open in the *Bouny Case*. The exemption, nevertheless, was sustained. It was recognized that in some jurisdictions, "including the Supreme Court of the United States," it was held that the exemption of the capital of a corporation from taxation does not of necessity include the exemption of the shareholders on their shares of stock. But the court considered that it was not necessary to approve or disapprove the doctrine, and rejected it as inapplicable to shares in the Citizens' Bank, because the intent of the legislature was otherwise. And that intent was deduced "not only from the words of the charter," but from the purposes for which the bank was instituted, and they were vividly described. Because of them, it was in effect said, and of the bank's relation to them and the state's relation to the bank, the state "granted the clause quoted above, exempting from taxation." And it was observed, "at that time the refined distinction between the capital and the capital stock of a corporation had not been made by the courts, or was at least unrecognized as yet in Louisiana." We see, therefore, that in the *Bouny Case* it was

held that a tax on that which might become capital, or a tax which the bank would have to pay, is illegal. In the *Chaffraix Case* it is held that a tax which falls on the stockholders of the bank is illegal. In other [85] words, the *effect of the two cases is that a tax which falls upon the capital or is to be paid by the bank or its stockholders, is prohibited. A license tax has surely some one of those effects.

It is urged, however, that neither the *Boumy Case* nor the *Chaffraix Case* can be adduced as authoritative. The argument is that a judgment in the case at bar has become the law of the case, and that it cannot be affected by what was or has been decided in some other case, and that the judgment in the case at bar rested on non-Federal grounds which were sufficient to sustain it, to wit, the construction and application of the constitutions and statutes of that state. The argument is the same as that directed against our jurisdiction, and has been answered. When a contract is asserted, and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to our review; and, also, all of that which is claimed to have taken it away. We are certainly not confined to the decision under review. To hold that would surrender the power of review. That decision, of course, claims our first and a most thoughtful consideration, but in the right to challenge it is the right to go outside of it, and certainly nothing can afford more light or persuasion than the utterances of the same tribunal on prior and subsequent occasions.

These propositions, then, are established: the exemption granted to the bank in 1833 and 1836 was not taken away by the acts extending its charter, and the application thereto of the constitutions of 1868 and 1879. This was the thing adjudged in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

The exemption of the charter includes a license tax. This, for the reasons stated, must be regarded as part of the contract between the state and the bank. And in reaching that conclusion the rule requiring a strict construction of statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that when- [86] ever a controversy is or can *be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of con-

troverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them,—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute. Will courts ever be exempt, or have they ever been exempt, from that duty? Has skill in the use of language ever been so universal, or will it ever be so universal, as to make indubitably clear the meaning of legislation? Has forecast of events ever been so sure, or will it ever be so sure, as to make inevitably certain all the objects contemplated by a statute? We think not, and there never will be a time in which judicial interpretation of laws will not be invoked, and it cannot be omitted because a doubt may be asserted concerning the meaning of the legislators. We repeat, it is the judicial duty to ascertain if doubt exists.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Brewer**, with whom the Chief Justice concurs, dissenting:

I dissent from the opinion and judgment in this case, and will state briefly my reasons therefor: Where it is contended that a state, having once entered into a contract, has, by subsequent legislation, impaired its obligations, this court, while exercising its independent judgment in respect to the terms of the contract and the fact of impairment, will lean to the views announced by the courts of that state. In *Wilson v. Standefer*, 184 U. S. 399, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384, 389, we said:

“But as the general rule is that the in-[87]terpretation put on a state constitution or laws by the supreme court of such state is binding upon this court, and as our right to review and revise decisions of the state courts in cases where the question is of an impairment by legislation of contract rights is an exception, perhaps the sole exception, to the rule, it will be the duty of this court, even in such a case, to follow the decision of the state court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a state, regulating its exercise of the taxing power, or relating to the state's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situa-

tion of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special function is to expound and interpret the state enactments."

Where it is contended that exemption from taxation has been granted by contract with the state, the exemption, if any be found to exist, will not be extended by construction, but will be confined to that which is clearly within the terms of the contract. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. ed. 773, 822; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 435, 14 L. ed. 997, 1005; *Dubuque & P. R. Co. v. Litehfield*, 23 How. 66, 88, 16 L. ed. 500, 509; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559-564, 25 L. ed. 222-224; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174-185, 33 L. ed. 302-306, 10 Sup. Ct. Rep. 68; *Wilmington & W. R. Co. v. Alsbrough*, 146 U. S. 279-295, 36 L. ed. 972-978, 13 Sup. Ct. Rep. 72; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *New York ex rel. Schurz v. Cook*, 148 U. S. 397, 409, 37 L. ed. 498, 502, 13 Sup. Ct. Rep. 645; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174-177, 40 L. ed. 660, 661, 16 Sup. Ct. Rep. 471.

In the last of these cases, on page 177, L. ed. p. 661, Sup. Ct. Rep. p. 472, we said:

"It must always be borne in mind in construing language of this nature that the claim for exemption must be made out wholly beyond doubt; for, as stated by Mr. Justice Harlan, in *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569, 575, 30 L. ed. 732, 734, 7 Sup. Ct. Rep. 693, 696, 'It is the settled doctrine of this court that an immunity from taxation by a state will not be recognized unless granted in terms too plain to be mistaken.'"

[88] *And in next to the last, on page 146, L. ed. p. 649, Sup. Ct. Rep. p. 460, we also said:

"These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must, on that account, be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; no implication will be indulged in for the purpose

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of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power."

Only last term the same doctrine was reaffirmed in *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 672, 47 L. ed. 641, 648, 23 Sup. Ct. Rep. 386, 387, in these words:

"The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

I make these quotations, which are in harmony with the many other decisions of this court, for even the most casual examination of them makes it apparent that the rule therein stated is plainly ignored in this case, and that a term whose meaning is well understood is stretched beyond its ordinary significance and to its utmost limits in order to include the alleged exemption.

The supreme court of Louisiana in this case held that a license tax was not within the exemption of the bank from any tax upon its capital, the one being a charge for the privilege of carrying on the business, and the other an exemption of a part of the property of the bank from taxation. In the course of its opinion it said, after referring to a prior case:

"There the tax resisted, like those resisted in the cases relied on, was at least a tax of the same character; that is, a tax *upon[89] 'property,' while the tax involved in this litigation is one essentially different; it is a tax, it is true, but one upon callings or occupations, and it is controlled and governed by rules and principles entirely different from those which bear upon property taxation. *New Orleans v. Louisiana Sav. Bank & S. D. Co.* 31 La. Ann. 638; *Walters v. Duke*, 31 La. Ann. 671; *Morehouse v. Brigham*, 41 La. Ann. 667, 6 So. 257. Articles 203, 206, 207, and 209 of the Constitution of 1879 also discloses this very fully and clearly. (See *New Orleans v. Ernst*, 35 La. Ann. 746, and *State ex rel. Ernst v. State & City Board*, 36 La. Ann. 347.)

"The defendant urges that the license tax is substantially one upon its capital. The views expressed by us above indicate our opinion upon this point. The mere reference in the license acts to the declared or nominal capital or surplus from business or banking institutions is not a tax upon the capital or surplus itself of the different banks, but a mere method of classifying the banks and establishing a graduation of licenses, as required by article 206 of the Constitution. *State v. Liverpool, L. & G. Ins.*

Co. 40 La. Ann. 463, 4 So. 504; *Morehouse v. Bringham*, 41 La. Ann. 666, 6 So. 257.

"This court, in *New Orleans v. State Nat. Bank*, 34 La. Ann. 892, said: 'A provision in the charter of a corporation exempting its stock and real estate from taxation does not cover an exemption from license taxation. The grant of a charter to a bank, authorizing it to carry on a certain business during the term of its charter, does not import permission to do so without contributing to the support of the government in like manner with natural persons pursuing the same business.'

"The extent of the exemption granted originally from taxation was from 'taxation upon its capital.' It could never have claimed greater or other exemption [90] than that. The law of *1890, the unconstitutionality of which is pleaded, does not pretend to impose, nor does it impose, any tax upon the 'bank's capital,' and therefore there could by no possibility be, nor is there, any violation of any contract obligation through that act, even should there really be any existing obligation at all between the state and the defendant as to taxation."

That there is a clear distinction between a property tax on the capital of a corporation and a license tax for the privilege of carrying on the business of the corporation has been so often decided by this and other courts, and is so clear, that it seems almost a waste of words to refer to decisions. And yet it may be well to refer to a few that it may be apparent how strongly, emphatically, and for how long a time the distinction has been affirmed. As a preliminary thereto let it be borne in mind that the franchise of a corporation is the privilege granted to it to do the business named in its charter, and a license tax for the privilege of doing business is simply a tax upon the franchise. In *Gordon v. Appeal Tax Ct.* 3 How. 133, 150, 11 L. ed. 529, 537, decided in 1844, it was said:

"A franchise for banking is in every state of the Union recognized as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government."

In *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 640, 18 L. ed. 904, 907:

"Property taxation and excise taxation, as authorized in the Constitution of the state, are perfectly distinct."

In *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558, Mr. Justice Swayne, after referring to taxation of bank capital and

shares of stock, added (p. 687, L. ed. p. 560):

"There are other objects in this connection liable to taxation. It may be well to advert to some of them.

"1. The franchise to be a corporation and exercise its powers in the prosecution of its business."

In *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 645, 647, Chief Justice Waite declared:

"In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a state, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation."

Both of these last cases were cited with approval in *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456. Many more cases might be cited to the same effect, but these will serve as illustrations. It is conceded that this distinction was recognized in Louisiana, though it is contended that it was not always held sufficient to uphold, in the case of a contract exemption of the capital, the retention of a power to impose license taxes, and some early decisions of the supreme court of that state are cited. But what does this argument amount to? Because the distinction between the two taxes has not always been recognized in Louisiana it must now be repudiated. The legislature must be held to have not recognized the distinction in this case, because the courts have sometimes in other cases failed to recognize it. It is not pretended that there has been a uniform ruling on the part of the supreme court of Louisiana ignoring the distinction. On the contrary, this very case (and this is only one of several) recognizes it. It seems to me this is a plain overturning of the hitherto settled rule of this court, that a doubt is to be resolved in favor of a state, for the alleged doubt in this particular case is resolved in favor of the corporation.

But upon what ground is it claimed that a doubt exists? Why should not the legislature be credited with recognizing the distinction recognized elsewhere through the country and sometimes at least, if not always, in Louisiana? It is said that there is something peculiar in the organization of this bank; that its purpose was to aid the agricultural interests of the *state, and that [92] the state assisted by a loan of its credit,

and retained partial control through directors appointed by it. But is it not the rule that an exemption from taxation is not given as a gratuity, but by reason of some supposed benefit to the state as a whole or some particular interest therein? Does the fact that some interest in the state is specially benefited change the rule as to the construction of an exemption? It seems to me that that is a doctrine as novel as it is dangerous. It is true that the state loaned its credit, and retained a partial control through directors appointed by it, but we have in the legislation of Congress and in the decisions of this court a very suggestive analogy. The Union Pacific Railroad Company was a corporation chartered by Congress. It was given a large amount of public lands and the credit of the United States was loaned to it to the extent of \$16,000 and over a mile. A partial control was retained through directors appointed by the government. In these respects it presents a close similarity to the Citizens' Bank. It was held by this court that while the franchise given by Congress to this and other trans-continental railroads was exempt from state taxation, yet the property belonging to those corporations was not. *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787. It was not doubted that Congress could in its discretion have provided for such exemption, but as it failed to prescribe it, the court held that it did not exist. If, from the fact that the corporation was aided by bonds of the United States, was engaged in doing the work of the nation in interstate transportation, and a partial control retained by Congress, that its property as well as its franchise was exempt from state taxation, why should there be an inference from the fact that Louisiana aided by its bonds this particular corporation and retained a partial control thereof, that it intended to grant any other exception than was expressly stated?

Again, it is contended that contemporaneous construction determines that the exemption of the capital included the *exemption of the franchise. It seems to me a sufficient answer is that in 1853 the supreme court held that a provision exempting the capital stock of a bank from taxation, except at a particular rate, exempted the bank from a license tax. *New Orleans v. Southern Bank*, 11 La. Ann. 41. It is not strange that thereafter there was no effort to impose a license tax on this bank and that the administrative officers respected the opinion of the supreme court, and did not until of late seek a reconsideration of that ruling.

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It also appears that there was no specific statute providing for a license tax upon banks until 1869, and that was after the decision of the supreme court referred to.

It is also said that if a license tax on the franchise is enforced it must be paid out of the capital, and so, in effect, be a tax upon the capital. That argument would make in every case an exemption of the capital a relief from all taxation, for every tax must in the last analysis come out of the capital. But what, under those circumstances, becomes of the doctrine of a strict construction of a contract exemption of taxes?

Further, it must be remembered that objects and means of taxation were not in the years past sought for with the same avidity as at present. The demand for revenue was not so great, and there was much inattention to the matter of securing objects and devising modes of taxation. So the mere fact that a particular kind of tax was not sought to be enforced upon any institution is not conclusive of the fact that it was necessarily exempt therefrom. It may simply mean that other objects seemed to the taxing authorities more accessible and more conveniently reached for taxation. At any rate, we are not justified in holding that the mere fact of an omission to press such a taxation upon the bank establishes that such a tax was included within the exemption in the face of a ruling of the highest court of the state that it was not.

For these reasons I am constrained to dissent from the opinion of the court.

Mr. Justice Harlan also dissents.

*FERDINAND M. JOPLIN, Individually[94]
and as Administrator of the Succession of
Bennet Joplin, Plff. in Err.,
v.

THEODORE C. CHACHERE, John P. Boagni, and Victor C. Sittig.

(See S. C. Reporter's ed. 94-108.)

Public lands—when title passes—prescription.

The confirmation by commissioners appointed under the act of Congress of March 3, 1807 (2 Stat. at L. 440, chap. 36), of a claim to 913.98 acres of land in the territory of Orleans, based on occupancy and settlement, followed by the confirmation by Congress in the act of April 29, 1816 (3 Stat. at L. 329, chap. 159), of the claim so confirmed, and by a survey, passed title so as to permit prescription, founded on uninterrupted possession, to begin to run before the patent issued.

[No. 96.]

Argued December 16, 1903. Decided January 4, 1904.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a decree of the Eighteenth Judicial District Court, parish of Acadia of that State, sustaining a plea of prescription to an action to recover land. *Affirmed.*

See same case below, 107 La. 522, 32 So. 243.

Statement by Mr. Justice **McKenna**:

This action was brought by the eighteenth judicial district court, parish of Acadia, state of Louisiana, by plaintiff in error, to have himself declared the owner of a tract of land containing 870.06 acres, described as section 41, township 7 south, range 1 east. Subsequently he amended his petition and claimed one tenth individually and nine tenths as administrator of the succession of Bennet Joplin. He traced title in both capacities to Bennet Joplin, to whom the land was confirmed by the act of Congress, approved March 3, 1807, entitled "An Act Respecting Claims of Land in the Territories of Orleans and Louisiana." 2 Stat. at L. 440, chap. 36. This act was an amendment to the act of March 2, 1805 (2 Stat. at L. 324, chap. 26), which provided for ascertaining and adjusting the titles and claims to land within the same territory. The purpose of both acts was to recognize and establish the titles possessed by the inhabitants of that territory prior to its acquisition by the United States.

Section 4 of the act of 1807 provided:

"That the commissioners appointed or to be appointed for the purpose of ascertaining the rights of persons claiming land in the territories of Orleans and Louisiana shall have full powers to decide according to the laws and established usages and customs of the French and Spanish governments, upon [95] *all claims to lands within their respective districts, where the claim is made by any person or persons, or the legal representative of any person or persons, who were, on the 20th of December, one thousand eight hundred and three, inhabitants of Louisiana, and for a tract not exceeding the quantity of acres contained in a league square, and which does not include either a lead mine or salt spring, which decision of the commissioners, when in favor of the claimant, shall be final against the United States, any act of Congress to the contrary notwithstanding."

A patent was issued July 16, 1900, in favor of Bennet Joplin, heirs and assigns. Stating the recitals of the patent and some

other facts, the supreme court of Louisiana said:

"That it [the patent] was granted in accordance with the provisions of the act of Congress of the 3d of March, 1807. It declares there had been deposited in the General Land Office of the United States a patent certificate numbered 1499, issued by the register and receiver of the United States Land Office, on the 25th of May, 1900, whereby it appeared that the private land claim of Bennet Joplin, being numbered 1927, class B, in the report of the old board of commissioners for the western district of the territory of Orleans, was confirmed by the said commissioners under the authority conferred upon them by the act of Congress approved on the 3d of March, 1807, entitled 'An Act Respecting Claims to Land in the Territories of Orleans and Louisiana;' that the claim had been regularly surveyed and designated as section 49 in township 7 south, of range 1 west, and section 41 in township 7 south, of range 1 east, of the Louisiana meridian, in the southwestern district of Louisiana, containing 870 acres and 6 hundredths of an acre, as appeared by a plat and descriptive notes on file (in the General Land Office) thereof, duly examined and approved by James Lewis, surveyor *general for Louisiana, on the 9th day of [96] May, 1900. That this plat and descriptive notes were inserted and made part of the patent.

"The plat and descriptive notes referred to were signed, as recited, by James Lewis, surveyor general of Louisiana, on the 9th of May, 1900.

"Immediately following the plat the surveyor general recites that it represents the survey of the private land claim of Bennet Joplin, confirmed by the old board of commissioners for the western district of Louisiana, in pursuance of the authority conferred upon them by the 4th section of the act of Congress approved March 3, 1807, entitled 'An Act Respecting Claims to Lands in the Territories of Orleans and Louisiana,' as appeared by their confirmation certificate No. B, 1927, dated March 11, 1812. After making this recital, the surveyor general says: 'The following being a description of the survey taken from the approved field notes of N. B. Phelps, deputy surveyor.' He then gives the field notes of the survey.

"At the end of the document, under date of May 9th, 1900, are the words 'examined and approved,' followed by the signature of the surveyor general."

The defendants Chachere and Boagni depended for title upon purchases from Victor C. Sittig, by authentic acts duly recorded. Sittig purchased the same at tax sale in 1871. The defendants pleaded that Sittig

and themselves had the uninterrupted, peaceable, and actual possession of the land in good faith since 1871; had erected improvements thereon and paid taxes. They also pleaded the prescription of three, four, five, ten, and twenty years. Victor Sittig was called in warranty and made the same defenses.

The district court decreed that the claim of plaintiff be rejected, the plea of prescription set up by defendants be sustained, and they be quieted in their title and possession of the land. The supreme court of the state affirmed the decree, and the case was then brought here. Other facts are stated in the opinion.

Mr. Samuel D. McEnery argued the cause, and, with *Messrs. George S. Dodds* and *Mark M. Boatner*, filed a brief for plaintiff in error:

It is conceded that private land claims based on title derived from the treaty with France in the purchase of Louisiana, which had not ripened into complete grants before the cession of the territory of Louisiana, were segregated from the public domain and entered into private ownership, when the grant was confirmed by the board of commissioners, and confirmed by act of Congress, and identified by survey, and approved by the surveyor general. In such case the patent adds nothing to the title, and its issuance is a mere ministerial act.

Whitney v. Morrow, 112 U. S. 693, 28 L. ed. 871, 5 Sup. Ct. Rep. 333.

But in such a case the legislative confirmation must be by specific boundaries distinguishing and separating it from other tracts, and must be capable of identification.

Ibid.

The survey of 1856 was not approved until May 9, 1900, when the receiver and register approved such survey, giving to Joplin and to conflicting claimants the tracts to which they were entitled under the confirmation. It was only then that the complete legal title was vested in Joplin and his heirs to the tract of land in controversy. It was only from this time that prescription commenced.

Langdeau v. Hanes, 21 Wall. 521, 22 L. ed. 606; *Morrow v. Whitney*, 95 U. S. 551, 24 L. ed. 456.

Mr. Gilbert L. Dupre argued the cause, and, with *Mr. E. D. Saunders*, filed a brief for defendants in error:

A patent is merely evidence of a grant. It adds nothing to the grantee's rights, but only furnishes him with convenient proof thereof.

Carroll v. Safford, 3 How. 441, 11 L. ed. 671; *Kansas P. R. Co. v. Prescott*, 16 Wall. 192 U. S.

603, 21 L. ed. 373; *Union P. R. Co. v. MeShane*, 22 Wall. 444, 22 L. ed. 747; *Simion v. Perrodin*, 35 La. Ann. 931; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Moran v. Horsky*, 178 U. S. 212, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

The allowance and confirmation by the commissioners and by Congress of a claim to a particular determined tract in itself carries title to the confirmee without survey or patent.

Langdeau v. Hanes, 21 Wall. 521, 22 L. ed. 606.

Both of the state courts found that, as a fact, a survey of the Bennet Joplin tract was made and approved by the United States surveyor general of Louisiana in 1856.

It is immaterial on what evidence the state courts based their finding of fact in this matter.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681.

***Mr. Justice McKenna** delivered the [100] opinion of the court:

The question presented is the effect of the defense of adverse possession and the plea of prescription. The contention of plaintiff in error is that such defense cannot avail against a United States patent. In other words, until the issue of the patent the title was in the United States, and was unaffected by the occupation of the defendants.

Counsel say:

"The confirmation to Joplin by act of Congress was only as to quantity, and not to any specifically described tract of land. There was only an equitable interest in Joplin and his heirs until a survey should be made and approved by the surveyor general, segregating his part from the public domain, and from conflicting claims. The survey of 1856 was not approved until May 9, 1900, when the receiver and register approved said survey, giving to Joplin and to conflicting claimants the tracts to which they were entitled under the confirmation. It was only then that the complete legal title was vested in Joplin and his heirs to the tract of land in controversy. It was only from this time that prescription commences.

Is the contention of counsel justified? They cite *Langdeau v. Hanes*, 21 Wall. 521, 22 L. ed. 606, and *Morrow v. Whitney*, 95 U. S. 551, 24 L. ed. 456. To determine the application of those cases there are important facts to be considered. The supreme court of Louisiana said:

"We do not think there is any dispute between the parties as to the facts. That, on the 12th of March, 1812, the board of com-

missioners appointed under § 4 of the act of Congress, approved March 3, 1807, confirmed to Bennet Joplin under certificate No. 1,927, by virtue of occupancy and settlement under Joseph Chevalier Poirot, 913.98 acres of land in Bayou Mallet woods, in the county of Opelousas. That on April 29, 1816 [3 Stat. at L. 329, chap. 159], Congress reciting the various acts bearing upon the subject (act of March 10, 1812 [2 Stat. at L. 692, chap. 38], act of February 27, 1813 [2 Stat. at L. 807, chap. 38], and act [101] of April, *1814 [3 Stat. at L. 121, chap. 52]) passed an act for the confirmation of certain land claims in the western district of the state of Louisiana, and that under § 1 of that act it was enacted 'that the claims marked "B," described in the reports of the commissioners for the western district of the state of Louisiana, formerly territory of Orleans, and recommended by them for confirmation, be, and the same are hereby, confirmed.' That the claim of Bennet Joplin covered by certificate No. 1,927 of the board of commissioners, was confirmed in favor of Joplin by that act of Congress. That although the claim was so confirmed by act of Congress, no patent was issued for the land by the United States government until July, 1900."

In other words, the land claimed by Poirot was identified by his possession. It contained a definite quantity. Fractions of acres were even regarded, and almost necessarily. The right of a claimant depended upon possession, and naturally its extent was marked by definite boundaries. How else could a claim have any strength at all, —any right to confirmation at all? The certificates issued by the commissioners were denominated grants (§7), and they were required to designate a tract of land (§6). Section 7, it is true, provided for a survey. The provision is "that the tracts of land thus granted by the commissioners shall be surveyed at the expense of the parties, under the direction of the surveyor general," in all cases where authenticated plats of the land, as surveyed by the French, Spanish, and American governments, respectively, shall not have been filed with the proper register and recorder, or shall not appear on the public records of the territories. The surveying officer was required to transmit general and particular plats of land thus surveyed to the proper register and recorder, and copies to the Secretary of the Treasury. The duties of the officers under the act may be summarized as follows: (1) The commissioners to investigate the claim, and, if they confirmed it, to issue a certificate thereof, and transmit a transcript of their final decision to the Secretary of the Treasury. (2) The register

and receiver, upon the filing of the *certifi-[102] cate with him and a plat of the land being also filed with him by the surveyor general or officer acting as surveyor general, should issue a certificate, which, being transmitted to the Secretary of the Treasury, would entitle the party to a patent. (3) The survey of the land by the surveyor general or officer acting as such. (4) Reports by the Secretary of the Treasury to Congress "for their final determination hereon, in the manner and at the time heretofore prescribed by law for that purpose." There is no evidence that the register and receiver issued a certificate other than that mentioned in the patent. The commissioners performed the duties required of them and the Secretary of the Treasury performed his. And a survey was made of the land in 1856.

Under these facts did the title pass by the confirmation expressed in the act of Congress of April 29, 1816 (3 Stat. at L. 328, chap. 159), or, at the latest, upon the survey in 1856, or did it pass by the patent in July, 1900? For answer we may refer to the cases cited by the plaintiff in error.

In *Langdcau v. Hanes*, the contest was between a title claimed by virtue of the act of Congress, March 26, 1804 [2 Stat. at L. 277, chap. 35], which confirmed claims to lands in the district of Vincennes, and a title claimed by adverse possession. It was provided by the act of Congress that a person to whom land is confirmed, whenever his claim shall have been located and surveyed, shall be entitled to the certificate from the register and receiver, which certificate shall entitle him to a patent. The tract in dispute was surveyed in 1820, but a patent was not issued until 1872. The defendant's claim of title rested on an adverse possession of thirty years. The state court held that the act of confirmation of 1807 was a present grant, and became so far operative and complete as to convey the legal title when the land was located and surveyed by the United States in 1820; second, the patent was not of itself a grant of the land, but only evidence of a grant; third, the adverse possession of the defendant was a bar to the recovery by the plaintiff. These propositions were affirmed by this court. The *court held that the act of Congress of 1804 [103] was a recognition and discharge of the obligation incurred by the government upon acquiring the territory from Virginia, to protect and confirm the possession and titles of the inhabitants to their property. And it was held that it was competent for Congress to provide how that it should be done, and Congress required a presentation of the claims to the register and receiver of the Land Office, constituted them commissioners to pass upon the claims "according to jus-

tice and equity," and to transmit to the Secretary of the Treasury a transcript of their decisions with his report. The Secretary of the Treasury submitted the decisions and the report to Congress, as he has required to do, and Congress passed the act of 1807 to confirm them. The court said:

"This confirmation was the fulfillment of the condition stipulated in the deed of cession so far as the claimants were concerned. It was an authoritative recognition by record of the ancient possession and title of their ancestor, and gave to them such assurance of the validity of that possession and title as would be always respected by the courts of the country. The subsequent clause of the act providing for the issue of a patent to the claimants when their claim was located and surveyed took nothing from the force of the confirmation.

"In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.

[104] "In the present case the patent would have been of great value to the claimants as record evidence of the ancient possession and title of their ancestor, and of the recognition and confirmation *by the United States, and would have obviated in any controversies at law respecting the land the necessity of other proof, and would thus have been to them an instrument of quiet and security. But it would have added nothing to the force of the confirmation. The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia.

"The whole error of the plaintiff arises from his theory that the fee to the land in controversy passed to the United States by the cession from Virginia, and that a patent was essential to its transfer to the claimants, whereas, with respect to the lands covered by the possession of the inhabitants and settlers mentioned in the deed of cession, the fee never passed to the United States, and if it had passed, and a mere equitable title had remained in the claimants after the cession, the confirmation by the act of 1807 would have operated as a release to them of the interest of the United

States. A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quitclaim from the government."

This doctrine was repeated in *Morrow v. Whitney*, 95 U. S. 551, 24 L. ed. 456. The question arose upon the ruling of the trial court refusing to admit a patent of the United States in evidence. Sustaining the ruling, this court said:

"In this case, the patent would have been of great value to the claimant. It would have enabled him, without other proof, to maintain his title in the tribunals of the country. Founded as it would have been upon a survey by the government, it would have removed the doubt as to the boundaries of the tract, which always arises where their establishment rests in the uncertain recollection of witnesses as to ancient possession. It would thus have proved to its possessor an instrument of quiet and security, but it would not have added anything to the interest vested by the confirmation. *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807."

*These cases are not in conflict with *Gibson v. Chouteau*, 13 Wall. 93, 20 L. ed. 534, as was observed in *Langdeau v. Hanes*. The land in controversy had been part of the public lands of the United States. The title of Gibson was derived under the act of Congress of February 17, 1815, for the relief of the inhabitants of the county of New Madrid, in the territory of Missouri, who had suffered by earthquakes. 3 Stat. at L. 211, chap. 45. James T. O'Carroll obtained permission from the Spanish authorities to settle on vacant lands in the district of New Madrid, in the territory of Louisiana, and in pursuance of the permission he settled upon a tract embracing about 1,000 arpents of land, in that part of the country which afterwards comprised the county of New Madrid in the territory of Missouri. The land settled upon, to the extent of 640 acres, was confirmed to O'Carroll by different acts of Congress. In 1812 the land was injured by an earthquake, and, upon proof of the fact, the recorder of land titles at St. Louis gave a certificate to that effect, which authorized the location of a like quantity on any of the public lands of the territory of Missouri, a sale of which was authorized by law. Under this certificate the land in dispute was located. The land located had been previously surveyed, but for some cause the survey and plat were not returned to the recorder until August, 1841. The recorder then issued a patent certificate to "James T. O'Carroll or his legal representatives." The survey was not approved by the Commissioner of the General Land Office, because it did not show its interferences with

conflicting claimants. A new survey and plat were made, showing interferences, and were filed with the recorder on the 26th of March, 1862, and a new patent certificate issued. In the following June the patent of the United States was issued to Mary McRee, who had acquired the interest of the locator by various mesne conveyances. In August following she conveyed to Gibson. Against the title thus acquired, among other defenses, adverse possession for the period prescribed by the statute of Missouri was pleaded. The plea was sustained. The judgment was reversed by this court.

[105] *It is obvious that there is a clear distinction between the case and *Langdeau v. Hanes* and *Morrow v. Whitney*. The act of 1815 did not confirm to O'Carroll the tract of land which he obtained from the Spanish authorities. It only enabled him or his representatives to locate a like quantity of the public land, and a segregation of that quantity and its exact identification were necessary, and this did not occur until the issue of the patent in 1862. The patent, therefore, was not the mere formal assurance of a title that had been conveyed by another government, but it was the conveyance of the title of this government after conditions performed, which authorized but did not anticipate it, nor were they its equivalent. The case at bar, therefore, does not come under the precedent of *Gibson v. Chouteau*; it comes under that of *Langdeau v. Hanes* and *Morrow v. Whitney*.

Plaintiff in error claims under Joplin, who claimed under Poiret, who claimed under the French government. And it was the title to a tract of land thus claimed that the commissioners under the act of 1807 adjudicated and granted, and it was that title which was confirmed by the act of April 29, 1816.

What element, then, is wanting? Plaintiff in error says the identification of the land,—its complete definition by boundaries,—and until this was done the title was in the United States. We need not dispute the principle upon which the contention rests. We think its conditions were satisfied. Poiret's title was obtained by occupation, and the right of his successor, Joplin, depended upon that, and by that the award of the commissioners could only have been measured. It is not conceivable that the boundaries of the tract were not ascertained by them. Their certificate, as was seen, expressed an exact quantity, 918.98 acres, and having a frontage of 1,080 arpents. The evidence before the commissioners is not exhibited, but there was a survey in 1856. The remarks of the supreme court of Louisiana are, therefore, apposite:

"It is evident that Poiret was shown to

the board to have already occupied and settled a particular body of land for the time *stated, and to have already had an existing[107] right or privilege to a particular tract. The identity of the tract confirmed must have been fixed by evidence before the board, and the survey which followed was unquestionably based upon that evidence, preserved and made known to the surveyor. The Joplin claim under Poiret was not based upon the survey, but the survey was based upon the existing claim, and simply identified the land to which Poiret and Joplin were entitled by antecedent occupancy and settlement."

Speaking of the survey, the court said:

"If, however, a survey of the claim was necessary in order to complete the transfer of ownership of this property to Joplin, we are satisfied that a survey of the same was made and approved by the surveyor general, W. J. McCulloh, as far back as 1856. The present surveyor general of Louisiana refers to the survey and field notes of Phelps as having been approved, but not as a matter of original approval by himself, as the plaintiff seems to contend. In the act of sale of this land under which the plaintiff claims from James W. Joplin to James H. Houston, Jr., the land transferred is referred to as a 'Spanish grant' with the added words (see parish map and a list of private land claims, where the above described property is well defined as belonging to Bennet Joplin). We have before us a copy of the parish map here referred to, with the different private claims (among others that of Bennet Joplin) distinctly set out, and the surveys on which they were located minutely detailed, certified to as far back as 1856 by the surveyor general. It may be that it is not strictly and technically in evidence, but it is before us by reference in one of the acts, and were we not to act upon it the only effect would be to remand uselessly the case in order to have it formally introduced."

Bennet Joplin, it was testified, died before the assessment was made upon which the tax sale upon which the title of the defendants in error depended, and the validity of the assessment, therefore, is denied, because it was not made in the name of the owner, as required by the statute of the state of 1870. *The assessment is also at-[108] tacked for nonconformity with the statutes in other particulars. In passing on the questions thus raised the supreme court of Louisiana construed the statutes of the state differently from plaintiff in error, and answered all the questions on grounds not Federal, and which, therefore, we need not discuss.

Judgment affirmed.

DANIEL CRONIN, *Plff. in Err.*,
v.

FRANK ADAMS, John T. Bottom, and William H. Griffith, Constituting the Fire and Police Board of the City of Denver, and Hamilton Armstrong, Chief of Police of the City of Denver.

(See S. C. Reporter's ed. 108-115.)

Constitutional law—validity of police regulations excluding females from saloons.

A municipal ordinance which prohibits liquor sellers from providing wine rooms or other places where females may be supplied with liquor, and from permitting females to be or remain for that purpose where liquor is sold or in any place adjacent thereto or connected therewith, and from employing females to wait or attend upon any person therein, and which forbids females from remaining in any such place and waiting and attending upon any person, or soliciting drinks therein,—is a valid exercise of the police power, not repugnant to the Federal Constitution.

[No. 100.]

*Argued and submitted December 16, 1903.
Decided January 4, 1904.*

IN ERROR to the Supreme Court of the State of Colorado to review a judgment

NOTE.—*Validity of police regulations excluding women from saloons.*

Police regulations, whether designed entirely to exclude women from saloons or to prohibit their presence there for certain purposes, have quite generally been sustained.

Where the regulations merely prohibit the sale of liquor where women are employed they have been held to be valid. *State ex rel. Marion v. Reynolds*, 14 Mont. 383, 36 Pac. 449; *Ex parte Hayes*, 98 Cal. 555, 20 L. R. A. 701, 33 Pac. 337.

And there can be no objection to the validity of an ordinance which fixes the amount of a saloon license at a higher rate where women are employed. *Ex parte Felchliu*, 96 Cal. 360, 31 Pac. 224.

An ordinance which forbids granting a liquor license to any person employing women to wait on customers in carrying on the liquor business is also valid. *Poster v. Police Comrs.* 102 Cal. 483, 37 Pac. 763.

Regulations which absolutely prohibit the employment of women in places where intoxicating liquors are sold have, with one exception, been sustained. *Bergman v. Cleveland*, 39 Ohio St. 651; *State v. Considine*, 16 Wash. 358, 47 Pac. 755; *Re Considine*, 83 Fed. 157; *Hoboken v. Goodman*, 68 N. J. L. 217, 51 Atl. 1092. *Contra, Re Maguire*, 57 Cal. 604, 40 Am. Rep. 125, where an ordinance making it a misdemeanor for a female to wait, or in any manner attend, upon any person in any place where liquors are used or sold, was held to be repugnant to Cal. Const. art. 20, § 18, providing that "no person shall, on account of sex, be disqualified from entering upon, or pursuing, any lawful business, vocation, or profession."

And the fact that an ordinance of this char-

which reversed a decree of the District Court of Arapahoe County perpetually enjoining municipal officials from enforcing an ordinance excluding females from saloons. *Affirmed.*

See same case below, 29 Colo. 488, 69 Pac. 590.

The facts are stated in the opinion.

Mr. Milton Smith submitted the cause for plaintiff in error:

The statutory provision guaranteeing civil rights, and entitling all persons to the full and equal enjoyment of all places of public resort and amusement, is clearly violated by the enforcement of this ordinance.

Baylies v. Curry, 128 Ill. 287, 21 N. E. 595; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 675; *New Orleans v. Philippi*, 9 La. Ann. 44; *Siloam Springs v. Thompson*, 41 Ark. 461; *Haywood v. Savannah*, 12 Ga. 405.

That a particular use of property is declared a nuisance by an ordinance of the city does not make that use of property a nuisance unless it is in fact so, and comes within the common-law or statutory idea of nuisance.

Wood, Nuisances, p. 977.

Ordinances on the subject of the sale of

acter permits the wife of a licensed proprietor to sell or distribute drinks, and that women are not debarred from proprietorship under license, does not make the ordinance invalid as a denial of the equal protection of the laws. *Hoboken v. Goodman*, 68 N. J. L. 217, 51 Atl. 1092.

It is also a fair police regulation to prohibit a saloon keeper from permitting women to assemble in his saloon for the purpose of enticing customers. *Hoboken v. Greiner*, 68 N. J. L. 592, 53 Atl. 693.

And a statute making it unlawful to sell liquors where women are allowed to assemble for the purposes of the business there carried on was held valid in *State ex rel. Marion v. Reynolds*, 14 Mont. 383, 36 Pac. 449.

A state may even absolutely prohibit any woman from remaining in a saloon after 12 o'clock at night,—so far, at least, as the constitutional requirement that every law of a general nature shall have a uniform operation is concerned. *Ex parte Smith*, 38 Cal. 702.

And women may be prohibited from entering or remaining in a wine room connected with a saloon for the purpose of being supplied with liquor. *Adams v. Cronin*, 29 Colo. 488, 69 Pac. 590.

But a municipal ordinance making it a misdemeanor for a woman to go into any building where liquor is sold, or stand within 50 feet of such building, is void as an unnecessary interference with individual liberty. *Gastineau v. Com.* 108 Ky. 473, 49 L. R. A. 111, 56 S. W. 705.

And see the note appended to the report of the case last cited, in 49 L. R. A. 111, on the question of the constitutionality of discrimination against women in police regulations.

spirituous and other intoxicating liquors must be in conformity to the general laws of the state, and cannot be such as are repugnant to, and violative of, the Constitution of the state or of the United States; nor can they be such as are utterly opposed to, and nullify, existing statutory laws; and authority to enact ordinances on that subject cannot be construed as imparting to the municipality the power to repeal the general laws in force.

Dill. Mun. Corp. §§ 315, 316.

This ordinance is a special and unwarranted discrimination against a large class of citizens.

Memphis v. Winfield, 8 Humph. 707; Dill. Mun. Corp. § 322.

The ordinance is not void solely because it is unjust, partial, and oppressive, and because it violates natural, social, and political rights of our citizens; but because it prohibits rights and privileges, and takes away property rights guaranteed and protected by the Constitution and laws of the state and of the nation,—not only such rights as rest merely upon the Constitution, but upon the great principles of eternal justice which lie at the foundation of all free governments.

People v. Morris, 13 Wend. 325; *Munn v. Illinois*, 94 U. S. 142, 24 L. ed. 90.

The police power in its broadest acceptation means the general power of the government to preserve and promote the public welfare, even at the expense of private rights.

New Orleans Gaslight Co. v. Hart, 40 La. Ann. 474, 4 So. 215; 4 Bl. Com. 162; *Com. v. Alger*, 7 Cush. 84; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

Police power is circumscribed by the Federal and state Constitutions.

Tiedeman, Pol. Power, § 2; 18 Am. & Eng. Enc. Law, p. 760; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; 1 Dill. Mun. Corp. 142; *Cooley*, Const. Lim. 6th ed. chap. 16; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Platte & D. Canal & Mill. Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036; *Platte & D. Canal & Mill. Co. v. Dowell*, 17 Colo. 376, 30 Pac. 68.

Every republican government is in duty bound to protect its citizens in the equality of rights.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

A woman has the same rights as a man.

Re Maguire, 57 Cal. 604, 40 Am. Rep. 125.

The restrictions of these ordinances are invalid because they do not operate equally upon all persons, and because they tend to

deprive certain persons of the right to do business and acquire property.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 160, 41 L. ed. 670, 17 Sup. Ct. Rep. 255; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Vanzant v. Waddell*, 2 Yerg. 260; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, *sub nom. Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

Mr. Charles R. Brock argued the cause, and, with Messrs. Henry A. Lindsley and Halsted L. Ritter, filed a brief for defendants in error:

To the states has been reserved the right to regulate and control within their respective boundaries and in their own discretion every trade or business which affects the public health, public safety, or public morals.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; *Black, Intoxicating Liquors*, § 26; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

A city council may prescribe the limits of the city within which laundries and wash houses shall not be operated for certain hours of the night, without in anywise infringing the constitutional rights of the proprietors thereof.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

A legislative restriction designed for the public health, with respect of the sale of cigarettes to young persons, has been held by this court to be within the police power of the state.

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

A statute which limits the period which workmen shall be required to labor each day in mines or in smelters for the reduction or refining of ores or metals to eight hours per day is held in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, to be a legitimate exercise of the police power of the state.

L'Heute v. New Orleans, 177 U. S. 588, 44 L. ed. 899, 20 Sup. Ct. Rep. 788, holds an ordinance to be valid within the police power of the state which seeks to regulate the location, within certain limits of the city, of houses occupied by women of lewd character.

Whatever is contrary to the public policy, or inimical to the public interests, is subject to the police power of the state, and within legislative control; and, in the ex-

ercise of such power, the legislature is vested with a large discretion, which, if exercised bona fide, for the protection of the public, is beyond the reach of judicial inquiry.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

The police power is not subject to any definite limitations, but is coextensive with the necessities of the ease and the safeguard of the public interests.

Campfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864.

It is upon the principle advanced in the cases mentioned that it is held that the states may control and regulate the sale of ardent spirits within their respective boundaries.

Black, *Intoxicating Liquors*, §§ 37, 39; *Schwuchow v. Chicago*, 68 Ill. 444; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *License Cases*, 5 How. 504, 12 L. ed. 256; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

From the principle announced in the above authorities it follows that no citizen has an inherent or indefeasible right, either to buy, or to sell, intoxicating liquors.

The right to prohibit the sale to all necessarily includes the right to prohibit the sale to some. It is a matter wholly within the discretion of the state and the city. The state, in its own wisdom, may wipe the traffic out entirely by prohibiting the sale to all, or it may lessen the evil by designating those most likely to be injured by its use and prohibiting its sale to them.

State ex rel. Henshall v. Ludington, 33 Wis. 107.

There has been no unlawful exercise of power reserved to the state of Colorado in the enactment of the laws before the court.

Denver v. Domedian, 15 Colo. App. 36, 60 Pac. 1107; Black, *Intoxicating Liquors*, § 42; *Poster v. Police Comrs.* 102 Cal. 491, 37 Pac. 763; *Ex parte Hayes*, 93 Cal. 556, 20 L. R. A. 701, 33 Pac. 337; *Bergman v. Cleveland*, 39 Ohio St. 651; *Blair v. Kilpatrick*, 40 Ind. 312; *State ex rel. Marion v. Reynolds*, 14 Mont. 383, 36 Pac. 449; *State v. Considine*, 16 Wash. 358, 47 Pac. 755, 83 Fed. 157.

Even though the laws attacked do discriminate against women, that objection cannot be raised by the plaintiff.

Wagner v. Garrett, 118 Ind. 114, 20 N. E. 706; *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *Marshall v. Donovan*, 10 Bush, 681; *Smith v. McCarthy*, 56 Pa. 359.

192 U. S.

Mr. Justice **McKenna** delivered the opinion of the court:

This suit was brought by the plaintiff in error against the defendants in error, who were officers of the city of Denver, to restrain them from enforcing an ordinance of the city on the ground that the ordinance was "contrary to the provision of the Constitution of the state of Colorado and amendments thereto, and contrary to the provisions of the Constitution of the United States," and "contrary to the laws of the state of Colorado, guaranteeing civil rights to all persons, and contrary to other statutes of the state of Colorado."

A preliminary injunction was allowed. It was made perpetual upon hearing, by decree of the court. The decree was reversed by the supreme court of the state, and this writ of error was then sued out.

*Sections 745 and 746 of article 15 of the [113] ordinance of Denver, which are complained of and attacked, are as follows:

"Sec. 745. Each and every liquor saloon, dram shop, or tippling house keeper, . . . who shall have or keep, in connection with or as part of such liquor saloon, dram shop, or tippling house, any wine room or other place, either with or without door or doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such liquor saloon, dram shop, or tippling house, and there be supplied with any kind of liquor whatsoever, shall, upon conviction, be fined as hereinafter provided.

"Sec. 746. No person . . . having charge or control of any liquor saloon or place where intoxicating or malt liquors are sold or given away, or any place adjacent thereto, or connected therewith in any manner whatsoever, either by doors or otherwise, shall suffer or permit any female person to be or remain in such liquor saloon, dram shop, tippling house, or other place where intoxicating or malt liquors are sold or given away, for the purpose of there being supplied with any kind of liquor whatsoever. No person owning or having charge or control of any liquor saloon, dram shop, or tippling house shall employ or procure, or cause to be employed or procured, any female person to wait or in any manner attend on any person in any dram shop, tippling house, or liquor saloon, or in any place adjacent thereto or connected therewith where intoxicating or malt liquors are sold or given away, nor shall any female person be or remain in any dram shop, tippling house, liquor saloon, or place adjacent thereto or connected therewith, and wait or attend on any person, or solicit drinks in any such place."

The supreme court held that those sec-

tions did not violate the Constitution of the state, and that they were authorized by the statutes of the state, and sustained the validity of the ordinance against the contention that it violated the Constitution of the United States, on the ground that it was enacted *in the exercise of the police power of the state. Declaring the laws of the state in regard to liquor selling, the court said:

"Under the license laws of this state no one may engage in the business of selling liquor without a license. He has no absolute right to sell at all. It is only a privilege he gets when a license is granted. The city of Denver, under its charter, has the exclusive power to prohibit, restrain, tax, and regulate the sale of intoxicating liquors. It may exercise that power to prohibit the sale altogether; or, if it sees fit, it may regulate the sale and impose such conditions as it deems necessary. Under these license laws, one may not engage in the liquor traffic as of common right, but may do so only upon compliance with prescribed regulations, and if he applies for a license under which only he may lawfully sell, he is held to take that license with whatever restrictions or limitations are imposed by the authority which, and which only, can give him the coveted privilege. One of the conditions which the charter of Denver requires to be inserted in every liquor license is the one of which plaintiff complains." [29 Colo. 495, 69 Pac. 592.]

This, the court decided, disposed of the complaint of plaintiff in error. In other words, that the restrictions of the ordinance were conditions of his license, and by accepting the license he accepted the conditions, and no rights of his were infringed. "The traffic in it (liquor) is unlawful without a license, and it may be prohibited in Denver," was the unequivocal declaration of the court.

What cause of action, then, has plaintiff in error? He is not a female nor delegated to champion any grievance females may have under the ordinance, if they have any. The right to sell liquor by retail to anybody depends upon the laws of the state, and they have affixed to that right the condition expressed in the ordinance. But even if plaintiff in error were not in such situation he cannot resist the ordinance. We said in *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13:

"The sale of such liquors in this way [by retail] has therefore been, at all times, by the courts of every state, considered *as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restric-

tions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of Federal law. The police power of the state is fully competent to regulate the business,—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States."

Judgment affirmed.

DANIEL CRONIN, *Plff. in Err.*,
v.
CITY OF DENVER.

(See S. C. Reporter's ed. 115, 116.)

Constitutional law—police regulations excluding females from saloons.

This case is governed by the decision in *Cronin v. Adams*, ante, 365.

[No. 101.]

*Argued and submitted December 16, 1903.
Decided January 4, 1904.*

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which affirmed a judgment of the County Court of Arapahoe County, affirming a conviction in the Police Court of the city of Denver for the violation of a municipal ordinance excluding females from saloons. *Affirmed.*

See same case below, 29 Colo. 503, 69 Pac. 1125.

The facts are stated in the opinion.

Mr. **Milton Smith** submitted the cause for plaintiff in error.

Mr. **Charles R. Brock** argued the cause, and, with Messrs. *Henry A. Lindsley* and *Hulsted L. Ritter*, filed a brief for defendant in error.

For contentions of counsel see their briefs as reported in *Cronin v. Adams*, ante, 365.

Mr. Justice **McKenna** delivered the opinion of the court:

This action was brought in the police court of the city of *Denver, state of Colo-[116] rado, to collect \$500, for the violation of § 746 of ordinance No. 101 of the city. Plaintiff in error was found guilty, and fined the sum of \$50. On appeal to the county court

NOTE.—As to the validity of police regulations excluding women from saloons—see note to *Cronin v. Adams*, ante, 365.

he was also found guilty, and fined \$100. The judgment was affirmed by the supreme court of the state, and thereupon the chief justice of the state allowed this writ of error.

The case involves the constitutionality of §§ 745 and 746 of the ordinance of the city of Denver. That question was passed upon in *Cronin v. Adams*, 192 U. S. 108, *ante*, 365, 24 Sup. Ct. Rep. 219, just decided, and on its authority the judgment is affirmed.

CHARLES McINTIRE, *Appt. and Plff. in Err.*,
v.

EDWIN A. McINTIRE, Administrator, c. t.
a. of David McIntire. (No. 84.)

EDWIN A. McINTIRE, Administrator, c. t.
a. of David McIntire, *et al.*, *Appts. and Plffs. in Err.*,
v.

CHARLES McINTIRE. (No. 85.)

(See S. C. Reporter's ed. 116-125.)

Wills—distribution—per capita or per stirpes—accounting—counsel fees—commissions—interest.

1. The children of the brothers of an illiterate testator take *per capita*, and not *per stirpes*, under the residuary clause of a will in which, after making a bequest to certain "nephews and nieces," the testator provides for an equal division of the remainder "between my brothers Edwin and Charles children."
2. A decedent's estate is properly charged with the counsel fees paid to counsel for services rendered for an administrator with the will annexed in defending the will against attack, although certain of the legatees as well as the administrator had a share in calling in such counsel.
3. The restoration of the assets of a decedent's estate to the hands of the administrator, with the duty of distribution, which was effected by an order made on condition of his filing a new bond, did not relieve him from his obligation assumed under a prior order, made by consent of all parties, which directed that the assets should remain under the control of the court, and that he should act as administrator without any allowance for commission or other charge for his services as such.
4. Charging the sums paid to the legatees on a partial distribution of a decedent's estate against their legacies instead of against their share in the residuary estate is not objectionable as stopping the running of interest on the legacies to the disadvantage of such legatees, because the sum paid on such distribution to one entitled to share only in such

residuary estate necessarily is charged against his share thereof.

5. Counsel fees paid from a decedent's estate upon a petition of legatees which stated that counsel had been managing their interests are properly directed to be borne by such legatees, where they consented to the order directing the same to be charged to their distributive shares, without reserving any right to apply to have it finally charged to the estate.
6. An administrator is properly charged with interest on a sum which stands on the record charged to him with his consent as money which he should have put into his account and held as an identified fund.
7. Interest is properly charged against an administrator on a sum which he retained in his own hands after the assets of the decedent's estate had been ordered paid into court, and then had been transferred to the solicitors of the parties as custodians, by an order made with the consent of the parties.

[Nos. 84, 85.]

Argued December 8, 1903. Decided January 4, 1904.

A PPEALS from, and IN ERROR to, the Court of Appeals of the District of Columbia to review a decree which affirmed a final decree of the Supreme Court of the District, settling the account of an administrator with the will annexed. *Affirmed.*

See same case below, 20 App. D. C. 134.

The facts are stated in the opinion.

Mr. William G. Johnson argued the cause and filed a brief for Charles McIntire:

No other rational explanation can be furnished than that it was the intention of the testator, by his special pecuniary bequest to the children of Edwin, to place that set of children upon what he conceived to be an equality with his brother Charles, and, having thus equalized the situation, to divide the remainder of his estate into two parts between the children of his two brothers.

White v. Holland, 92 Ga. 216, 18 S. E. 17.

The word "between," without something to qualify its ordinary meaning, must be taken in its proper sense as indicating a division between two, and not among six.

Thrie's Estate, 162 Pa. 369, 29 Atl. 750; *Green's Estate*, 140 Pa. 253, 21 Atl. 317; *Records v. Fields*, 155 Mo. 314, 55 S. W. 1021.

Had the testator in this case intended the residue to go to all his nephews and nieces in equal shares *per capita*, it would have been very simple and natural to have bequeathed the residue to his nieces and nephews or to the children of his brothers, without specifying how it was to be divided. They would have taken *per capita*.

Walker v. Griffin, 11 Wheat. 375, 6 L. ed. 498.

NOTE.—On the distribution of an estate *per stirpes*—see note to *Jackson v. Jackson*, 11 L. R. A. 305.

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The old technical rule of construction is no longer of force.

Adler v. Beall, 11 Gil. & J. 124; *Plummer v. Shepherd*, 94 Md. 466, 51 Atl. 173; *Henry v. Thomas*, 118 Ind. 23, 20 N. E. 519; *Vincent v. Newhouse*, 83 N. Y. 505; *Baleom v. Haynes*, 14 Allen, 204; *Raymond v. Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688; *Lyon v. Acker*, 33 Conn. 222; *Minter's Appeal*, 40 Pa. 111.

Messrs. Charles Cowles Tucker and William Henry Dennis argued the cause, and, with **Mr. Henry E. Davis**, filed a brief for Edward A. McIntire *et al.*:

The fact that Charles, Sr., the brother of the testator, was living when the will was made, lends a significance to the words of the will, and throws a light upon the intent of the testator which renders an interpretation of the language of the will a matter of little or no difficulty.

Blackler v. Webb, 2 P. Wms. 383; *Bryant v. Scott*, 21 N. C. (1 Dev. & B. Eq.) 155, 28 Am. Dec. 590; *Scott's Estate*, 163 Pa. 165, 29 Atl. 877.

The English rule of construction, that, where a gift is to the children of several persons, whether it be to the children of A and B, or to the children of A and the children of B, they take *per capita*, and not *per stirpes*,—is supported by the weight of American construction.

Howard v. Howard, 30 Ala. 391; *De Laurencel v. De Boom*, 67 Cal. 362, 7 Pac. 758; *Walker v. Griffin*, 11 Wheat. 375, 6 L. ed. 498; *Moffit v. Varden*, 5 Cranch C. C. 658, Fed. Cas. No. 9,689; *Follansbee v. Follansbee*, 7 App. D. C. 282; *Payne v. Rosser*, 53 Ga. 662; *Huggins v. Huggins*, 72 Ga. 825; *White v. Holland*, 92 Ga. 216, 18 S. E. 17; *Pitney v. Brown*, 44 Ill. 363; *Best v. Farris*, 21 Ill. App. 49; *Purnell v. Culbertson*, 12 Bush, 369; *McFartridge v. Holtzelaw*, 94 Ky. 352, 22 S. W. 439; *Brown v. Brown*, 6 Bush, 648; *Maddox v. Slate*, 4 Harr. & J. 540; *Alder v. Beall*, 11 Gil. & J. 123; *Brown v. Ramsey*, 7 Gill, 348; *Levering v. Levering*, 14 Md. 30; *McPherson v. Snowden*, 19 Md. 197; *Thompson v. Young*, 25 Md. 450; *Brittain v. Carson*, 46 Md. 186; *Allender v. Kepingler*, 62 Md. 8; *Plummer v. Shepherd*, 94 Md. 466, 51 Atl. 173; *Hill v. Bowers*, 120 Mass. 135; *Nichols v. Denny*, 37 Miss. 59; *Farmer v. Kimball*, 46 N. H. 435, 88 Am. Dec. 219; *Campbell v. Clark*, 64 N. H. 328, 10 Atl. 702; *Burnet v. Burnet*, 30 N. J. Eq. 595; *Benedict v. Ball*, 38 N. J. Eq. 48; *Maeknet v. Maeknet*, 24 N. J. Eq. 277; *Thornton v. Roberts*, 30 N. J. Eq. 473; *Hayes v. King*, 37 N. J. Eq. 1; *Budd v. Haines*, 52 N. J. Eq. 488, 29 Atl. 170; *Stokes v. Tilly*, 9 N. J. Eq. 130; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Bunner v. Storm*, 1 Sandf. Ch. 357; *Collins v. Hoxie*, 9 Paige, 81; *Seabury v. Brewer*,

53 Barb. 662; *Myres v. Myres*, 23 How. Pr. 410; *Re Verplanck*, 91 N. Y. 439; *Lee v. Lee*, 39 Barb. 172; *Bisson v. West Shore R. Co.* 143 N. Y. 125, 38 N. E. 104; *Ward v. Stow*, 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 729; *Waller v. Forsythe*, 62 N. C. (1 Phill. Eq.) 353; *Johnston v. Knight*, 117 N. C. 122, 23 S. E. 92; *Bryant v. Scott*, 21 N. C. (1 Dev. & B. Eq.) 155, 28 Am. Dec. 590; *Cheeves v. Bell*, 54 N. C. (1 Jones Eq.) 234; *Lane v. Lane*, 60 N. C. (1 Winst. Eq.) 84; *Roper v. Roper*, 58 N. C. (5 Jones Eq.) 16, 75 Am. Dec. 427; *Howell v. Tyler*, 91 N. C. 207; *Ex parte Leith*, 1 Hill Eq. 152; *Campbell v. Wiggins*, Rice Eq. 10; *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716; *Perdriau v. Wells*, 5 Rich. Eq. 20; *Wessenger v. Hunt*, 9 Rich. Eq. 459; *Dupont v. Hutchinson*, 10 Rich. Eq. 1; *Seay v. Winston*, 7 Humph. 472; *Kimbrow v. Johnston*, 15 Lea, 78; *Puryear v. Edmondson*, 4 Heisk. 43; *Ingram v. Smith*, 1 Head, 411; *Rogers v. Rogers*, 2 Head, 660.

While it may be conceded that decisions of the Maryland courts, rendered since the cession of the District by that state, are not in general binding on the courts of the District of Columbia, it is suggested that such decisions are always very persuasive, and should be followed unless manifestly wrong. This is especially true where rules of property, or rules for the effect and construction of wills, are involved. And in some instances they are to be regarded as binding in our courts.

De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; *Moffit v. Varden*, 5 Cranch C. C. 658, Fed. Cas. No. 9,689; *Follansbee v. Follansbee*, 7 App. D. C. 282.

Construction is not controlled by the use of the word "between."

Purnell v. Culbertson, 12 Bush, 369; *Myres v. Myres*, 23 How. Pr. 410; *Lord v. Moore*, 20 Conn. 122; *Farmer v. Kimball*, 46 N. H. 435, 88 Am. Dec. 219; *Abrey v. Newman*, 17 Eng. L. & Eq. Rep. 126; *Lucden v. Blackmore*, 10 Sim. 626; *Warrington v. Warrington*, 2 Hare, 54; *Williams v. Yates*, Cooper, 177.

The allowance of commissions is a matter peculiarly within the province of the orphans' court, which has a close-at-hand view of the administration of the estate; and, so far as discretion is vested in that court, its exercise is not subject to appeal.

Wilson v. Wilson, 3 Gill & J. 20; *Parker v. Gwynn*, 4 Md. 423; *Sinnott v. Kenaday*, 12 App. D. C. 115, 14 App. D. C. 1.

In *Eversfield v. Eversfield*, 4 Harr. & J. 12, even where an executrix had agreed to charge no commission and the orphans' court had acted upon that agreement, yet, when she afterward applied for her commis-

sion, it was held that the court should grant it.

So, where one executor claimed to have done all the work pertaining to his position, he was, nevertheless, directed to share his commission with his coexecutors.

Richardson v. Stansbury, 4 Harr. & J. 275.

So, the allowance made for commissions to a collector was held to have no effect upon the commissions of an executor or administrator of the estate.

Wilson v. Wilson, 3 Gill & J. 20.

Where money is paid to a party who holds both an interest-bearing and a noninterest-bearing obligation, he has a right to apply it on the latter.

Jones v. United States, 7 How. 681, 12 L. ed. 870.

A court does not charge a fiduciary with interest unless he has unreasonably detained money, or has used it or realized interest on it himself.

Wilson v. Wilson, 3 Gill & J. 20; *Handy v. State*, 7 Harr. & J. 42.

Mr. Justice **Holmes** delivered the opinion of the court:

These are cross appeals from the court of appeals of the District of Columbia. See 14 App. D. C. 337. To avoid all questions of form there are also writs of error on the same grounds. The appeal of Charles McIntire is from the overruling of exceptions to the final account of the administrator with the will annexed of the estate of David [120] McIntire, and presents two *questions, one of construction and one of administration, outside the terms of the will. The probate of the will already has been before this court. 162 U. S. 383, 40 L. ed. 1009, 16 Sup. Ct. Rep. 814.

The question of construction is the main one. It is whether the children of the testator's brothers, Edwin and Charles, take *per capita* or *per stirpes* under the residuary clause of the following will:

January 7th, 1880.

This is my last will and testament.

I David McIntire, tin-plate worker, of this city (of) do will, bequeath, or devise, to my nephews, and nieces, that is to say, from July the first. 1st eighteen hundred and fifty-four. 1854.

To the opening of. on reading of this, paper. one thousand three hundred and fifty dollars and sixty-four cents (\$1,350.64) is to be calculated at six (6) per cent. interest

That amount whatever it may be is to be given to each of my brother Edwin's children. The remainder if any, is to be equally divided between my Brothers Edwin and Charles children. David McIntire.

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There was an addition and also an earlier document of January 1, 1880, which it is unnecessary to copy. At the date of the will the brother Charles was living and had two sons, Charles and Henry, the latter of whom died before the testator. The brother Edwin had died, leaving six children, one of whom died before the testator. The testator held promissory notes of his brother Charles for \$1,350.63. The brother Charles also now is dead.

The argument for a division *per stirpes* is this. Earlier in the paper the testator had used the phrase "nephews and nieces," which it would have been natural to repeat had he intended to make a division *per capita*. But instead of that he says "my brothers Edwin and Charles children," which is not very different from "my brother Edwin's children and my brother Charles's children," and orders an equal division "between" them. "Between," if accurately used, imports that not more *than two persons or groups are [121] set against each other (*Ihrle's Estate*, 162 Pa. 369, 372, 29 Atl. 750; *Records v. Fields*, 155 Mo. 314, 322, 55 S. W. 1021), and those groups are earmarked and shown to be regarded as groups by naming the parents from which respectively they come. The equality of division is an equality between the groups. See *Hall v. Hall*, 140 Mass. 267, 271, 2 N. E. 700. This mode of distribution has the recommendation that it follows the rule in cases of intestacy. *Raymond v. Hillhouse*, 45 Conn. 467, 474, 29 Am. Rep. 688. See, further, *Alder v. Beale*, 11 Gill & J. 123, explained in *Plummer v. Shepherd*, 94 Md. 466, 470, 51 Atl. 173. But the court is of opinion that the general rule of construction must prevail, according to which, in the case of a gift to the children of several persons described as standing in a certain relation to the testator, the objects of the gift take *per capita*, and not *per stirpes*. *Walker v. Griffin*, 11 Wheat. 375, 379, 6 L. ed. 498, 499; *Balcom v. Haynes*, 14 Allen, 204; *Hill v. Bowers*, 120 Mass. 135. The fact that one of the parents was living at the date of the will is deemed sufficient to exclude a reference to the statute of distributions. *Blackler v. Webb*, 2 P. Wms. 383; *Bryant v. Scott*, 21 N. C. (1 Dev. & B. Eq.) 155, 157, 28 Am. Dec. 590. And with regard to the word "between," the will is an illiterate will, and as the popular use of the word is not accurate no conclusion safely can be based upon that. See *Maddox v. State*, 4 Harr. & J. 539; *Brittain v. Carson*, 46 Md. 186; *Lord v. Moore*, 20 Conn. 122; *Pitney v. Brown*, 44 Ill. 363; *Farmer v. Kimball*, 40 N. H. 435, 439, 88 Am. Dec. 219; *Burnet v. Burnet*, 30 N. J. Eq. 595; *Myres v. Myres*,

23 How. Pr. 410; *Waller v. Forsythe*, 62 N. C. (1 Phill. Eq.) 353.

The other error assigned on behalf of Charles McIntire is that the court charged the estate with \$11,500, fees paid to counsel for services in defending the will against the attack of the said Charles and his father. The amount was paid in different sums by orders of court, in several instances on the petition of the children of Edwin, one of whom was the administrator with the will annexed, and was directed to be charged [122] *against the interest of those children in the first instance, but without prejudice to an application to have it finally charged against the estate. On the allowance of the account it was charged against the estate. We are of opinion that the charge was proper. There is no contest over the amount. It was the proper business and duty of the administrator to defend the will, and he was entitled to a reasonable allowance for what he had to pay in doing so. The only just alternative would be to charge counsel fees as costs against the losing party, which would have been less favorable to the appellant. The general proposition is not disputed, but it is said that in this case the legatees retained the counsel and therefore ought to pay them. The other legatees as well as the administrator no doubt had a share in calling the counsel in. But that did not matter. The services were services to the estate in maintaining the testator's will; they were adopted by the administrator, and the usual rule must prevail. It is said that there was no application to change the original order, and no chance to be heard against it. But plainly this cannot be true. As observed by the court below, allowing the account changed the order and charged the fees on the estate. Whatever want of formality there may have been, the appellant had the right and opportunity to object and except to the account, as well on this ground as others, and he used it. The precise mode in which the allowance appeared upon the account is not material, but may be explained in a word or two. The payments were made by the solicitors of the parties while they had the assets in their hands, as will be stated in a moment. They rendered their account, crediting themselves with those payments generally. Then they turned over the assets, less these payments and their commissions, to the administrator. In the account of the latter he charges himself only with the net amount received by him, and makes no charge for the counsel fees against the legatees, and thus throws the burden on the residue of the estate.

The foregoing considerations dispose of the appeal of Charles *McIntire. There is a [123] cross appeal by the administrator from the allowance of certain exceptions to the account. The first error assigned is that he was denied commissions. The reason was this. On February 19, 1885, pending the controversy on the will and other controversies, an order was made by consent of all parties, to the effect, among other things, that Edwin A. McIntire should act as administrator, "but without any allowance for commission or other charge for his services as such administrator," and that the assets should remain under the control of the court (they having been paid into court under another order of the same date, passed in an equity cause). The next year, all debts having been paid except a disputed note, another order was made by consent, turning over the assets to the solicitors of the parties. The funds were managed by the solicitors until the will was established, when, on petition of the administrator, offering to give an additional bond, the assets were put into his hands on July 7, 1896, upon his filing a bond for \$100,000. It is argued that this restoration of the assets to the hands of the administrator, with the duty of distribution and the requirement of a new bond, relieved him of the terms of the bargain on which it was agreed that he should act, if that bargain ever was valid. We think it enough to say that we perceive no such change of situation from what was anticipated as should have that result. Whether the bargain was good or bad, the services were rendered under it, and therefore purported to be gratuitous. The law does not forbid gratuitous services, even in fiduciary relations, and if acts purport to be done gratuitously no claim for payment can be founded upon them at a later date. See *Johnson v. Kimball*, 172 Mass. 398, 400, 401, 52 N. E. 386.

A partial distribution was made under an order of December 9, 1897, of \$2,800 to each of the children of Edwin, and of \$6,022.02 to Charles McIntire. Complaint is made because the sums paid to Edwin's children were charged against the legacies to them instead of against their share in the residue, whereas the payment to Charles was charged to his share in *the residue, which [124] was all he had. It is said that this mode stops the running of interest on the legacies, to the disadvantage of the legatees. But we see no ground for complaint. Of course, the liabilities of the estate in the form of legacies as well as those in the form of debts are to be satisfied before the residue exists. In the absence of a definite under-

standing at the time, partial payments naturally would be taken as working that satisfaction and as stopping the liability of the estate for interest. The same principle applies to another sum which four of the legatees agreed to treat as having been paid to them as stated below.

A third error alleged concerns \$500, part of the counsel fees in addition to the sums mentioned above. This was paid upon a petition of Edwin's children, stating that the counsel "had been managing their interests," and under an order directing the same to be charged to their distributive shares, without reserving any right to apply to have it finally charged to the estate. We are not disposed to overturn the decision that this payment must be borne by the legatees, as they were content to be charged with it in the order allowing the payment.

The next error assigned is that the administrator was charged with interest on an item of \$10,000 from April 18, 1884, to February 25, 1885. This sum was alleged to have been received by the administrator, and improperly omitted from the inventory. The matter was referred to arbitrators. In order to avoid a family quarrel, if possible, the four sisters of the administrator agreed to be charged with \$2,500 each, as on a partial distribution, and gave receipts on February 25, 1885. Thereupon the administrator requested the arbitrators to find that he received and must account for the sum, and they did so. Very probably the matter of interest was overlooked, but the result of the transaction is that the administrator stands charged on the record as owing the estate \$10,000 until the time of distribution to the sisters, and of course that he must pay interest at the legal rate. It is not a case of charging interest not earned against

[125] an administrator having funds in his *hands as such, but it is a charge against him for money which he ought to have put into his account and held as an identified fund, but did not. The motives which induced his consent to charge himself are immaterial. Whatever they were, the effect of the record is the same.

Finally, the administrator objects to being charged with interest on an item of \$1,419.72, which he received in 1891. There is, perhaps, more doubt about this than concerning the more important matters, but we shall not disturb the decree. The assets had been ordered to be paid into court and then had been transferred, as above stated, to the solicitors of the parties as custodians. The administrator did not pay this sum over, but kept it in his own hands.

Decree affirmed.

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GERMAN SAVINGS & LOAN SOCIETY,
Plff. in Err.,

v.

DORA MAY DORMITZER, William L. Tull, and Ernest B. Tull.

(See S. C. Reporter's ed. 125-129.)

Constitutional law—full faith and credit—foreign decree of divorce—contradiction of jurisdictional facts.

A decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction because of the plaintiff's want of domicile, even when the record purports to show such jurisdiction and the appearance of the other party.

[No. 104.]

Argued December 16, 17, 1903. Decided January 4, 1904.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which reversed a judgment of the Superior Court of the County of Spokane in that State, dismissing a suit to establish a right to an undivided share in certain real property upon the theory that it was community property of the parents of the plaintiffs. *Affirmed.*

See same case below, 23 Wash. 132, 62 Pac. 862.

The facts are stated in the opinion.

Mr. William Scott Goodfellow argued the cause, and, with Messrs. E. C. Hughes and W. W. Hindman, filed a brief for plaintiff in error:

The mere setting up of a judgment of a court of a sister state, and asking that effect be given to it, introduce a Federal question.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Huntington v. Attrill*, 146 U. S. 666, 36 L. ed. 1127, 13 Sup. Ct. Rep. 224.

All that is necessary is that there shall be something in the case showing that the Federal question has been in fact brought to the attention of the court.

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 534, 46 L. ed. 677, 22 Sup. Ct. Rep. 446; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Tullock v. Mulvane*, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; *Sveringen v. St.*

NOTE.—On conflict of laws on the subject of divorce—see note to *Re Benton's Succession*, 59 L. R. A. 135.

Louis, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569; *Home for Incurables v. New York*, 187 U. S. 155, 47 L. ed. 117, 23 Sup. Ct. Rep. 84.

The supreme court of Washington did not intend to render judgment upon the independent ground of estoppel.

Maguire v. Tyler, 8 Wall. 650, 19 L. ed. 320; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Johnson v. Risk*, 137 U. S. 301, 34 L. ed. 684, 11 Sup. Ct. Rep. 111.

When rights under the Constitution are claimed to have been denied, this court will not consider itself bound by the construction placed upon a contract or state statute by the highest court of a state.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; *Jacobs v. Marks*, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865.

There was no issue of fact whatsoever, tendered either to the superior court or to the supreme court in impeachment of the Kansas divorce, excepting, only, the existence of the record; if, therefore, the supreme-court decision be treated as a finding of fact as to domicil, residence, fraud, service of summons, or authority of the attorney to appear, such finding was without the issue.

Morenhout v. Barron, 42 Cal. 591.

A final judgment of a court having a conceded jurisdiction both of the parties and of the subject-matter may be set at naught collaterally because not responsive to the matters controverted.

Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

That the pleadings raised no issue as to the judgment of divorce except its mere existence is clear.

Hill v. Mendenhall, 21 Wall. 453, 22 L. ed. 616; *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380.

Sister state judgments cannot be collaterally attacked on the ground of fraud.

Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Simmons v. Saul*, 138 U. S. 459, 34 L. ed. 1063, 11 Sup. Ct. Rep. 369; *Robb v. Vos*, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4.

As between Tull and his wife, this was not a foreign judgment, but a domestic judgment. The mere fact that she was without the territorial limits of the state at the time of service of summons, even if she did not afterwards appear by attorney, makes no difference.

Ouseley v. Lehigh Valley Trust & S. D. Co. 84 Fed. 602.

Messrs. Robert A. Howard and Lucius

G. Nash argued the cause and filed a brief for defendants in error:

The judgment rests on non-Federal grounds sufficient to sustain it.

Connecticut ex rel. New York & N. E. R. Co. v. Woodruff, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Hale v. Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113.

If the Federal question raised by the plaintiff in error is considered, the decision of the Washington court was so clearly right that its judgment and decree should be affirmed.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Streitwolf v. Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553.

Messrs. William M. Murray and Frederick W. Dewart filed a brief for Ernest B. Tull:

There are certain Federal questions which need not be raised in the lower court, but this is not one of them.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

Jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Kipley v. Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Michigan Sugar Co. v. Dix*, 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; *Jacobi v. Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48.

A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it.

Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

Whether the Federal claim was properly and sufficiently set up is a question for this court, and any statement by the court below, or by any of its members, does not bind this court.

Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

And it has been held that a certificate by the chief justice of the supreme court of the state is insufficient to give this court jurisdiction, but that such a certificate may be used to make certain and specific what is too general and indefinite in the record.

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

Statements from the briefs filed in the supreme court of the state were not proper to show that the Federal question was raised in the lower court.

Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639.

But, assuming, without intimating an opinion to that effect, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution, was relied upon, and that such provision must be set forth.

New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

Even if the state court has decided against the plaintiff in error on a Federal question, this court will not look into the Federal question if the state court has decided against the plaintiff in error on an independent ground sufficient to support the judgment, not involving a Federal question.

Bacon v. Texas, 163 U. S. 227, 41 L. ed. 140, 16 Sup. Ct. Rep. 1023; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *McQuade v. Trenton*, 172 U. S. 636, 43 L. ed. 581, 19 Sup. Ct. Rep. 292; *Seeberger v. McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128.

Estoppel is a good and sufficient ground in such cases on which to support a judgment.

Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856; *Speed v. McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613; *Adams County v. Burlington & M. R. Co.* 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Hale v. Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *Lowry v. Silver City Gold & S. Min. Co.* 179 U. S. 196, 45 L. ed. 151, 21 Sup. Ct. Rep. 104.

The decree of divorce rendered by the Kansas court was entitled to the same effect in Washington that it would have had in Kansas, and no more.

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

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There has never been any doubt as to what was the law in Kansas on that question.

Litowich v. Litowich, 19 Kan. 455, 27 Am. Rep. 145; *Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588; *Larimer v. Knoyle*, 43 Kan. 338, 23 Pac. 487; *Chicago, R. I. & P. R. Co. v. Campbell*, 58 Kan. 818, Appx. 51 Pac. 1100; *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539.

It is true that the plaintiff in error contends—and it is really its only contention—that the state court erred in its findings of fact. But those findings are conclusive on this court, and cannot be re-examined for any purpose.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Whitney v. United States*, 181 U. S. 104, 45 L. ed. 771, 21 Sup. Ct. Rep. 565; *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566; *Jenkins v. Neff*, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905; *E. Bement & Son v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

It is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by this court as absolutely to foreclose further contention on the subject.

Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error to the supreme court of Washington on the ground that full faith and credit has not been given to a decree of divorce rendered in the state of Kansas. See 23 Wash. 132, 62 Pac. 862. The record is long, but all that is material to the case in this court can be stated in a few words. The defendants in error are the children of one F. M. Tull, and brought a complaint for the purpose, so far as the savings society, the plaintiff in error, is concerned, of establishing their right to an undivided share in certain land in Spokane, Washington, to which the savings society claims an absolute title. At least, that form of relief was held to be open under their complaint. Their claim was made on the ground that the land was community property of their parents, and that they inherited an undivided share upon their mother's death. The savings society claimed under the foreclosure of a mortgage executed by F. M. Tull. Before the execu-

tion of their mortgage, and after Tull had applied for a loan, his wife died, and probate proceedings were instituted under which Tull purported to purchase his children's interest as a preliminary to making the mortgage. It has been decided that these probate proceedings were void as against a purchaser with notice, and that the savings society took with notice. These are local matters, with which we have no concern. But the savings society contended that it had a good title, irrespective of these proceedings. The land was purchased with the proceeds of Kansas property which seems to have stood in the name of F. M. Tull. Tull procured a divorce in Kansas, [127] and, if that *divorce was valid, his wife's interest in his property was gone. Therefore, it is said, the land in Washington followed the character of the purchase money as his separate property, although, before the payment was completed, the divorced parties made up their differences, and were married to each other a second time.

The supreme court of Washington, trying the case *de novo*, found that Tull had changed his domicile from Kansas to Washington before beginning his divorce proceedings, and therefore that the decree was without jurisdiction, and void. It further found, on evidence satisfactory to itself, that, the divorce being out of the way, the property was joint or community property, and that his children had the right they claimed. With this last again we are not concerned, and the only question for us is whether the court could go behind the record of the Kansas case.

There is a motion to dismiss. It is said that the Federal question was not set up in the court below, and that the court put its decision on two distinct grounds, one of which was that the society was estopped to deny the children's title. The latter ground, it is said, was independent of the Federal question. But the opinion of the court deals expressly with the constitutional rights of the savings society, and the society seems to have insisted on those rights as soon as the divorce was attacked. *Tullock v. Mulvane*, 184 U. S. 497, 503, 504, 46 L. ed. 657, 662, 663, 22 Sup. Ct. Rep. 372. As to the other point, it is at least doubtful whether the court meant to find any estoppel except on the footing that the property was shown to be community property. The motion to dismiss is overruled. See *Johnson v. Risk*, 137 U. S. 300, 307, 34 L. ed. 683, 686, 11 Sup. Ct. Rep. 111.

On the merits, however, the plaintiff in error has no case. It is suggested that the invalidity of the judgment for want of jurisdiction was not put in issue in the pleadings. It is a sufficient answer that the su-

preme court of the state treated it as in issue. *Hill v. Mendenhall*, 21 Wall. 453, 22 L. ed. 616, relied on by the plaintiff in error, came from the circuit court of the United *States, and when a case properly is [128] brought here from the circuit court upon constitutional grounds, the whole case is open. *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522. But it is otherwise when a case comes, as this does, from a state court. *Osborne v. Florida*, 164 U. S. 650, 656, 41 L. ed. 586, 588, 17 Sup. Ct. Rep. 214; *McLaughlin v. Fowler*, 154 U. S. 663, and 26 L. ed. 176, 14 Sup. Ct. Rep. 1192; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429.

It is too late now to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. *Andrews v. Andrews*, 188 U. S. 14, 39, 47 L. ed. 366, 372, 23 Sup. Ct. Rep. 237, 176 Mass. 92, 93, 57 N. E. 333. An attempt was made to avoid the authority of *Andrews v. Andrews* by the suggestion that there the respondent in the divorce suit had disappeared before the decree. But a respondent cannot defeat jurisdiction by disappearing. Indeed, in strictness, only the attorney disappeared, and the respondent simply ceased to defend the suit. The effect given to the statute of Massachusetts in that case depended wholly on contradicting the record of the divorce suit and proving the want of jurisdiction by proving the libellant's want of domicile in the state.

It very well may be that, if the supreme court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal without evidence impeaching it, such an evasion of the Constitution would not be upheld. It may be that in fact some circumstances were adverted to by that court which hardly warranted an inference. But it had before it the testimony of the husband, Tull, from which it appeared that before he made the contract for a part of the land in question he had sold out his property and business in Kansas, and had gone in search of what he called a new location, and that when he bought this land he decided to locate there. The land, it will be remembered, is in Spokane, Washington. Tull was there when the contract was made, and therefore there was ground for the court to find that at that moment he changed his domicile to Spokane. The contract was made on December 28, 1886, *and the libel for di- [129] vorce in Kansas was not filed until February 25, 1887. There was evidence warranting the finding, and that being so we take

the facts as they were found. *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

Decree affirmed.

Mr. Justice **McKenna** dissents.

JAMES G. JAMES, *Appt.*,

v.

GEORGE H. APPEL.

(See S. C. Reporter's ed. 129-138.)

New trial—discharge of motion by operation of law—validity of territorial statutes providing for such discharge.

1. A motion for a new trial is to be deemed to be overruled at the end of the term, although continued to another term by an order in chambers made by the judge who tried the cause, because of his inability to attend, by virtue of *Ariz. Rev. Stat. 1887, § 837*, requiring motions for new trials to be "determined at the term of the court at which the motion shall be made,"—especially when considered in connection with § 842, as amended by Acts 1891, No. 49, providing for a review by the territorial supreme court of a denial of a motion for a new trial, and enacting that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied."
2. An unconstitutional assumption of judicial functions was not made by the enactment of *Ariz. Rev. Stat. 1887, § 837*, which discharges a motion for a new trial by operation of law if not acted upon at the same term.
3. The grant by Congress of common-law jurisdiction to the Arizona courts, made by U. S. Rev. Stat. §§ 1868, 1908, did not prevent the enactment of *Ariz. Rev. Stat. 1887, § 837*, which discharges a motion for a new trial by operation of law if not acted upon at the same term,—especially in view of the provision of U. S. Rev. Stat. § 1866, that the jurisdiction given by § 1908 "shall be limited by law."

[No. 108.]

*Argued and submitted December 17, 1903.
Decided January 4, 1904.*

A PPEAL from the Supreme Court of the Territory of Arizona, which dismissed, because taken too late, an appeal from a judgment of the District Court of the First Judicial District in and for the County of Pima in that Territory, in favor of plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. F. Bowie** argued the cause, and, with Messrs. *Thomas B. Bishop* and *Bishop, Wheeler, & Hoefler*, filed a brief for appellant:

To determine the proper construction of a statute, the law as it stood at the time of the enactment of the statute is to be regarded—
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ed, but not amendments made subsequent to the adoption of the statute under consideration.

United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224.

Statutes such as the one under consideration are purely directory.

Sutherland, Stat. Constr. § 448; *Black*, Interpretation of Laws, § 126; *Endlich*, Interpretation of Statutes, §§ 436, 437; 23 Am. & Eng. Enc. Law, p. 458; *Rawson v. Parsons*, 6 Mich. 401; *People v. Doe*, 1 Mich. 451; *Gomer v. Chaffe*, 5 Colo. 383; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; *Broad v. Murray*, 44 Cal. 228; *Pearce v. Strickler*, 9 N. M. 46, 49 Pac. 727; *People v. Cook*, 14 Barb. 259; *Gilleland v. Schuyler*, 9 Kan. 569; *Shaw v. Orr*, 30 Iowa, 355; *Bell v. Taylor*, 37 La. Ann. 56; *Neal v. Burrows*, 34 Ark. 491; *McCarver v. Jenkins*, 2 Heisk. 629; *Boykin v. State*, 50 Miss. 375; *McBee v. Hoke*, 2 Speers L. 138; *State v. Carney*, 20 Iowa, 82; *Huecke v. Milwaukee City R. Co.* 69 Wis. 401, 34 N. W. 243; *State v. Pitts*, 58 Mo. 556; *State v. Smith*, 67 Me. 328; *Ex parte Holding*, 56 Ala. 458; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Gaston v. Stott*, 5 Or. 48; 14 Enc. Pl. & Pr. p. 902.

The refusal or neglect of a court to act cannot be reviewed on appeal.

Greehn v. Shumway, 73 Cal. 263, 14 Pac. 863; *Astor v. Chambers*, 1 Mo. 191.

Only judicial action can be reviewed by writ of error or appeal.

Gordon v. United States, 117 U. S. 697; *Sanborn v. United States*, 27 Ct. Cl. 485; *Hicks v. Murphy*, Walk. (Miss.) 66; *Phelps County v. Bishop*, 46 Mo. 68; *Ex parte Chadwell*, 3 Baxt. 98; *Re Weymouth*, 2 Cush. 335; *Bower v. Cook*, 39 Ga. 27.

The maxim, *Actus curiæ neminem gravabit*, applies.

Evans v. Rees, 12 Ad. & El. 167; *Freeman v. Tranah*, 12 C. B. 406; *Elliott*, App. Proc. § 117; *Jackson v. Carrington*, 4 Exch. 41; *Boody v. Watson*, 64 N. H. 169, 9 Atl. 794.

The rights of a party should not be affected by a delay of the court.

Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551.

The order of the district court of the territory denying the motion for a new trial must be considered as a *nunc pro tunc* order.

Gray v. Brignardello, 1 Wall. 627, 17 L. ed. 693; *Fishmongers' Co. v. Robertson*, 3 C. B. 970.

A court created by act of Congress cannot be shorn of its inherent powers by an act of the territory in which it is constituted.

The power to grant a continuance is an

inherent power of the district court of Arizona.

4 Enc. Pl. & Pr. p. 825; *Caswell v. Ward*, 2 Dougl. (Mich.) 374; *Burris v. Wise*, 2 Ark. 33; *Caughlin v. Blake*, 55 Iowa, 634, 8 N. W. 475; *Burt v. Williams*, 24 Ark. 91.

Where, by the Constitution of the state, the legislative power is intrusted to one branch of the government and the judicial power is confided to another, any act by the legislative power, judicial in its nature, is void.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; *People ex rel. Butler v. Saginaw County*, 26 Mich. 22.

The creation of a department for the exercise of the judicial power constitutes of itself a delegation to that department of all the judicial power of the sovereignty except as otherwise limited by the Constitution itself.

Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567; *Alexander v. Bennett*, 60 N. Y. 204; *Van Slyke v. Trempealeau County Mut. F. Ins. Co.* 39 Wis. 390, 20 Am. Rep. 50; *Cooley*, Const. Law, p. 35.

A grant of general powers to one department of government impliedly excludes all other departments of government from the exercise of the powers granted to the first.

Cooley, Const. Lim. 6th ed. 104; *Montesquieu*, *Esprit des Lois*, p. 11, c. 6; *Story*, Const. 518, 525.

A judgment is in its nature an emanation from a judicial tribunal, and the rendition of a judgment is a judicial function.

Black, Law Dict.; 3 Bl. Com. 395; *Bouvier*, Law Dict.

The judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case.

Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 440, 15 L. ed. 441.

Passing judgment upon proceedings pending in courts is beyond the powers of a legislative assembly.

State v. Fleming, 7 Humph. 152, 46 Am. Dec. 73; *Ex parte Shrader*, 33 Cal. 279; *Sinking Fund Cases*, 99 U. S. 761, 25 L. ed. 516; *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Taylor v. Place*, 4 R. I. 324; *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570; *Young v. State Bank*, 4 Ind. 301, 58 Am. Dec. 630; *Officer v. Young*, 5 Yerg. 320, 26 Am. Dec. 268; *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677; *Sanders v. Cabaniss*, 43 Ala. 173; *Cooley*, Const. Lim. *91; *Marpole v. Cather*, 78 Va. 239.

The phrase "shall be as limited by law"

refers, not to such law as might be enacted by the legislature, though that might sometimes be included, but to the organic act itself, and to the general history of our jurisprudence.

Ferris v. Higley, 20 Wall. 375, 22 L. ed. 383.

The right of a party to move for a new trial, and the power of the court to determine such motion, were well established at common law prior to the American Revolution.

3 Bl. Com. 387, 388; *Witham v. Lewis*, 1 Wils. 48; *Wood v. Gunston*, Style, 466; *Bright v. Eynon*, 1 Burr. 391.

Messrs. **C. W. Holcomb**, **W. C. Keegin**, and **J. H. McGowan** submitted the cause for appellee. Messrs. *Frank H. Hereford* and *Seth E. Hazzard* were with them on the brief:

A motion for a new trial may be continued to succeeding terms like other motions or proceedings, unless the statute requires said motion to be heard during the trial term.

Valentine v. Holland, 40 Ark. 338; *Walker v. Jefferson*, 5 Ark. 23; *Doddridge v. Gaines*, 1 MacArth. 335; *England v. Duckworth*, 75 N. C. 309; *Kane v. Burrus*, 2 Smedes & M. 313.

The statute is mandatory, and not directory.

McKean v. Ziller, 9 Tex. 59; *Bullock v. Ballew*, 9 Tex. 498; *Laird v. State*, 15 Tex. 317; *Bass v. Hays*, 38 Tex. 129; *Wilcox v. State*, 31 Tex. 587; *Carter v. Van Zandt County*, 75 Tex. 286, 12 S. W. 985.

In adopting and enacting a foreign statute decisions expounding it are adopted with it.

Tucker v. Oxley, 5 Cranch, 42, 3 L. ed. 31; *Pennock v. Dialogue*, 2 Pet. 18, 7 L. ed. 333; *Cutheart v. Robinson*, 5 Pet. 280, 8 L. ed. 126; *McDonald v. Hovey*, 110 U. S. 628, 28 L. ed. 272, 4 Sup. Ct. Rep. 142; *Brown v. Walker*, 161 U. S. 600, 40 L. ed. 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Henrietta Min. & Mill. Co. v. Gardner*, 173 U. S. 130, 43 L. ed. 640, 19 Sup. Ct. Rep. 327.

The constitutionality of a statute providing that a judgment shall be entered in certain cases has been expressly decided in Wyoming.

Barkwell v. Chatterton, 4 Wyo. 307, 33 Pac. 940.

After a judgment has been rendered upon a full hearing, it could hardly be considered an encroachment upon the judicial power if the trial court were denied altogether the right to change its decision.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114.

The simple disapproval by Congress at any time would have annulled the statute. It is no unreasonable inference, therefore, that it was approved by that body.

Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659; *Canon v. United States*, 171 U. S. 277, 43 L. ed. 163, 18 Sup. Ct. Rep. 855.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a judgment of the supreme court of the territory of Arizona, dismissing an appeal because taken too late. The appellee recovered a sum from the appellant in the court of first instance, and, after judgment was entered, the appellant moved for a new trial. The judge who tried the case, being unable to attend, made an order in chambers, continuing the motion to another term. At a later term, after several similar continuances, the motion was overruled, and the appellant then appealed to the supreme court of the territory. These events took place before the passage of the Arizona Revised Statutes of 1901. (See par. 1479.) It is assumed that the appeal was too late if the judgment became [135] final at *the term when it was rendered (Revised Statutes of Arizona, 1887, par. 849), and we may assume further that the ground of dismissal was the paragraph of the Revised Statutes requiring that motions for new trials "shall be determined at the term of the court at which the motion shall be made." Rev. Stat. 1887, par. 837, and the further provision of par. 842. By the latter, as amended in 1891, "when, upon motion, a new trial is denied," a review by the supreme court is provided for, and it then is enacted that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied, and the questions that may have been raised thereby shall be subject to review by the supreme court as if said motion had been overruled and exceptions thereto reserved and entered on the minutes of the court." Acts of 1891, No. 49, p. 69.

The Arizona par. 837 is copied from a similar section in the Texas Code, act of May 13, 1846, § 112, Hart's Dig. Texas Code, art. 766, 1 Sayles' Texas Civ. Stat. art. 1372. Long before its adoption in Arizona the latter section had been construed in Texas as mandatory, and as discharging a motion by operation of law if not acted upon at the same term. It was held to put it out of the power of the court to postpone the motion for a new trial to the next term, and then to act upon it. If the requirement could be avoided by a continuance, it would be made almost nugatory. *McKean v. Ziller*, 9 Tex. 58; *Bullock v. Ballew*, 9 Tex. 192 U. S.

498; *Bass v. Hays*, 38 Tex. 128. When a statute is taken in this way from another, even a foreign, state, it generally is presumed to be adopted with the construction which it has received. *Tucker v. Oxley*, 5 Cranch, 34, 42, 3 L. ed. 29, 31; *Henrietta Min. & Mill. Co. v. Gardner*, 173 U. S. 123, 130, 43 L. ed. 637, 640, 19 Sup. Ct. Rep. 327; *Com. v. Hartnett*, 3 Gray, 450. See *Coulam v. Doull*, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. Rep. 253. On this ground as well as that of the meaning of the words, the act had been construed as in Texas by the supreme court of Arizona. *Ruff v. Hand*, 24 Pac. 257. In view of the history of the section we shall spend no more time upon the question. Even *were it more [136] doubtful, we are of opinion that the amendment of 1891 to par. 842 makes the meaning plain. The words "then [necessarily after the end of the term] said motion shall be denied," show that the motion is disposed of at the end of the term. Furthermore, they do not mean that an order must be made out of term because of the failure to make an order within it, but mean that the motion shall be barred by the lapse of time, adopting the decision of the year before in *Ruff v. Hand*, and save an exception as if the motion had been denied by the court. The amendment assumes or enacts that the motion is to be deemed overruled at the end of the term, and has for its object to give the party an exception in case he appeals from the judgment, so that the propriety of granting the motion may be reviewed along with the other matters brought before the supreme court. See *Spicer v. Simms* (Ariz.) 57 Pac. 610.

It is urged that at least the statute cannot be meant to operate when the postponement is for the convenience of the court, and the case is likened to those where a judgment or order is entered *nunc pro tunc* in order to prevent a loss of rights through a delay caused by the court itself. But there is no need of an exception in such a case. The party's rights are saved, but transferred for consideration to a higher court, and were it otherwise we should hesitate to read the exception into such absolute words.

It is said that by the foregoing construction the legislature attempts an unconstitutional assumption of judicial functions. But this is a mistake, both in form and substance. In form, because the legislature does not direct a judgment, but merely removes an obstacle to a judgment already entered. (We need not consider whether a different construction would be adopted if the statute dealt with the time for entering judgments.) In substance, because we no more can doubt the power of the legislature

to enact a statute of limitations for motions for a new trial than we can doubt its power to enact such a statute for the bringing of an action. It may be questioned [137] whether there would be any constitutional objection to a law making the original judgment final, and doing away with new trials altogether. "Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings." *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 426, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114. See *Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 160, 171, 38 L. ed. 398, 400, 14 Sup. Ct. Rep. 506. The statute did not deal with the past, or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules. Whether the attempt to grant a review of the motion in case of an appeal or writ of error was valid is not before us. But certainly it does not seem an extraordinary stretch of legislative power to say that if the right to have a motion considered is lost in the lower court by lapse of time, the motion may be considered on appeal. There is no judgment by the legislature, but simply a qualification of the time limit if the case goes up.

Finally, it is argued that the sections, construed as we construe them, are inconsistent with the grant of common-law jurisdiction to the courts by Congress. Rev. Stat. §§ 1868, 1908. It is said that the right to grant new trials was a well-recognized incident of common-law jurisdiction, and that it cannot be taken away or cut down by the territorial legislature. In view of the provision in § 1866, that the jurisdiction given by § 1908 "shall be limited by law," and, indeed, apart from it, we should hesitate to say that the territorial legislature was prevented by the grant of common-law jurisdiction, in general words, from doing away with new trials altogether. A rule of practice like this does not touch jurisdiction in any proper sense. *Ferris v. Higley*, 20 Wall. 375, 22 L. ed. 383, cited by the appellant, has no application. Apart from other differences, that was a case of an attempt to confer original jurisdiction in civil and criminal cases, both in chancery and common law, upon the probate courts. We certainly see nothing to prohibit the local legislature from making this not unusual

[138] or unreasonable rule. *See *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. ed. 966; *Bent v. Thompson*, 138 U. S. 114, 34 L. ed. 902, 11 Sup. Ct. Rep. 238; *Grecley v. Winsor*, 1 S. D. 618, 631, 48 N. W. 214.

Judgment affirmed.

NEW YORK COUNTY NATIONAL BANK,
Appt.,
v.

ALBERT P. MASSEY, Trustee in Bankruptcy of George H. Stege and Frederick H. Stege.

(Sec S. C. Reporter's ed. 138-149.)

Bankruptcy—preferences—deposit in bank by insolvents.

Insolvents, by depositing money in a bank upon an open account, subject to check, do not thereby make a transfer of property amounting to a preference, which, under the bankruptcy act of 1898 (30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3445), § 60a, will deprive the bank of its right under § 68a to set off the amount of such deposit remaining to the depositors' credit on the date of their adjudication in bankruptcy and to prove its claim against the bankrupt estate for the balance.

[No. 90.]

Argued December 11, 1903. Decided January 4, 1904.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed an order of the District Court for the Southern District of New York, allowing a claim against a bankrupt's estate, and held that a preference must first be surrendered before the claim could be proved. *Reversed*, and the judgment of the District Court affirmed.

See same case below, 54 C. C. A. 116, 116 Fed. 342.

The facts are stated in the opinion.

Mr. Latham G. Reed argued the cause, and, with Messrs. John M. Bowers and Bowers & Sands, filed a brief for appellant:

The relation of a depositor in a bank with the bank itself is that of debtor and creditor.

National v. Millard, 10 Wall. 152, 19 L. ed. 897; *Davis v. Elmira Sav. Bank*, 161 U. S. 288, 40 L. ed. 703, 16 Sup. Ct. Rep. 502; *Hill, Trustees*, 4th Am. ed. 173; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148.

Transfers made in the usual and ordinary course of a trader's business, or payments made at the time a debt matures and in the usual mode of paying debts, are prima facie valid.

Traders' Nat. Bank v. Campbell, 14 Wall. 97, 20 L. ed. 834; *Driggs v. Moore*, 1 Abb. (U. S.) 440, Fed. Cas. No. 4,083.

If a transfer is made in the usual and

NOTE.—On set-off in bankruptcy cases—see note to *Morgan v. Wordell*, 55 L. R. A. 33.

ordinary course of business of the bankrupt, the burden of proof will rest upon the assignee.

Collins v. Bell, 3 Nat. Bankr. Reg. 587, Fed. Cas. No. 3,010; *Seammon v. Cole*, Hask. 214, 3 Nat. Bankr. Reg. 393, Fed. Cas. No. 12,433.

An exchange of values between an insolvent debtor and one of his creditors does not constitute a preference, because in such cases there is no diminution of the debtor's estate whereby creditors may be injured.

Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933; *Clark v. Iselin*, 21 Wall. 378, 22 L. ed. 574; *Fox v. Gardner*, 21 Wall. 480, 22 L. ed. 687; *Sawyer v. Turpin*, 91 U. S. 120, 23 L. ed. 237; *Stevens v. Blanchard*, 3 Cush. 169; *Jaquith v. Alden*, 189 U. S. 82, 47 L. ed. 719, 23 Sup. Ct. Rep. 649.

These deposits were a proper set-off.

Re Myers, 99 Fed. 691; *Re Kalter*, 2 N. B. N. Rep. 264; *Hough v. First Nat. Bank*, 4 Biss. 349, Fed. Cas. No. 6,721; *Blair v. Allen*, 3 Dill. 109, Fed. Cas. No. 1,483; *Ex parte Howard Nat. Bank*, 2 Low. Dec. 487, Fed. Cas. No. 6,764; *Re Petrie*, 5 Ben. 110, Fed. Cas. No. 11,040; *Ex parte Whiting*, 2 Low. Dec. 472, Fed. Cas. No. 17,573; *Kelly v. Phelan*, 5 Dill. 228, Fed. Cas. No. 7,673; *Re Farnsworth*, 5 Biss. 223, Fed. Cas. No. 4,673; *Robinson v. Wisconsin M. & F. Ins. Co. Bank*, 9 Biss. 117, 18 Nat. Bankr. Reg. 243, Fed. Cas. No. 11,969; *Re Meyer*, 107 Fed. 86; *Re Elsasser*, 7 Am. Bankr. Rep. 215.

The bank had a banker's lien upon the balance of the general deposit account of the bankrupt for all indebtedness then due to it.

Smith v. Eighth Ward Bank, 31 App. Div. 6, 52 N. Y. Supp. 290; *Central Nat. Bank v. Connecticut Mut. Ins. Co.* 104 U. S. 71, 26 L. ed. 701; *Bank of the Metropolis v. New England Bank*, 1 How. 239, 11 L. ed. 116; *Straus v. Tradesmen's Nat. Bank*, 122 N. Y. 379, 25 N. E. 372; *People v. St. Nicholas Bank*, 44 App. Div. 313, 60 N. Y. Supp. 719.

A banker's lien is not only a lien which springs purely by force and operation of law, but is one which is also, within the contemplation of law, agreed to by a customer of a bank when he opens a deposit account.

Myers v. New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504.

The rule is that in general the assignee does not stand in a better position than the bankrupt himself, and can claim only what the latter might claim.

Re Emslie, 42 C. C. A. 350, 102 Fed. 291; *Winsor v. Kendall*, 3 Story, 507, Fed. Cas. No. 17,886; *Fiske v. Hunt*, 2 Story, 582, Fed. Cas. No. 4,831; *Foster v. Hackley*, 2 Nat. Bankr. Reg. 406, Fed. Cas. No. 4,971; *Re Leland*, 10 Blatchf. 503, Fed. Cas. No. 192 U. S.

8,234; *Re Lyon*, 7 Nat. Bankr. Reg. 182, Fed. Cas. No. 8,644.

The bankruptcy act entirely recognizes liens, whether state or common law, so long as they were not liens given in violation of the specific terms of the act.

Re Falls City Shirt Mfg. Co. 3 Am. Bankr. Rep. 437; *Re Byrne*, 3 Am. Bankr. Rep. 268; *Re Beck*, 2 N. B. N. Rep. 532; *Re Brown*, 104 Fed. 762; *Re Gillette*, 104 Fed. 769, 5 Am. Bankr. Rep. 119.

Mr. **Louis Stürcke** argued the cause, and, with Messrs. **Albert P. Massey** and **Hill, Stürcke, & Andrews**, filed a brief for appellee:

Ignorance of the fact of insolvency on the part of the bank on January 22, 1900, is, of course, immaterial.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

A broad construction should be given to the word "transfer."

Ibid.

The bank having received a preference, the doctrine of set-off cannot be invoked to undo and to make good what the statute has declared is a "preference."

Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731; *Re Kellar*, 110 Fed. 348; *Re Tacoma Shoe & Leather Co.* 3 N. B. N. Rep. 9; *Re Christensen*, 3 N. B. N. Rep. 231.

To say that the bank has a banker's lien does not save the transaction from being a preference under the bankruptcy act.

Re Kellar, 110 Fed. 348.

The lien of the bank does not come into existence until the debt to the bank becomes due.

Jordan v. National Shoe & Leather Bank, 74 N. Y. 467, 30 Am. Rep. 319; *Straus v. Tradesmen's Nat. Bank*, 122 N. Y. 379, 25 N. E. 372; *Myers v. New York County Nat. Bank*, 36 App. Div. 482, 55 N. Y. Supp. 504; *People v. St. Nicholas Bank*, 44 App. Div. 313, 60 N. Y. Supp. 719; *Pearsall v. Nassau Nat. Bank*, 74 App. Div. 89, 77 N. Y. Supp. 11; *Smith v. Eighth Ward Bank*, 31 App. Div. 6, 52 N. Y. Supp. 290.

The lien would not attach until actual possession took place.

Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74; *Mathews v. Haradt*, 79 App. Div. 570, 80 N. Y. Supp. 462; *Re Mandel*, N. Y. L. J. Nov. 24, 1903.

Mr. Justice **Day** delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of appeals for the second circuit, reversing the order of the *district[142] court affirming the order of the referee in bankruptcy, allowing a claim against the estate of Stege & Brother. This claim was allowed against the contention of the trustee

of the bankrupt, that it could not be proved until the bank should surrender a certain alleged preference given to them in contravention of the bankrupt act. The circuit court of appeals reversed the order of the district court, holding that the bank must first surrender the preference before it could be allowed to prove its claim. 54 C. C. A. 116, 116 Fed. 342. The circuit court of appeals made the following findings of fact:

"For a number of years past the bankrupts, George H. Stege and Frederick H. Stege, were engaged, in the city and county of New York, in the business of dealing in butter, eggs, etc., at wholesale, under the firm name and style of Stege & Brother. On January 27, 1900, they filed a voluntary petition of bankruptcy in the district court, with liabilities of \$67,232.49 and assets of \$20,729.66, and upon the same day were duly adjudicated bankrupts. Among their liabilities there was an indebtedness of \$40,000 to the New York County National Bank for money loaned upon four promissory notes for \$10,000 each. The money was loaned to the bankrupts and the notes were originally given as follows:

"April 26, 1899, \$10,000, 6 months, due October 26, 1899.

"April 26, 1899, \$10,000, 7 months, due November 26, 1899.

"June 26, 1899, \$10,000, 4 months, due October 26, 1899.

"August 2, 1899, \$10,000, 4 months, due December 2, 1899.

"None of these notes were paid when they fell due, but were all renewed as follows:

"October 26, 1899, \$10,000, 3 months, due January 26, 1900.

"November 26, 1899, \$10,000, 75 days, due February 9, 1900.

"October 26, 1899, \$10,000, 3 months, due January 26, 1900.

"December 2, 1899, \$10,000, 69 days, due February 9, 1900.

[143] "On January 23, 1900, in the morning, the bankrupts went to the New York County National Bank and asked the officers to have the two notes of \$10,000 each, which fell due on January 26, extended. The bankrupts at that time informed the bank officers that they were unable to pay the notes then about to fall due. In the afternoon of the same day, January 23, 1900, the bankrupts again called upon the bank officers, and at that time they delivered to them a statement of their assets and liabilities, which statement was not delivered until after the deposit of \$3,884.47 had been made on that day. This statement as of January 22, 1900, showed their assets to be \$19,095.67 and their liabilities \$65,864.61.

"The bankrupts kept their bank account in the New York County National Bank

since May 6, 1899. On January 22, 1900, their balance in the bank was \$218.50. On the same day they deposited in that account \$536.83; on January 23, 1900, \$3,884.47; on January 25, 1900, \$1,803.95, making a total of \$6,225.25 deposited in the three days mentioned. Of this amount there was left in the bank account on the day of the adjudication in bankruptcy, January 27, 1900, the sum of \$6,209.25, the bank having honored a check of Stege Brothers after the date of all these deposits.

"At the first meeting of creditors, February 9, 1900, the New York County National Bank filed its claim for \$33,790.25.

"In its proof of claim the bank credited upon one of the notes which became due on January 26, 1900, the deposit of \$6,209.25. The claim was allowed by the referee in the sum of \$33,750.25, being \$40,000 less the amount on deposit in bank (\$6,209.25) and a small rebate of interest on the unmatured notes. Some of the creditors at this meeting reserved the right to move to reconsider the claim of the New York County National Bank; the referee granted this request. Afterwards the trustee, as the representative of the creditors, moved before the referee to disallow and to expunge from his list of claims the claim of the New York County National Bank unless it surrendered the amount of the deposit, namely, \$6,209.25, which had been credited by the bank upon one of the notes. The referee denied that motion, and an appropriate order was made and entered. The trustee thereupon duly filed his petition to have the question certified to the district judge. The district judge on *the 25th day of November, 1901, made an order affirming the order of the referee. From that order an appeal was duly taken by the trustee to the circuit court of appeals. The deposits were made in the usual course of business; at the time they were made Stege Brothers were insolvent."

As a conclusion of law, the court of appeals held that the deposit would amount to a transfer enabling the bank to obtain a greater percentage of the debt due to it than other creditors of the same class, and that allowance of the claim should be refused unless the preference was surrendered. This case requires an examination of certain provisions of the bankrupt law. Section 68 of that law provides:

"Sec. 68. Set-offs and counterclaims:

"(a.) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set-off against the other and the balance only shall be allowed or paid.

"(b.) A set-off or counterclaim shall not

be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate, or (2) was purchased by or transferred to him after the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."

Section 60 provides (prior to the amendment of February 5, 1903):

"Sec. 60. Preferred creditors: *a*. A person shall be deemed to have given a preference if, being insolvent, he has . . . made a transfer of any of his property, and the effect of the . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 57*g* provides (prior to amendment of February 5, 1903): "Claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." [30 Stat. at L. 560, chap. 541, U. S. Comp. Stat. 1901, p. 3443.]

[145] *Considering, for the moment, § 68, apart from the other sections, subdivision *a* contemplates a set-off of mutual debts or credits between the estate of the bankrupt and the creditor, with an account to be stated and the balance only to be allowed and paid. Subdivision *b* makes certain specific exceptions to this allowance of set-off, and provides that it shall not be allowed in favor of the debtor of the bankrupt upon an unproved claim or one transferred to the debtor after the filing of the petition in bankruptcy, or within four months before the filing thereof, with a view to its use for the purpose of set-off, with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy. Obviously, the present case does not come within the exceptions to the general rule made by subdivision *b*. It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character. *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897. Or, as defined by Mr. Justice White, in the case of *Davis v. Elmira Sav. Bank*, 161 U. S. 288, 40 L. ed. 702, 16 Sup. Ct. Rep. 505: "The deposit of

money by a customer with his banker is one of loan, with the superadded obligation that the money is to be paid, when demanded, by a check." *Scammon v. Kimball*, 92 U. S. 369, 23 L. ed. 485. It is true that the findings of fact in this case establish that at the time these deposits were made the assets of the depositors were considerably less than their liabilities, and that they were insolvent, but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor. The check of the depositor was honored after this deposit was made, and for aught that appears Stege Brothers might have required the amount of the entire account without objection from the bank, notwithstanding their financial condition.

We are to interpret statutes, not to make them. Unless other sections of the law are controlling, or, in order to give a harmonious construction to the whole act, a different interpretation is required, it would seem clear that the parties stood in the relation defined in § 68*a*, with the right to set off mutual debts, the creditor being allowed to prove but the balance of the debt.

Section 68*a* of the bankruptcy act of 1898 is almost a literal reproduction of § 20 of the act of 1867. [14 Stat. at L. 526, chap. 176, U. S. Comp. Stat. 1901, p. 3418.] So far as we have been able to discover the holdings were uniform under that act that set-off should be allowed as between a bank and a depositor becoming bankrupt. *Re Petrie*, 7 Nat. Bankr. Reg. 332, 5 Ben. 110, Fed. Cas. No. 11,040; *Blair v. Allen*, 3 Dill. 101, Fed. Cas. No. 1,483; *Scammon v. Kimball*, 92 U. S. 362, 23 L. ed. 483. In *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. ed. 832, the right of set-off was not relied upon, but a deposit was seized on a judgment which was a preference.

But it is urged that under § 60*a* this transaction amounts to giving a preference to the bank, by enabling it to receive a greater percentage of its debts than other creditors of the same class. A transfer is defined in § 1 (25) of the act to include the sale and every other and different method of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. While these sections are not to be narrowly construed so as to defeat their purpose, no more can they be enlarged by judicial construction to include transactions not within the scope and purpose of the act. This section, 1 (25), read with §§ 57*g* and 60*a*, requires the surrender of preferences having the effect of transfers of property "as payment, pledge, mortgage, gift, or security

which operate to diminish the estate of the bankrupt and prefer one creditor over another."

[147] *The law requires the surrender of such preferences given to the creditor within the time limited in the act before he can prove his claim. These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor, and the consequent diminution of the bankrupt's estate. It is such transactions, operating to defeat the purposes of the act, which, under its terms, are preferences.

As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. It is true that it creates a debt, which, if the creditor may set it off under § 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of § 68a. If this argument were to prevail, it would, in cases of insolvency, defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that, to the extent of the set-off, he is paid in full.

It is insisted that this court in the case of *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 48 L. ed. 1171, 21 Sup. Ct. Rep. 906, held a payment of money to be a transfer of property within the terms of the bankrupt act, and, when made by an insolvent within four months of the filing of the petition in bankruptcy, to amount to a preference, and that case is claimed to be decisive of this. In the *Pirie Case* the turning question was whether the payment of money was a transfer within the meaning of the law,

[148] and it was held *that it was. There the payment of the money within the time named in the bankrupt law was a parting with so much of the bankrupt's estate, for which he received no obligation of the debtor but a credit for the amount on his debt. This was held to be a transfer of property with-

in the meaning of the law. It is not necessary to depart from the ruling made in that case, that such payment was within the operation of the law, while a deposit of money upon an open account subject to check, not amounting to a payment, but creating an obligation upon the part of the bank to repay upon the order of the depositor, would not be. Of the case of *Pirie v. Chicago Title & T. Co.* it was said in *Jaquith v. Alden*, 189 U. S. 78, 82, 47 L. ed. 717, 719, 23 Sup. Ct. Rep. 649, 650: "The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within § 60a, although the creditor was ignorant of the insolvency, and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class."

In other words, the *Pirie Case*, under the facts stated, shows a transfer of property to be applied upon the debt, made at the time of insolvency of the debtor, creating a preference under the terms of the bankrupt law. That case turned upon entirely different facts, and is not decisive of the one now before us. It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than *to create a debt to the bank-[149] rupt, and not a diminution of his estate.

In our opinion the referee and the district court were right in holding that the amount of the deposit could be set off against the claim of the bank, allowing it to prove for the balance, and the circuit court of appeals, in holding that this deposit amounted to a preference, to be surrendered before proving the debt, committed error.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed; cause remanded to latter court.

Mr. Justice McKenna dissents.

ROYAL INSURANCE COMPANY, *Plff. in*
Err.,
v.

RUPERTO MARTIN, as Executor of the
 Will of Francisco Martin, Deceased.

(See S. C. Reporter's ed. 149-167.)

Appeal — direct review of judgment of district court for Porto Rico — insurance — loss during riot — independent causes — waiver of formal proof — change in interest — separate insurance.

1. A direct review in the Supreme Court of the United States of a judgment of the district court for the district of Porto Rico in an action on a policy of insurance issued by a foreign corporation in which the matter in dispute exceeds the sum of \$5,000 may be had on writ of error to the latter court, under the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 35, providing for the allowance of such writs of error in the same manner, under the same regulations, and in the same cases as from the supreme courts of the territories, since the judgment, if rendered by a territorial supreme court, would not have been reviewable in the circuit court of appeals under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), § 15, on the theory that the case was one of the class in which the judgments of the latter court are made final by § 6 of that act, nor is the question affected by the provision in the acts relating to the re-examination in certain designated circuit courts of appeals of judgments of the highest courts of the Indian territory, Hawaii, and Alaska.
2. The effect of a provision in a policy of insurance that it shall not cover loss or damage by fire happening during the existence of a riot within the country or locality in which the property is situated unless proof be made, to the satisfaction of the directors, that such loss or damage was due to independent causes, is to entitle the company to demand such proof before being sued.
3. A denial by an insurance company of all liability under its policy dispenses with the necessity of furnishing the proofs that the loss occurred from independent causes,—which the company, under the policy, was entitled to demand before it could be sued, where the fire happened during the existence of a riot in the country or locality where the property was situated,—and opens the way for a suit by the insured, where the rights of the parties can be determined according to the facts as disclosed by the evidence.
4. A policy under which a building and a stock in trade contained therein were sep-

NOTE.—As to severability of insurance in same policy—see note to *Wright v. Fire Ins. Asso.* 19 L. R. A. 211.

On change in ownership of insured property as affecting the insurance—see notes to *Nussbaum v. Northern Ins. Co.* 1 L. R. A. 704; *Russell v. Cedar Rapids Ins. Co.* 4 L. R. A. 538; *Cottingham v. Fireman's Fund Ins. Co.* 9 L. R. A. 627, and *East Texas F. Ins. Co. v. Clarke*, 11 L. R. A. 293.

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ately insured for distinct and different amounts is not avoided as respects the insurance on the building by a change in the ownership of such stock in trade without notice to the insurance company, although the policy provides that it shall cease to be in force as to any property thereby insured which shall pass from the insured to any other person otherwise than by due operation of law, unless notice thereof be given to the company.

5. A transfer by an insured, without notice to the insurance company, of his entire stock in trade to a firm in which he is a silent partner, discharges the company from all liability under a policy insuring such stock in trade, which provided that it should cease to be in force as to any property insured which should pass from the insured to any other person otherwise than by operation of law, unless notice be given to the company.

[No. 86.]

Argued December 8, 9, 1903. Decided January 11, 1904.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment entered on a verdict in favor of the plaintiff in an action on a policy of fire insurance. *Reversed* and remanded for a new trial.

The facts are stated in the opinion.

Mr. William G. Choate argued the cause and filed a brief for plaintiff in error:

The appellate jurisdiction of this court from supreme courts of the territories remains unimpaired, except as such appellate jurisdiction is transferred to the circuit courts of appeals by the act of 1891.

Shute v. Keyser, 149 U. S. 649, 37 L. ed. 884, 15 Sup. Ct. Rep. 960; *Aztec Min. Co. v. Ripley*, 151 U. S. 79, 38 L. ed. 80, 14 Sup. Ct. Rep. 236; *Polson v. United States*, 160 U. S. 121, 40 L. ed. 363, 16 Sup. Ct. Rep. 222; *Simms v. Simms*, 175 U. S. 162, 44 L. ed. 115, 20 Sup. Ct. Rep. 58; *Union Cent. L. Ins. Co. v. Champin*, 54 C. C. A. 208, 116 Fed. 858.

This case does not fall within either of the five enumerated cases by which, under the act of 1891, the judgments or decrees of the circuit courts of appeals are made final.

A transfer to a firm including the insured is a transfer within the condition of the policy, and avoids it.

Germania F. Ins. Co. v. Home Ins. Co. 144 N. Y. 195, 26 L. R. A. 591, 39 N. E. 77; *Dreunen v. London Assur. Corp.* 20 Fed. 657, 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. Rep. 341, 116 U. S. 461, 29 L. ed. 688, 6 Sup. Ct. Rep. 442; *Malley v. Atlantic F. & M. Ins. Co.* 51 Conn. 251.

Such a provision including a change of title or interest is provided by the courts as just and reasonable.

Germania F. Ins. Co. v. Home Ins. Co. 144 N. Y. 199, 26 L. R. A. 591, 39 N. E. 77; *Biggs v. North Carolina Home Ins. Co.* 88 N. C. 141; *Card v. Phoenix Ins. Co.* 4 Mo. App. 424.

Cases in the supreme court of Iowa subsequent to the case of *Cowan v. Iowa State Ins. Co.* 40 Iowa, 551, 20 Am. Rep. 583, which is relied on by the defendant in error, distinguish that case on the ground that there was no provision in the policy in that case relating to a change of title or interest, but a provision merely in respect to a sale or conveyance which was held to mean a technical sale of the whole property.

Hathaway v. State Ins. Co. 64 Iowa, 229, 52 Am. Rep. 438, 20 N. W. 164; *Oldham v. Anchor F. Ins. Co.* 90 Iowa, 225, 57 N. W. 861; *Jones v. Phoenix Ins. Co.* 97 Iowa, 275, 66 N. W. 169. See also *Germania F. Ins. Co. v. Home Ins. Co.* 4 Misc. 443, 24 N. Y. Supp. 357; May, Ins. 4th ed. § 279; 3 Joyce, Ins. §§ 2293-2295; 1 Biddle, Ins. § 224; Elliott, Ins. § 273.

Mr. Fritz von Briesen argued the cause and filed a brief for defendant in error:

The proper method of construing an act of Congress is to try to ascertain the intent of Congress as evidenced by the entire act.

Co. Litt. 381a; *United States v. Union P. R. Co.* 91 U. S. 72, 23 L. ed. 224; *People ex rel. Wood v. Draper*, 15 N. Y. 532.

The primary object of the circuit court of appeals act was to facilitate the prompt disposition of cases in the Supreme Court, and to relieve it of the enormous burden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigations.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

The courts have read the "diversity citizenship" clause of § 6 into § 15.

Union Cent. L. Ins. Co. v. Champlin, 54 C. C. A. 208, 116 Fed. 858; *Aztec Min. Co. v. Ripley*, 3 C. C. A. 388, 10 U. S. App. 383, 53 Fed. 7, 151 U. S. 79, 38 L. ed. 80, 14 Sup. Ct. Rep. 236; *Polsom v. United States*, 160 U. S. 121, 40 L. ed. 363, 16 Sup. Ct. Rep. 222; *Shute v. Keyser*, 149 U. S. 649, 37 L. ed. 884, 13 Sup. Ct. Rep. 960.

Congress could never have intended to deprive a United States citizen of his right to an appeal, and in the same breath confer it upon a citizen of Porto Rico.

Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

A transfer of insured goods to a partnership of which the insured is a member is not an alienation, and does not avoid the policy.

1 Biddle, Ins. p. 199; *Washington F. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Scanlon v. Union F. Ins. Co.* 4 Biss. 511, Fed. Cas. No. 12,436; *Blackwell v. Miami*

Valley Ins. Co. 48 Ohio St. 533, 14 L. R. A. 431, 29 N. E. 278; *Cowan v. Iowa State Ins. Co.* 40 Iowa, 551, 20 Am. Rep. 583.

In case a loss by fire occurs during the existence of an invasion or riot, the board of directors may call for proof that such loss was not occasioned by the invasion, and, if such proof be not furnished, or, if furnished, be not reasonably satisfactory, no action on the policy may be maintained.

Braunstein v. Accidental Death Ins. Co. 1 Best & S. 783, 31 L. J. Q. B. N. S. 17, 8 Jur. N. S. 506, 5 L. T. N. S. 550.

A denial of all liability by an insurance company before the expiration of the time for making proof of loss is a waiver of the condition requiring such proof.

Lewis Bailie & Co. v. Western Assur. Co. 49 La. Ann. 658, 21 So. 736; *La Société de Bienfaisance v. Morris*, 24 La. Ann. 347; *Montelcone v. Royal Ins. Co.* 47 La. Ann. 1563, 56 L. R. A. 784, 18 So. 472; *National Union v. Thomas*, 10 App. D. C. 277; *German Ins. Co. v. Frederick*, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 144.

The company may not in this court juggle away the evident meaning and intent of the condition, and make it mean something that it never said, namely, that the burden of proof in an action at law should be upon the insured to show that the fire had not been caused by the riot.

1 Wood, Fire Ins. 2d ed. p. 161; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *Reynolds v. Commerce F. Ins. Co.* 47 N. Y. 597; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841.

Mr. Justice Harlan delivered the opinion of the court:

This was an action by the executor of the insured on a policy of insurance made by the Royal Insurance Company, a British corporation, whereby that company insured Francisco Martin against loss or damage by fire to the amount of £700 on a certain building at Coto Laurel, district of Ponce, Porto Rico, and for £900 on the stock in trade contained in such building.

The declaration alleged, and the fact was not disputed, that during the term of the policy all the property insured was destroyed by fire. The case was tried by the court and a jury, and a verdict was returned in favor of the plaintiff for \$7,623, the court refusing to require the jury to find the damages, separately, as to the building and the stock of goods; and for the above amount judgment was rendered against the company.

The defendant in error disputes the jurisdiction of this court to review the judgment below. If this position be well taken, the writ of error should be dismissed without

considering the merits of the case. *Continental Nat. Bank v. Buford*, 191 U. S. 119, ante, 119, 24 Sup. Ct. Rep. 54. We must therefore examine the question of the jurisdiction, which depends upon the scope and effect of various statutory provisions, including those relating to the court established by Congress in Porto Rico. We will look at the statutes according to the respective dates of their enactment.

[156] *By § 702 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 571), it is provided that "the final judgments and decrees of the supreme court of any territory except the territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, . . . exceeds \$1,000, may be reviewed and reversed or affirmed in the Supreme Court [of the United States] upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court. In the territory of Washington the value of the matter in dispute must exceed \$2,000, exclusive of costs. And any final judgment or decree of the supreme court of said territory in any cause [when] the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner."

This provision was modified by the act of March 3d, 1885, entitled "An Act Regulating Appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the Several Territories;" for by the latter act it was provided: "§ 1. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of \$5,000. § 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." 23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572.

Then came the act of March 3d, 1891, "to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547. The 5th section of that act prescribes the cases that may be brought directly to this court from the district courts

or from the existing circuit courts of *the[157] United States, while the 6th section provides that the circuit courts of appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law;" the judgments or decrees of the circuit court of appeals to be final "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." Further, by the same section: "In all cases not hereinbefore, in this [6th] section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed \$1,000, besides costs." § 6. The 13th section of the act provides: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act." And the 15th section is in these words: "That the circuit court of appeal *in cases* in which the judgments of the circuit courts of appeal are made *final* by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits." 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547.

This brings us to the act of April 12th, 1900, chap. 191, entitled, "An Act Temporarily to Provide Revenues and a Civil Government *for Porto Rico, and for Other[158] Purposes." 31 Stat. at L. 85.

By § 33 of that act it is declared, among other things, that the judicial power shall be vested in the courts and tribunals of Porto Rico as then established and in operation, under and by virtue of certain general orders promulgated by military authority, —the chief justice and associate justices of the supreme court of Porto Rico, and the marshal thereof, to be appointed by the President, by and with the advice and con-

sent of the Senate, and the judges of the district courts by the governor, by and with the advice and consent of the executive council.

By the 34th section of that act Porto Rico was constituted a judicial district, to be called the district of Porto Rico, with a district judge, a district attorney, and marshal, to be appointed by the President, by and with the advice and consent of the Senate, and with a district court called the "district court of the United States for Porto Rico," which court, in addition to the ordinary jurisdiction of district courts of the United States, shall have jurisdiction of all cases cognizant in the circuit courts of the United States.

The section of the Porto Rico act upon which the question of our jurisdiction mainly depends is the 35th, which is in these words: "That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the *Supreme Court of the United States* in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress, is brought in question, and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico, and the respective judges thereof, may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the [159] district and circuit courts of the *United States. All such proceedings in the Supreme Court of the United States shall be conducted in the English language." 31 Stat. at L. 85, chap. 191.

It thus appears that writs of error and appeals may be prosecuted directly to this court from the district court of the United States for Porto Rico, in the same manner, under the same regulations, and "in the same cases" as from the supreme courts of the territories of the United States.

Could a case like the one before us have been brought directly to this court from the supreme court of one of the territories of the United States? If so, our jurisdiction in this case cannot be disputed under the Porto Rico act.

The question just stated must be answered in the affirmative, if we look alone at § 702 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 571), and the act of March 3d, 1885, chap. 355 (23 Stat. at L. 443, U. S. Comp. Stat. 1901, p. 572); for it is clear from the express words of those enactments that this court may review the final judgment of the supreme court of one

of the territories of the United States in any case, without regard to the sum or value in dispute, where the Constitution or a statute or treaty is brought in question, and in every other case whatever where the sum or value in dispute exceeds \$5,000, exclusive of costs.

Is this result, so far as the final judgments of the district court of the United States for Porto Rico are concerned, affected by anything in the circuit court of appeals act of 1891? We think not. That act, no doubt, contemplated a review by the appropriate circuit court of appeals, first, of the final judgments of the United States court in the Indian territory in all cases covered by § 702 of the Revised Statutes and the act of March 3d, 1891; second, of the final judgments of the supreme courts of the other territories of the United States in cases the judgments in which, by that act (§ 6), are made final. No provision is found in the act of 1891 for the review in a circuit court of appeals of the judgment of the supreme court of a territory of the United States in a case of the class the judgment in which, if rendered in a circuit court of appeals, is not final. So that the jurisdiction *of this court to review the [160] judgments of the supreme courts of the several territories in that class of cases was the same after as before the passage of that act. *Shute v. Keyser*, 149 U. S. 649, 651, 37 L. ed. 884, 885, 13 Sup. Ct. Rep. 960. Clearly, this case is not of the class the judgment in which, if rendered in the supreme court of a territory of the United States, to use the words of the act of 1891, is reviewable in a circuit court of appeals under that act. It is not a patent, revenue, or criminal case, nor one in which the jurisdiction of the court below depended entirely upon the opposite parties to the controversy being aliens and citizens of the United States or citizens of different states. But it is one which, if it had been determined by the supreme court of one of such territories of the United States, could have been brought here directly, upon writ of error, after as well as before the passage of the act of 1891. Our conclusion must, therefore, be that the jurisdiction of this court cannot be denied by reason of any provision in the act of 1891.

This view is strengthened by what we deem the better construction of the Porto Rico act of 1900. That act does not refer to the circuit court of appeals act of 1891, nor contain any provision looking to the assignment of Porto Rico to one of the established circuits. This tends to show that it was the intention of the act of 1900 to establish a direct connection between this court and the United States court for Porto Rico

in respect of every case which, if determined by the supreme court of a territory of the United States, could have been brought here under the statutes in force when the act of 1891 was passed. In our opinion, Congress did not intend that any connection should exist between the United States court for Porto Rico and any circuit court of appeals established under the act of 1891.

These views as to the scope and effect of the Porto Rico act of 1900 are not at all affected by the provisions in the acts relating to the re-examination of the final judgments of the highest courts of the Indian territory, Hawaii, and Alaska. "Indian Territory," 26 Stat. at L. 829, chap. 517, § 13, U. S. Comp. Stat. 1901, p. 553; "Hawaii," [161] 31 Stat. at L. 141, 158, *chap. 339, § 86; "Alaska," 31 Stat. at L. 321, 345, chap. 786. Those acts had exclusive reference to the particular territories named; each, upon its face, showing that the final judgments of the courts of those territories, at least in certain cases, should be reviewable, primarily, in a designated circuit court of appeals of the United States. No such provisions are found in the act of 1900, and this court has not assumed to assign Porto Rico to any circuit of the United States. The territories of the United States, referred to in the 15th section of the act of 1891, are, in our opinion, those which it was contemplated would be assigned to some circuit, and they do not embrace Porto Rico; and the words in the act of 1900, "in the same manner and under the same regulations and in the same cases as from the supreme court of a territory of the United States," refer not to the act of 1891, but to those general statutes authorizing this court to review the final judgment of the supreme court of a territory of the United States in every case, without regard to the sum or value in dispute, where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question, and the right claimed thereunder is denied, and in every other case where the sum or value in dispute exceeds \$5,000, exclusive of costs. If Congress had intended that the judgments of the United States court for Porto Rico should, in any class of cases, be re-examined in some circuit court of appeals of the United States, it would have so declared by appropriate words. It did not so declare.

For the reasons stated, we hold that our jurisdiction to re-examine it cannot be questioned.

We come now to the merits of the case; our attention being first directed to the questions arising under that clause of the policy providing that it shall not cover "loss or damage by fire happening during the existence of any invasion, foreign enemy, re-

bellion, insurrection, riot, civil commotion, military or usurped power, or martial law within the country or locality in which the property insured is situated, unless proof be made to the satisfaction of the directors that such loss or damage *was not occasioned [162] by or connected with, but occurred from a cause or causes independent of, the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law."

As the words of the policy are those of the company, they should be taken most strongly against it, and the interpretation should be adopted which is most favorable to the insured, if such interpretation be not inconsistent with the words used. *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 678, 679, 24 L. ed. 563, 565; *Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S. 132, 136, 45 L. ed. 460, 462, 21 Sup. Ct. Rep. 326; *Texas & P. R. Co. v. Reiss*, 183 U. S. 621, 626, 46 L. ed. 358, 360, 22 Sup. Ct. Rep. 253. In this view the above words should be held to mean that the policy covered loss by fire occurring during the existence of (if not occasioned by nor connected with) any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law, in the general locality where the property insured was situated. If the loss so occurred, then the company was entitled to demand, before being sued, that proofs be furnished showing that the loss was not occasioned by or connected with, but was from causes independent of, such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law. But the company made no demand for proofs on this point. On the contrary, the formal production of such proofs was, in effect, waived; for the company assumed that what occurred in the locality at the time of the fire constituted a riot, which relieved it from all liability. It, therefore, gave notice by its agents that, as the fire and the destruction of the goods "were produced by a riot, they were not compelled to pay," and that "the policy would not be paid." A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence. It was so held by this court in a case of fire *insurance (*Taylor v. Merchants' F. Ins.* [163] *Co.* 9 How. 390, 403, 13 L. ed. 187, 192); and the same principle was recognized as applicable in a case of life insurance. *Knickerbocker L. Ins. Co. v. Pendleton*, 112

U. S. 696, 709, 28 L. ed. 866, 870, 5 Sup. Ct. Rep. 314. To the same effect are authorities cited by text-writers. 2 May, Ins. 3d ed. § 469; 2 Biddle, Ins. § 1139; 2 Wood, Fire Ins. 2d ed. § 445. Now, whether there was any substantial connection between the fire and military or other disturbance of the kind specified existing in the locality where the property was situated was a question of fact, and it was properly left to the jury. The court, referring to the above clause of the policy, charged the jury: "A fair construction of that condition, in the opinion of the court, is that, in order to excuse this company from liability in case of loss of property by fire, that invasion by foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law must have been occurring within the section of the country where this loss occurred, or within the locality and within such radius of country where the loss occurred that damage arose to property by reason of the existence of that rebellion, invasion, insurrection, civil commotion, military or usurped power, or martial law. And I further tell you, gentlemen, that if you believe from the evidence that this destruction of property did not occur from any of these causes, and occurred from a cause independent of the existence of any foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law, then you should find, so far as this defense was concerned, for the plaintiff in damages whatever you think may have been his loss."

While there is some little confusion in this part of the record, we think that the trial court did not misconstrue the policy, nor commit any error upon this particular point of which the plaintiff was entitled to complain. It is to be taken that the jury found, upon the whole evidence, that the loss was occasioned by causes independent of the existence of any invasion, foreign enemy, rebellion, insurrection, riot, [164] civil commotion, *military or usurped power or martial law. The facts under this issue having been fairly submitted to the jury, its finding cannot be disturbed.

An important question remains to be considered. It arises out of the interest which the assured had in the property at the time of the fire. The evidence showed that the original policy was issued to Francisco Martin on the 12th day of March, 1877, he being at that time the sole owner of the building and of the goods contained in it. The policy was renewed from year to year, the last one being dated March 12th, 1898, and extending until March 12th, 1899. The fire occurred in August, 1898, the assured being then alive. He did not die until Octo-

ber, 1899. Now, at the time of the fire, the goods insured had, by act of the assured, become, *in their entirety*, the property of Martin Brothers, a firm or society composed of two sons of the assured as active partners, and of himself as silent partner. The father turned over the business to the control and management of the two sons, and to them surrendered the custody of the goods constituting the stock in trade. At what date the sons acquired their interests in the goods and in the business does not distinctly appear. But it was before the fire; and of the change whereby the father ceased to be the sole owner of the goods described in the renewal policy and whereby also they became the property of the firm of Martin Brothers, no notice whatever was given to the company prior to the fire.

The question is whether such change in the ownership of the goods insured—no change occurring in the ownership of the building—discharged the company from all liability on the policy under that clause providing that the policy should cease "to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by due operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favor of such other person be declared by a memorandum indorsed hereon by or on behalf of the company."

Upon the question whether an insurance policy of the general *class to which the one [165] in suit belongs continues in force after a sale or transfer by the assured of his interest in the property insured, the adjudged cases are by no means in accord, and it will serve no useful purpose to make an extended review of them and show wherein they differ. It will be found upon examination that each policy contained language peculiar to itself, and upon that language the particular case turned. Of course, in every case, the fundamental inquiry must be as to the intention of the parties, to be gathered from the words of the policy; always, however, interpreting the policy most favorably for the insured, where it is reasonably susceptible of two constructions.

On the face of the policy in suit it appears that the buildings and the goods contained in them were insured separately,—£700 on the building and £900 on the stock in trade. One construction of the policy is that if either the building or the stock in trade should pass from the assured to another person, then the policy should cease as to *all* the property insured. But another construction, the one most favorable to the assured, which is not unreasonnable, and which is not forbidden by the words used, is that, as the building and the stock in

trade were separately insured, the policy should cease to be in force only as to the particular property insured that passed from the assured without notice to the company. The latter is the better construction, and we hold that it is to be considered as if the building was covered by one policy and the goods by another. Whatever may have been the extent of the interest acquired by the firm of Martin Bros. in the goods, no interest in the building passed to them. The building remained, in its entirety, the sole property of the assured, up to the time of the fire, and the policy may reasonably be, and therefore ought to be, so construed as not to preclude a recovery in respect of its destruction by fire.

But in respect of the goods in question, the case depends upon other considerations. When the goods were insured they were, in their entirety, the sole property of Francisco [166]co *Martin, the assured. He was the legal owner of the whole of them. They were in his custody, and subject to his exclusive control. But at the time of their destruction by fire the ownership of the goods, in their entirety, had, by transfer from the assured, passed to Martin Brothers, and became, without notice to the company, subject to the exclusive control, in their entirety, of that firm. Such a change of ownership and control, it must be held, avoided the policy, unless it was kept alive by the mere fact that the assured, although taking no active part in the business of the firm, was yet a silent partner, and as such had some interest in the insured property. But that fact cannot be given the weight suggested, without ignoring altogether the reasons which, it must be assumed, induced the company to incorporate into its policy the provision that if any property insured passed from the assured to another person without notice to the company, the policy should cease to be in force. It may well be that an insurance company would be willing to insure property owned by a particular person of whose character and habits its agent had knowledge or information, but unwilling to insure the same property if owned by that person in connection with others. Prudence requires that a company, before insuring against fire, should be informed as to the actual ownership of the property proposed to be insured, and know who, in virtue of such ownership, will be entitled to its custody and to control it during the term of the policy. The provision that the policy in this case should cease to be in force from the moment the insured property passed from the assured to others without notice to the company implied not only that the company relied upon the integrity and watchfulness of the assured, but that, if he looked

to the company for indemnity against loss by fire, he must take care not to allow the property to "pass" from him to others, without notice to the insurer. The assured, without notice to the company, did pass the goods in question to a firm, each member of which thereby acquired an interest in the whole of the goods transferred. The ownership of the firm was, in law *and in fact, [167] distinct from the original sole ownership of the assured. Practically, for all purposes of guarding the goods insured against destruction by fire, they passed to the active partners, who were strangers to the property at the date of the policy,—the assured, as a silent partner, retaining no interest in any particular part of the goods, and being under no obligation as between himself and the active partners to care for the safety of the property. Its safety, after the transfer, depended altogether upon the watchfulness of the active partners, in whose possession the goods were up to the fire. It only remained for the original sole owner, after passing the goods in their entirety to the firm of Martin Brothers, in which he was a silent partner, to receive such profits as accrued to him from their use in the business as conducted by the active partners.

We are of opinion that the case was not tried in accordance with a sound construction of the terms of the policy relating to the goods insured. The court proceeded upon the ground that there was no evidence of such alienation or change of ownership as avoided the policy in respect of the goods. In this error was committed, and a new trial must be had in conformity with the views we have herein expressed.

The judgment of the court below is reversed, and the cause is remanded, with directions to set aside the judgment, and grant a new trial.

Reversed.

*JOHN M. WARD, *Appt.*,
v.

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MOSES H. SHERMAN and David Hardenberg.

(See S. C. Reporter's ed. 168-179.)

Laches—effect on right to rescind contract—vendee as mortgagee in possession.

1. A delay of three and a half years before

NOTE.—On the right to rescind or abandon a contract because of the other party's default—see note to *Lake Shore & M. S. R. Co. v. Richards*, 30 L. R. A. 33.

As to *laches* as a defense—see notes to *Hammond v. Hopkins*, 36 L. ed. U. S. 135; *Felix v. Patrick*, 36 L. ed. U. S. 720; *Middletown v. Newport Hospital*, 1 L. R. A. 191; *Cathoun v. Delhi & M. R. Co.* 8 L. R. A. 248, and *Coffey v. Emigh*, 10 L. R. A. 125.

questioning the completeness of the title acquired by a mortgagee by virtue of a delivery to him of the mortgaged property, during which time he has successfully dealt with it as his own, is fatal to the right to rescind the contract under which the delivery was made, and to treat him as a mortgagee in possession because of the breach of his agreement to cancel the mortgage and surrender certain notes, although he has brought an action upon one of the notes to recover a sum equal to the value of that portion of the property which was not delivered as agreed, instead of an action in form for the value of such undelivered property.

2. The right to rescind a contract under which certain mortgaged property was delivered to the mortgagee, and to treat him as a mortgagee in possession, after he has successfully dealt with the property for several years, cannot be founded upon his failure to cancel the mortgage and surrender certain notes, where a delivery of all the property described in the contract was not made, and his duty to surrender and cancel the notes and mortgage was conditioned upon a complete delivery.

[No. 25.]

Argued October 15, 16, 1903. Decided January 11, 1904.

A PPEAL from the Supreme Court of the Territory of Arizona to review a judgment which affirmed, because of an insufficient assignment of errors, a judgment of the District Court of the County of Maricopa, adjudging a vendee of certain property to be a mortgagee in possession. *Reversed* with instructions to reverse the judgment of the District Court, and remand the cause for further proceedings.

See same case below (Ariz.) 64 Pac. 434.

Statement by Mr. Justice **Brewer**:

The facts in this case are few and beyond dispute, most of them being shown by the averments in the answer of the defendant Sherman. On August 23, 1889, Ward, the plaintiff and appellant, sold to the defendants the Sunflower range, together with the cattle thereon and other personal property. A conveyance was, by agreement, made to the defendant Hardenberg, who, to secure a part of the purchase price, to wit, \$25,000, evidenced by two notes of \$12,500 each, made by Hardenberg and guaranteed by Sherman, executed a mortgage of the cattle and some other property. Thereafter the defendants incorporated themselves under the laws of the territory of Arizona as the Sherman-Hardenberg Cattle Company, and transferred to it all of the property above

[169] mentioned, *subject to the payment of the two notes held by the plaintiff. On September 12, 1894, an agreement was entered into between the company and the plaintiff

which, after reciting the indebtedness, reads as follows:

"Whereas, the said party of the second part is unable to pay to said party of the first part the said sum of \$14,500, due on October 1, 1894, and has notified said party of the first part that it will be unable to pay said sum at said time; and

"Whereas, said party of the second part desires to deliver up and turn over to said party of the first part all of the property heretofore purchased by one David Hardenberg of the party of the first part, and for which said notes were given as a part of the purchase money:

"Now, therefore, in consideration of the promises and agreements of said party of the first part, the said party of the second part hereby agrees to and with said party of the first part to transfer and convey by proper deeds of conveyance and bills of sale all of the real and personal property heretofore purchased by the said David Hardenberg of the said party of the first part; also, all personal and real property owned by the said party of the second part in the territory of Arizona, in whomsoever's name the same may now stand, to said party of the first part, and more particularly described as follows, to wit: The Sunflower Cattle Range in Maricopa county, Arizona territory; all cattle, horses, mules, or burros branded with either of the following brands: Diamond brand, thus: ◇; H. B. brand, thus: HB; also all wagons, mowing machines, farming implements, and camp outfit, and everything pertaining to or used by said Sherman-Hardenberg Cattle Company, excepting only from the provision of said conveyance such cattle as shall have been sold and delivered by said Sherman-Hardenberg Cattle Company prior or to September 1, 1894, it being understood that all stock cattle which may have been sold subsequent to September 1, 1894, shall be accounted for by the party of the second part to said party of the first part.

"That in consideration of the said party of the second part *conveying to said party of [170] the first part of all of the property hereinbefore described within thirty days from the date thereof, and delivering possession of the same to said party of the first part or his authorized agent, in said county of Maricopa aforesaid, the said party of the first part hereby covenants and agrees to deliver to said David Hardenberg and one M. H. Sherman two promissory notes, each for \$12,500, one of which matures on October 1, 1894, and one of which matures on October 1, 1897, heretofore executed by the said Hardenberg and Sherman to the party of the first part; also to release the said Hardenberg and Sherman from the payment of all interest due

thereon, and to cancel and discharge a certain chattel mortgage executed by the said David Hardenberg to the said party of the first part, for the purpose of securing the payment of said notes, which said mortgage is now on file and of record in the office of the county recorder of Maricopa county, in the territory of Arizona.

"In witness whereof, the said party of the second part, The Sherman-Hardenberg Cattle Company, has executed these presents in its corporate name, by its president, and the said party of the first part has executed these presents the day and year first above written."

The following instrument was also executed:

Phoenix, Arizona, Sept. 29, 1894.

To J. M. Ward, Esq.:

The Sherman-Hardenberg Cattle Company hereby authorizes you to enter upon and take possession of all the property belonging to the Sherman-Hardenberg Cattle Company, in accordance with and as described in that certain contract entered into by and between the Sherman-Hardenberg Cattle Company and yourself, bearing date on the 12th day of September, A. D. 1894.

[171] That on receipt of said property you are to turn over to the Sherman-Hardenberg Cattle Company, at the office of C. F. Ainsworth in Phoenix, Arizona, the notes described in the *contract, and also to cancel the chattel mortgage held by you on the property therein referred to.

The Sherman-Hardenberg Cattle Co.,

By C. F. Ainsworth, Its Secretary.

I hereby authorize H. C. Ward as my agent to rec. the above described property for me. J. M. Ward.

All the property mentioned in this agreement was turned over to Ward except, as he claimed, 104 head of cattle. Ward retained possession of the property, and managed it as his own, but did not cancel the mortgage or surrender the notes, insisting that he was entitled to receive the 104 head of cattle or else their value.

On June 12, 1895, he commenced an action in the district court for the county of Maricopa, in which he set forth a copy of the first of the notes, and alleged that there was due thereon the sum of \$1,500. At the same time he filed an affidavit for an attachment, in which he averred that the payment of the note was not secured by mortgage or lien upon any real or personal property, or any pledge of personal property, and that the amount due was \$1,500. No property was attached and no service of process made until May 6, 1899, and then only on the defend-

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ant Sherman, who thereupon filed an answer and counterclaim, which was in the nature of a cross-bill in equity, in which he set up the purchase from Ward, the organization of the company, the transfer to the company of the property purchased and the agreement for the delivery of the property to Ward and the return of the notes and cancellation of the mortgage, and alleged that though the property had been delivered, the notes had not been returned nor the mortgage canceled. He also alleged a transfer by the company to himself of all its rights and claims.

The trial court found the facts as above stated in respect to the original transactions between Ward and defendants, the organization of the company, the transfer to it and by *it to Sherman; and, further, in refer-[172] ence to the transaction between the company and Ward in 1894, it found as follows:

"5. That during the month of September, 1894, and before the maturity of the first note, the Sherman-Hardenberg Cattle Company attempted to make a settlement with the plaintiff, by agreeing to turn over to him the Sunflower range, all the cattle then on the range, also the desert wells, and other property which it had, which was not included in the mortgage, on condition that said plaintiff turn over and deliver up the two notes aforesaid, with the interest thereon, and cancel and satisfy the mortgage securing the same.

"6. That this contract was never carried out on the part of the plaintiff; but that acting under it he took possession of all the property of the Sherman-Hardenberg Cattle Company, as aforesaid, on or about October 1, 1894; but never turned over, delivered, or canceled said notes, or either of them, or satisfied or discharged the chattel mortgage securing the same. And that, on the contrary, he brought suit on one of said notes for the collection of a portion that he claimed to be due thereon. At the time he brought this suit on the note maturing October 1, 1894, the other note had not matured."

It thereupon adjudged that Ward was a mortgagee in possession, and, after finding the disposition which he had made of the property, entered a judgment in favor of the defendant Sherman for \$17,173.50, and decreed the cancellation of the notes and mortgage.

By § 1 of an act of the territorial assembly (Laws Arizona, 1897, p. 127), it is provided that in a case appealed to the supreme court of the territory the appellant may have the testimony taken in the trial transcribed and certified by the court reporter, and filed with the papers in the case, and that thereupon it shall "become and be a part of the record in said cause;" and be

[173]transmitted to the supreme court* of the territory with the other papers in the case. That was done in this case, and part of the record taken to the supreme court of the territory and brought here is the duly certified transcript of the testimony taken on the trial.

Section 2 of that act also provides that it shall not be necessary "to file with the supreme court any transcript, assignment of errors, or other papers except as herein provided." Section 3 requires the plaintiff in error, or appellant, to make an abstract of the record for the benefit of the opposite party and the supreme court. Sections 4 and 5 are as follows:

"Sec. 4. Each party shall prepare and print or typewrite an argument of the points and authorities relied on. The briefs of both sides shall begin with a succinct statement of so much of the record as is essential to the questions discussed in them, referring to the printed abstract by folios and sufficient to dispense with the reading of the printed abstract on the argument. The brief of the plaintiff in error or appellant shall also next contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived. It shall not be necessary to assign or file any assignment of errors in the court below or supreme court, except those assigned in the brief of the plaintiff in error or appellant.

"Sec. 5. All rulings made by the court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief shall be reviewed by the supreme court without any bill of exceptions or other assignment of errors except as herein provided."

The record discloses that in the supreme court the appellee moved to strike from the files appellant's abstract of record. No action appears to have been taken upon this motion. The record also discloses that leave was given to the appellant to file a supplemental brief. Neither the original nor the supplemental brief, if one was filed, is before us.

Messrs. A. A. Hoehling, Jr., and A. B. Browne argued the cause, and, with *Mr. C. S. Wilson*, filed a brief for appellant:

If the contract in plain and unambiguous language makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it, or to construct, by implication or otherwise, a

new contract in the place of that deliberately made by the parties.

7 Am. & Eng. Enc. Law, 2d ed. p. 118.

Where the performance of one's duties by the terms of the contract is made a condition precedent, either expressly or by implication, he can only recover by pleading and proving that he has faithfully discharged those duties, or that the other party has waived the performance of them.

7 Am. & Eng. Enc. Law, 2d ed. p. 145; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644.

Whether performance is made a condition precedent or not, there is demanded, as a prerequisite to a recovery, that the complainant show either a tender of performance, or a readiness or willingness to perform, or that this willingness was rendered ineffectual by conduct of the other party which makes compliance either unnecessary or impossible.

7 Am. & Eng. Enc. Law, 2d ed. pp. 146, 147; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644.

Unreasonable and inexcusable delay, on the part of one seeking rescission of a contract, will be deemed a waiver thereof.

Cummins v. Lods, 1 McCrary, 338, 2 Fed. 661; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221.

The rescission of a contract is a remedy to be applied in the sound discretion of the court, and only he is entitled to it who can show that he is without fault, or that the other party is derelict.

Thomas v. McCue, 19 Wash. 287, 53 Pac. 161.

If the appellant's pleading was inartificially drawn, or was deficient in form, it is manifest that his claim is founded upon principles of equity and justice, and his pleading can well be harmonized with that substantial justice which it is plain he is entitled to receive.

The Anne v. United States, 7 Cranch, 570, 3 L. ed. 442.

Mr. Charles F. Ainsworth argued the cause, and, with *Mr. L. E. Payson*, filed a brief for appellees:

This contract was an entire contract.

7 Am. & Eng. Enc. Law, 2d ed. p. 95; *Haslack v. Mayers*, 26 N. J. L. 284.

A breach of any part of it nullifies the whole contract, and it may be treated by the other party as entirely at an end, and just as if never made.

7 Am. & Eng. Enc. Law, 2d ed. p. 150; *Cockley v. Brucker*, 54 Ohio St. 214, 44 N. E. 559.

Appellant, taking possession of the property, and the contract under which he went

into possession being repudiated and abrogated by him, and the parties being *in statu quo*, was holding the property as a mortgagee in possession, and subject to the liabilities of such a holding.

Mr. Justice **Brewer** delivered the opinion of the court:

The supreme court of the territory, without considering the merits of the case, affirmed the judgment on the ground that the assignment of errors was insufficient, citing in its opinion from a rule of practice which had been prescribed by it and in force for many years: "All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. . . . An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided." [64 Pac. 435.] Undoubtedly the assignment of errors was general in its terms. An application was made to the supreme court for leave to amend the assignment of errors, but it was denied. In a short *per curiam* opinion, that court, after condemning the assignments as insufficient, said:

"The rules relating to assignments and specifications of error have been so long in force, and we have so often decided that a failure to make proper assignments amounts to a waiver of all errors which are not fundamental, that it would seem there should be no longer occasion for disregard of these plain requirements. In the absence of any assignment of error in this case, and none appearing upon the face of the record, the judgment must be affirmed."

We shall not stop to inquire whether the court erred in refusing to permit an amendment of the assignment of errors, but accepting its conclusion that the failure to make proper assignments is "a waiver of all errors which are not fundamental," and bearing in mind the provisions of § 5 of the statute of 1897, that all rulings made by the court below in opposition to the plaintiff or appellant are to be taken as excepted to, we proceed to inquire whether there was not a fundamental error which should have been [175] corrected by the supreme court. We are of opinion that there was. It may be assumed, as no objection was made on that account, that the counterclaim, which was in its nature a bill in equity for the redemption of the mortgaged property, was properly filed in this action to recover money. Can such a bill be sustained under the circumstances disclosed by the answer? It appears from that answer that the property was turned over to Ward to hold, not as mortgagee, but under a contract by which he was to take the property in satisfaction of the debt, cancel

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the mortgage, and return the notes. In other words, according to the averments of the answer, a contract of sale was made by the company to Ward, and under the contract of sale Ward took possession. Now, even if it be conceded that Ward's failure to perform was such a breach of the contract as entitled the company to rescind and thereafter to treat Ward as a mortgagee in possession, a bill in equity to enforce such a decision must be presented within a reasonable time. The right to rescind is an affirmative right, asserted by the vendor, the former mortgagor, and, being such, it must be asserted by him within a reasonable time. The answer alleges that on or about October 1, 1895, this agreement was made and the property delivered, but it was not filed until May 16, 1899,—more than three years and a half thereafter. During all that time, Ward was in possession of the property, managing and dealing with it as his own. Can it be that a vendor can wait three years and a half, permit the vendee to deal with the property as his own,—that property being of a value variable from year to year and requiring constant care to make it prosperous,—give his time and labor to its management, take the chances of rise or fall in the market, and then, if it turns out that the business has been prosperous through his efforts, insist, on account of some technical failure, upon a rescission of the contract, and that the party who has been supposing himself the owner, and acting as such, shall be treated as a mortgagee in possession, and held to account for the success of his business efforts? In Pollock's Principles of Contracts, p. 515, the author says:

"The contract must be rescinded within a [176] reasonable time, that is, before the lapse of a time after the true state of things is known, so long that, under the circumstances of the particular case, the other party may fairly infer that the right of rescission is waived."

See also *Grymes v. Sanders*, 93 U. S. 56, 23 L. ed. 799; *McLean v. Clapp*, 141 U. S. 429, 432, 35 L. ed. 804, 806, 12 Sup. Ct. Rep. 29.

But was there any ground for the rescission of the contract? There was no fraud, mistake, or false representations. There is no suggestion that the contract was not entered into with full knowledge or that it was unfair in any of its details. The complaint merely is that Ward was guilty of a breach of one of its stipulations. If so, the company was entitled to damages for that breach, but no damages are shown. The company paid nothing; has lost nothing. So far as disclosed it went out of business, and therefore the failure to release the mortgage could not have injured its business credit.

But whatever may be the rights, other than a simple claim of damages for breach of contract, possessed by the company and transferred by it to the defendant Sherman, they are equitable in their nature, and in respect to them the general doctrine of laches applies. We have often had occasion to consider the question of laches. In *Gallagher v. Cadwell*, 145 U. S. 368, 373, 36 L. ed. 738, 740, 12 Sup. Ct. Rep. 873, and *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223, are collected the decisions of the court. In the former of these cases it is said (p. 372, L. ed. p. 740, Sup. Ct. Rep. p. 874):

"They [the adjudicated cases] proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

And again (p. 373, L. ed. p. 740, Sup. Ct. Rep. p. 875):

[177] "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties."

And in the last case (p. 698, L. ed. p. 631, Sup. Ct. Rep. p. 228):

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

Apply these considerations to the case at bar. The property was turned over on a contract of sale. Ward was left in possession for over three years and a half without a suggestion of any claim that he was only a mortgagee in possession. He had a right to believe that he was the owner. If the contract had not been made he could have foreclosed his mortgage and acquired title by sale under foreclosure proceedings. He dealt with the property as his own. He gave

his time, skill, and labor to the work of caring for it. It is impossible to replace the parties in the situation they were in at the time the contract was made. It would be grossly inequitable to deprive him of the benefit of his time, skill, and labor, and give it to the mortgagor, who all those years did nothing and gave no notice of any question of the completeness of Ward's title. It seems to us that the doctrine of laches applies with force, and that upon the pleadings the court should have adjudged the defendant not entitled either to a rescission of the contract or to hold the vendee as a mortgagee in possession.

If we look beyond the pleadings to the testimony (and that, as we have seen, was, by virtue of the statute, made a part of the *rec-[178] ord of the case in the supreme court), the error of the trial court is even more apparent.

The agreement of September 12 provided for the transfer and conveyance of all cattle on the Sunflower range, branded with the named brands, "excepting only from the provision of said conveyance such cattle as shall have been sold and delivered by said Sherman-Hardenberg Cattle Company prior or to September 1, 1894, it being understood that all stock cattle which may have been sold subsequent to September 1, 1894, shall be accounted for by the party of the second part to said party of the first part." By this all the cattle belonging to the company on September 1 were to be transferred to the plaintiff, and if any of such cattle had been sold subsequently to September 1 they were to be accounted for by the company to the plaintiff. Further, the agreement stipulated for the delivery and cancelation of the notes and mortgage "in consideration of the said party of the second part conveying to said party of the first part all of the property hereinbefore described within thirty days from the date hereof, and delivering possession of the same to said party of the first part or his authorized agent, in said county of Maricopa aforesaid." By the undisputed testimony two lots of cattle, one of 69 or 70 head and the other of 34 or 35 head, were sold and delivered by the company to other parties than the plaintiff after the 1st of September. Therefore the company was to account for those cattle so sold and delivered, and the duty resting upon Ward to surrender and cancel the notes and mortgage was conditioned upon the delivery within the county of the property described within thirty days from September 12. In short, the terms of the contract were clear. Ward performed all that he was under obligations to perform. The default was on the part of the company. Ward took possession of the property delivered, managed it successfully for several years, and still

the court held that the defaulting party could take advantage of its own default, appropriate the entire profits of Ward's care and ability, and upon that basis adjudged [179] against Ward the *return of all the property then in his possession and the payment of over \$17,000. But it is said that Ward himself repudiated the agreement because he brought suit on the first of the notes. There may have been a technical mistake in the form of the action, but there was no repudiation of the agreement, as is shown by the fact that the complaint only asked judgment for \$1,500, and that Ward filed with the complaint an affidavit for an attachment, in which he averred that the payment of the sum due was "not secured by any mortgage or lien upon real or personal property or any pledge of personal property." But equity will not destroy rights on account of a mere technical mistake of counsel. It may be conceded that Ward should have brought an action in form for the value of the cattle not delivered, but it is manifest that that value was all that he was seeking to recover.

The judgment of the Supreme Court of Arizona is reversed and the case remanded to that court with instructions to reverse the judgment of the District Court, and remand the case to that court for further proceedings in conformity to the views herein expressed.

WABASH RAILROAD COMPANY, *Plff. in Err.*,
v.

WILLIAM N. PEARCE and the Mississippi Valley Trust Company, Executors of Charles E. Pearce, Deceased.

(See S. C. Reporter's ed. 179-189.)

Error to state court—Federal question—carrier's lien for duties paid on bonded goods.

1. Whether the payment by a carrier of the duties exacted under the statutes of the United States on bonded goods at the port of entry confers upon the carrier the right to maintain possession until reimbursed is a question respecting a right and privilege under the Federal statutes which, when specially set up and claimed, and denied by a state court, con-

NOTE.—As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbadé*, 62 L. R. A. 513.

On writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998, and *Re Buchanan*, 39 L. ed. U. S. 884.

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fers jurisdiction upon the Supreme Court of the United States of a writ of error to the state court.

2. The terminal carrier, which, under its tariff agreements, has paid the duties exacted under the laws of the United States on bonded goods at the port of entry that the initial carrier was forced to pay in order to regain possession and forward the goods, has a lien on such goods for the amount of such duties.
3. The right of a terminal carrier to a lien for the amount paid by it to satisfy the duties exacted under the laws of the United States on bonded goods at the port of entry is not defeated because the initial carrier wrongfully changed their bonded destination, to the owner's damage, where the contract of shipment stipulated that each carrier should be liable only for loss or damage accruing upon its own road, and that such carriers should not be jointly liable, nor either for any loss or damage accruing upon the road of the other.

[No. 112.]

Submitted December 18, 1903. Decided January 11, 1904.

IN ERROR to the St. Louis Court of Appeals of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of the City of St. Louis in favor of plaintiff in an action in replevin to recover a consignment from a carrier. *Reversed* and remanded for further proceedings.

See same case below, 89 Mo. App. 437.

Statement by Mr. Justice **Brewer**:

On June 25, 1895, Charles E. Pearce, the testator of the defendants in error, commenced his action in replevin in the circuit court of the city of St. Louis, Missouri, to recover from the railroad company four boxes of curios. After answer a trial was had before the court without a jury, resulting in a judgment for the plaintiff, which, on May 7, 1901, was affirmed by the St. Louis court of appeals. 89 Mo. App. 437. An application to transfer the case to the supreme court of the state on the ground that it involved the validity of a statute of, or authority exercised under, the United States, was denied (*State ex rel. Wabash R. Co. v. Bland*, 168 Mo. 1, 67 S. W. 580), and thereupon it was brought here on writ of error.

The facts are undisputed, and are as follows: Pearce was the owner of the curios, and in Yokohama, Japan, shipped them to St. Louis. The bill of lading was issued by the Canadian Pacific Railway Company, and recited that the goods were shipped upon the company's steamer, *Empress of India*, to be carried to Vancouver, British Columbia, and thence over the Canadian Pacific and connecting lines to St. Louis, Missouri.

The boxes were carried to Vancouver and thence by the Canadian Pacific Railway Company over its own and a connecting line controlled by it to St. Paul, Minnesota. Upon arrival at St. Paul the custom officers took possession of the boxes, opened and examined the contents, and duly assessed the duties thereon at \$264.31, which sum was paid by the railway company, and had to be paid in order to regain possession and forward the goods. The goods were thereafter delivered to the Chicago, Milwaukee, & St. Paul Railway Company, by it to the defendant at Given, Iowa, and by the latter carried to St. Louis. The inspection at St. Paul was in strict accordance with the laws of the United States, and the duties exacted were properly chargeable upon the goods. When the defendant received the goods from the Chicago, Milwaukee, & St. Paul Railway Company it became responsible under its traffic agreements for the payment of the charges then on the goods, including the custom duties, and has since paid those charges. On receipt of the goods in St. Louis they were tendered to the plaintiff upon payment of the charges. The goods were shipped in bond to St. Louis, and this was so marked on the boxes. If they had been transported to St. Louis in bond, as they should have been, they would there have been opened and examined and retained in the custody and possession of the custom officers, not only during examination and inspection, but also until the duties were paid.

Mr. Wells H. Blodgett submitted the cause for plaintiff in error. **Mr. George S. Grover** was with him on the brief:

The government of the United States had, until the payment was made to it, a prior and paramount lien on the goods for the duties.

Overton, Liens, § 656, p. 709; *Hodges v. Harris*, 6 Pick. 360.

The plaintiff in error has, also, a valid lien on the goods in question for the charges advanced by it to its connecting line, in the usual course of business.

Ray, Freight Carr. § 102, p. 407; *Hutchinson, Carr.* 2d ed. § 478a, p. 541; *Schouler, Bailments*, p. 544; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *Moore v. Henry*, 18 Mo. App. 41; *Armstrong v. Chicago, St. P. & K. C. R. Co.* 62 Mo. App. 642; *Gerber v. Wabash R. Co.* 63 Mo. App. 145.

Under the contract of shipment in evidence, the plaintiff in error is not responsible for the injury and loss here claimed, as it is conceded that such injury and loss occurred beyond its own line.

Goldsmith v. Chicago & A. R. Co. 12 Mo. App. 479; *Orr v. Chicago & A. R. Co.* 21 Mo. App. 333; *Myrick v. Michigan C. R. Co.* 107

U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; *Coates v. United States Exp. Co.* 45 Mo. 238; *Snider v. Adams Exp. Co.* 63 Mo. 376; *Dimmitt v. Kansas City, St. J. & C. B. R. Co.* 103 Mo. 433, 15 S. W. 761; *Nines v. St. Louis, I. M. & S. R. Co.* 107 Mo. 475, 18 S. W. 26; *McCann v. Eddy*, 133 Mo. 59, 35 L. R. A. 110, 33 S. W. 71.

Mr. Edward C. Kehr submitted the cause for defendants in error:

The question was adjudicated between the parties by the supreme court of Missouri.

State ex rel. Wabash R. Co. v. Bland, 168 Mo. 1, 67 S. W. 580.

The Supreme Court of the United States is bound by the decision of the state court in regard to the meaning of the Constitution and laws of its own state, and its decision upon such a state of facts raises no Federal question.

Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

To give the Supreme Court of the United States jurisdiction over the judgment of a state court, it must appear that the decision of a Federal question presented to that court was necessary to the determination of the cause, and that it was actually decided, or that, without deciding it, the judgment rendered could not have been given.

Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; *Citizens' Bank v. Board of Liquidation*, 98 U. S. 140, 25 L. ed. 114; *De Saussure v. Gaillard*, 127 U. S. 234, 32 L. ed. 132, 8 Sup. Ct. Rep. 1053; *Blount v. Walker*, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 606; *Jersey City & B. R. Co. v. Morgan*, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; *Sawyer v. Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633.

Where the supreme court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed.

Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *Murdoek v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *McManus v. O'Sullivan*, 91 U. S. 578, 23 L. ed. 390; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

The carrier had no right to change the contract destination of said goods, nor to change their consignment from Schade & Co., St. Louis, to F. Jones, St. Paul, nor to do otherwise than to carry said goods "in bond" to St. Louis.

Mellier v. St. Louis & N. O. Transp. Co. 14 Mo. App. 281.

The freight was prepaid to St. Louis. The carrier therefore has no freight lien on the goods. The money advanced in payment of the duties is no part of the cost of transportation, and the carrier acquired no lien on the goods by paying them.

The Virginia v. Kraft, 25 Mo. 76; *Hutchinson*, Carr. 2d ed. § 478.

The railroad company was not subrogated to the government's lien for the import duties.

Aetna L. Ins. Co. v. Middleport, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 625; *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863; *Griffing v. Pintard*, 25 Miss. 173; *Wallace's Estate*, 59 Pa. 401; *Mercantile Trust Co. v. Hart*, 35 L. R. A. 352, 22 C. C. A. 473, 40 U. S. App. 559, 76 Fed. 673; *Milwaukee & M. R. Co. v. Soutter*, 13 Wall. 517, 20 L. ed. 543; *German Bank v. United States*, 148 U. S. 573, 37 L. ed. 564, 13 Sup. Ct. Rep. 702; *Wilkinson v. Babbitt*, 4 Dill. 207, Fed. Cas. No. 17,668; *Sheldon*, Subrogation, § 241, p. 361.

Taxes are not debts. A tax is an impost levied by authority of government upon its citizens for the support of the state.

Carondelet use of Reuter v. Picot, 38 Mo. 125; *Blevins v. Smith*, 104 Mo. 595, 13 L. R. A. 441, 16 S. W. 213; *State ex rel. Hayes v. Snyder*, 139 Mo. 553, 41 S. W. 216.

Mr. Justice **Brewer** delivered the opinion of the court:

Two questions are presented,—one of jurisdiction and the other on the merits.

With regard to the first, the decision of the supreme court of the state is not controlling. It is not the province of a state court to determine our jurisdiction; and further, the Missouri statute, providing for a review of certain cases by the supreme court, is not identical with but more limited than § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), which prescribes our jurisdiction over final judgments of state courts.

It is contended that the only question determined by the state court was the applicability of the equitable doctrine of subrogation; that no statute of Congress was suggested giving a right of subrogation in cases like this, and therefore that the decision of the state court rested upon a matter of general law. But the answer of the defendant, [185] after stating the circumstances of the payment by the several carriers, alleged that it was "entitled to the first lien on said goods under the laws of the United States for the amount of said duties. Although no single statute was mentioned, it claimed a lien on the goods under and by virtue of the laws of the United States, and thus directly 192 U. S.

called for a determination of a Federal right. *Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116-142, 17 L. ed. 571-576; *Furman v. Nichol*, 8 Wall. 44, 56, 19 L. ed. 370, 376; *Dooley v. Smith*, 13 Wall. 604, 20 L. ed. 547. The question in fact presented and decided was not simply the scope and applicability of the doctrine of subrogation, but rather to what extent, considering the obligations cast by the revenue laws and the duties of common carriers as between themselves and the shipper, the carrier was protected by the laws of the United States in paying custom duties exacted under them. When we stop to consider the great volume of imports handled almost exclusively by common carriers, the owners or consignees being often in the interior of the country, this is obviously a question of supreme importance. And this question is solved not alone upon general principles of law, but involves an inquiry as to the effect of exactions made under authority of the statutes of the United States. We are, by § 709, Rev. Stat. given jurisdiction over the final judgments of state courts "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed." The contention of the railroad company is that payment of duties exacted under the statutes of the United States does not operate simply to release the goods, but also gives, in cases like the present, to the carrier, the right and privilege of maintaining possession until it is reimbursed these duties. Is the statute to be considered simply as a demand for money, or does it also carry a grant to one situated as this carrier, of a right and privilege of possession? This right and privilege was specially set up and claimed by the railroad [186] company. Whether it existed was the substantial question presented and decided. And, whether rightly or wrongly decided, the presentation of the question, the claim of the right and privilege, was, when denied by the state court, sufficient to give this court jurisdiction.

We pass, therefore, to consider the merits. Do the laws of the United States exacting the payment of duties at ports of entry justify the carrier in paying those duties, and give to it a lien therefor as against the owner? It must be remembered that the government has not prescribed payment simply at the place of delivery, but has named the ports of entry at which, and at which only, payment can be made. Must the carrier insist that the owner shall be present

at the place of entry to himself make payment, or, after notifying the owner, leave the goods in the hands of the government officials to be held for the charges thereon, or, may the carrier pay the charges, and maintain possession until reimbursed by the owner? It is unnecessary to consider what rights would exist if it were alleged that the goods imported were free from duty, or that there had been overcharges or wrongful conduct on the part of the government officials. Here the regularity of the proceedings on the part of the government officials and the correct amount of the duties collected are unquestioned.

We are of opinion that the custom laws of the United States are potent to fully protect the carrier in the payment of the legal duties charged upon goods in its possession. In order to fully understand the force and scope of any statute or body of statutes we must have regard to the conditions and circumstances for which the legislation was intended and under which it is to become operative. We are not narrowly to read the letter and ignore the state of affairs to which that legislation was intended and is applicable. As we have said, the great body of imports is subject to duties, and payment thereof is, by statute, specifically required to be made at certain places. These imports are brought in by carriers, and distributed by them to the several places of destination.

[187] *It is unnecessary to cite authorities to the proposition that it is the common-law duty of the carrier to receive, carry, and deliver goods; that by virtue of this obligation it is entitled to retain possession until its charges are paid. Nor is this lien confined to the charges for its own transportation. The law is thus stated in *Overton on Liens*, § 135, p. 166:

"The lien attaches not alone for the particular item of charge for carriage due upon the goods, but for such other legal charges as the carrier, in the course of his duty, may have been compelled to expend upon their care, custody, and preservation. As when a railway, in the transportation of live stock, as cattle, horses, and swine, has been at expense of labor and money in feeding and preserving them, such expense is a legitimate charge in addition to their transportation. For the carrier is under special obligation to guard and protect such property, hence the propriety of a lien for such extraordinary expense and care. If a carrier, in the ordinary course of the business, pay back charges upon goods due to another carrier in the course of transportation, as they come to him, he may recover for such back charges and freight so paid; and the owner may seek his remedy for any damages done them

against the party in whose hands it was done, or under his original contract of shipment."

See also *Hutchinson*, Carr. § 478a; *Ray*, Freight Carr. § 102. In *Schouler on Bailments*, p. 544, it is said:

"A common carrier, then, may usually retain particular goods, by virtue of his lien right, until the freight and charges due thereon for his whole transportation are paid or tendered him, and he cannot be compelled to give them up sooner. This lien, moreover, extends to all the proper freight and storage charges upon the goods throughout the whole of a continuous transit over successive lines; since the last carrier or final warehouseman may advance what was lawfully due his predecessors, and hold the property as security for his reimbursement."

In making payment to a connecting carrier of its freight *charges the carrier is not [188] a mere volunteer, such as is referred to in *Etna L. Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 625.

All this was matter of common knowledge, and upon this the legislation in respect to duties was enacted. Is it to be supposed that Congress intended that protection to the carrier should depend upon the perhaps varying opinions of the courts of the different states as to whether, in making payment, the carrier was a mere volunteer, or whether it can be subrogated to the rights and remedies of the nation? It must be remembered that the importation of goods is a subject of national, and not of state, regulation, that such power of regulation continues until the final delivery of the imported articles, so that over the entire transportation of these goods to St. Louis, the place of delivery, the power of Congress was supreme and exclusive. It must also be remembered that bonded goods are, by § 2993, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1962), deliverable only to carriers designated by the Secretary of the Treasury, who are made responsible to the United States, and are required to give bond to the United States in such form and amount and with such conditions and security as the Secretary of the Treasury shall require. Is it not reasonable to hold that Congress,—having in mind the duty of carriers in reference to transportation and delivery, their customary lien for charges, and their right to retain possession during transit,—in directing the custom house officers to take goods out of a carrier's possession, inspect and hold until the duties are paid, intended that, upon payment, the government lien should pass to the carrier, with a view of enabling it to discharge its duty of carriage and delivery to the consignee? It was not necessary to specifically state that

the government's lien was transferred, for when Congress provided by statute for interrupting the carrier's common-law right of possession, it is implied that the action necessarily taken by the carrier to regain possession shall work no injury to the rights which flow from possession. Such, it seems to us, is the fair import of this legislation, [189] enacted, as it was, in view of the *well-recognized rights and duties of carriers. The defendant should not, therefore, have been deprived of the possession of the goods without a repayment of the duties.

It is insisted, however, that the goods were shipped in bond to St. Louis, that the Canadian Pacific for its own convenience wrongfully changed their bonded destination to the port of St. Paul, and that during the examination and inspection at St. Paul some of the curios were broken, and some lost, whereas if they had been shipped in bond to St. Louis they might have been opened and examined in the presence of the plaintiff, and injury and loss prevented. Conceding this, and that the Canadian Pacific by its wrongful act was liable for the injuries resulting to the plaintiff, the contract of shipment stipulated that each of the parties employed in the carriage should be liable only for loss or damage accruing upon its own road, and that such carriers should not be jointly liable, nor either for any loss or damage accruing upon the road of the other; so that whatever claim the plaintiff may have had for such injury and loss was only against the Canadian Pacific, and could not operate to prevent the defendant company from receiving that which, by its payment, it was entitled to.

The judgment of the St. Louis Court of Appeals is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

GEORGE H. CROSSMAN and Herman Sielcken, Composing the Firm of W. H. Crossman & Brother,

v.

THEODORE G. LURMAN and Benjamin D. Williams, Composing the Firm of Theodore G. Lurman & Company.

(See S. C. Reporter's ed. 189-200.)

Constitutional law—pure food legislation as affected by commerce clause.

1. The prohibition against the sale within the

state of adulterated food products which is made by N. Y. Laws 1893, chap. 661, § 41, does not, as applied to food products imported into the United States through the channels of foreign commerce, violate the commerce clause of the Federal Constitution, but is a valid exercise of the police power of the state to legislate for the benefit of its people in the prevention of deception and fraud.

2. A contract made in New York by residents thereof for the sale to residents of another state of coffee to be shipped from Rio Janeiro to New York city by a designated steamer, the buyers to have free storage and fire insurance for the first month after the arrival of the steamer, and the storage of the coffee in New York,—is a New York contract, and as such is governed by the prohibition made by N. Y. Laws 1893, chap. 661, § 41, against the sale within the state of adulterated food products.
3. The enactment by Congress of the prohibition contained in the act of August 30, 1890 (26 Stat. at L. 414, chap. 839, U. S. Comp. Stat. 1901, p. 3185), § 2, against the importation of any adulterated or unwholesome food or drug, or any liquors, adulterated or mixed with any poisonous or noxious chemical, did not have the effect of rendering inoperative as regards food products imported into the United States through the channels of foreign commerce the provision of N. Y. Laws 1893, chap. 661, § 41, prohibiting the sale within the state of adulterated food products, enacted in the exercise of the police power of the state, to prevent deception and fraud.
4. The exclusion of evidence of a demand in some portions of the United States for artificially colored coffee, on the issue whether such coffee was adulterated within the prohibition of N. Y. Laws 1893, chap. 661, § 41, against the sale within the state of adulterated food products, will not require a reversal of the judgment of a state court on writ of error from the United States Supreme Court, on the theory that the effect of such evidence would have been to show that coffee artificially colored as a means of fraud and deception was a recognized article of commerce, the right to deal in which was protected by the commerce clause of the Federal Constitution.

[No. 117.]

Argued December 18, 1903. Decided January 11, 1904.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered in pursuance of the mandate of the Court of Appeals of that State, which affirmed a judgment of the Appellate Division of the Supreme Court for the First Judicial Department, which had in turn affirmed a judgment of the Supreme Court for the

NOTE.—Respecting the protection of health as within the police power—see note to State v. Schlemmer, 10 L. R. A. 135.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L. R. A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 192 U. S.

229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041, and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

As to police power as affecting commerce—see notes to People v. Budd, 5 L. R. A. 559, and State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co. 6 L. R. A. 579.

county of New York, sustaining the contention of vendees that the subject of the sale was adulterated within the provisions of the health laws of the state. *Affirmed.*

See same case below in Court of Appeals, 171 N. Y. 329, 63 N. E. 1097, and in Appellate Division of Supreme Court, 57 App. Div. 393, 68 N. Y. Supp. 311.

The facts are stated in the opinion.

Mr. Frederic R. Kellogg argued the cause, and, with **Mr. Arthur J. Baldwin** and **Messrs. Dill & Baldwin**, filed a brief for plaintiff in error:

The universally recognized basis of the police power of a state is the right to protect the health, morals, safety, and property of its citizens.

License Cases, 5 How. 504, 12 L. ed. 256; *Sherlock v. Alling*, 93 U. S. 103, 23 L. ed. 820; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Smith v. Alabama*, 124 U. S. 476, 31 L. ed. 511, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Brimmer v. Rebman*, 138 U. S. 82, 34 L. ed. 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Western U. Teleg. Co. v. James*, 162 U. S. 652, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

These decisions rest upon the undoubted right of the states of the Union to control their purely internal affairs.

Leisy v. Hardin, 135 U. S. 122, 34 L. ed. 137, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

Re Sanders, 18 L. R. A. 549, 4 Inters. Com. Rep. 305, 52 Fed. 807.

Not only is this police power based upon the right of the state to protect its own citizens in matters of purely local concern, but the exercise of this power is limited by the necessity which exists for such protection.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 628, 42 L. ed. 883, 18

Sup. Ct. Rep. 488; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

A party is always entitled to show, if possible, that the subject-matter of the case, instead of being contraband, is, as a matter of fact, a legitimate and well-known article of commerce.

Schollenberger v. Pennsylvania, 171 U. S. 7, 43 L. ed. 51, 18 Sup. Ct. Rep. 757.

As Congress has, in the exercise of its power, enacted legislation as to the importation of adulterated foods pursuant to the terms of which the coffees in question were not adulterated and were properly imported into the United States, and as these coffees had been inspected and admitted into the United States by the United States officials, a state statute in effect prohibiting the delivery of such coffees in the original packages in which they were imported is unconstitutional and void.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

Mr. Charles Stewart Davison argued the cause and filed a brief for defendant in error:

The line of demarcation between the reserved police powers of the state in relation to inspecting and prohibiting dealings in that which would be injurious to the public health or morals, or was designed to cheat or defraud, and those matters which fall within the regulation of commerce with foreign countries and between the states, is clear, and has been defined by this court on several occasions.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

Can it be that the Constitution of the United States secures to anyone the privilege of manufacturing and selling an article of food in such a manner as to induce the mass of the people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand recognition of the right to practise a deception upon the people in the sale of any articles, even those that may have become the subject of trade in different parts of the country?

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

It may be safely assumed that a yellow oxide of iron is a noxious chemical,—at least sufficiently so to prevent its being either a desirable adjunct to coffee, or its having been intended to be affirmatively permitted by Congress as an adulterant for coffee.

People v. Girard, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823.

Mr. Justice **White** delivered the opinion of the court:

The law of the state of New York contained the following:

Sec. 41. Adulterations.—No person shall, within the state, manufacture, produce, compound, brew, distill, have, sell, or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act, . . . in the case of food, . . . (6) if it be colored or coated, or polished or powdered, whereby damage is concealed, or it is made to appear better than it really is or of greater value." (Laws of the state of New York of 1893, ch. 661, § 41, being chapter 25 of the General Laws of the state of New York.)

With these provisions in force, in July, 1894, the firm of Crossman & Brothers, hereafter referred to as the sellers, residents of New York city, by contract made in New York, sold to the firm of Theodore G. Lurman & Company, hereafter referred to as the buyers, residents of Baltimore, five hundred bags of Rio coffee, one half the bags to be No. 8 grade and the other half No. 9 grade. It was stipulated that the coffee was to be shipped from Rio Janeiro to New York city by a designated steamer, the coffee to be sound or to be made sound by the sellers. The grades 8 and 9 referred to in the memorandum of sale were standard types, bearing those numbers, established by the Coffee Exchange of the city of New York, and it was agreed that the coffee was to be of the average of such types, and differences arising on the subject were to be determined by a "grader," to be selected by each of the parties, the two to select a third in the event of a disagreement, his decision to be conclusive. It was stipulated that on the arrival of the steamer and the storage of the coffee in New York the buyers were to have the advantage of the first month's storage and fire insurance, free of expense.

[194] *In due time the named steamer reached the port of New York, and the five hundred bags of coffee were stored and delivery tendered in New York city to the buyers. Some of the coffee was accepted and the remainder was rejected, on the ground that it was adulterated, because it had been artificially colored by coating the beans with a yellow wash. Without going into the details of what transpired between the parties as a result of the refusal to accept the coffee, it suffices, for this case, to say that ultimately the graders provided for in the contract were named, and on their disagreement a third was selected, who decided that, although the coffee had been coated with the

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wash, its average quality was yet equal to the specified types of the Coffee Exchange referred to in the contract. The buyers refused to abide by this finding, and to accept delivery and pay for the adulterated coffee. The sellers then disposed of the coffee for account of the buyers, and commenced this suit to recover the difference between the amount produced by the alleged sale and the contract price. During the course of the litigation two trials were had, and the cause was twice passed on by the appellate division of the supreme court in and for the first judicial department. On the first hearing in the supreme court it was held, in accord with a decision of the court of appeals of the state of New York, rendered in a collateral controversy which grew out of the refusal to accept the coffee (*Re Lurman*, 149 N. Y. 588, 44 N. E. 1125), that if the coffee was adulterated, within the statute of the state of New York, the buyers were not bound to accept, despite the finding of the grader that it conformed to the types of the Coffee Exchange, referred to in the contract. Finally, all incidental questions being eliminated, the cause was tried on the distinct issue whether the coffee was adulterated within the provisions of the statute. There was a verdict and judgment for the buyers, which was affirmed by the appellate division of the supreme court in and for the first judicial department. The cause having been then taken to the court of appeals of the state of New York, the court affirmed the *judgment of the supreme court, and re-[195] mitted the record to that court. 171 N. Y. 329, 63 N. E. 1097. Because of such remittitur this writ of error to the supreme court is prosecuted to review the judgment of the court of appeals.

Concerning the facts of the case the court of appeals said (p. 335, N. E. p. 1100):

"The coffee tendered by the plaintiffs, which was rejected, was of a low grade, containing many poor, withered, and black beans. It, confessedly, was colored and the beans coated with a yellowish substance. It is not contended that the coloring matter improved the taste or added to the value of the coffee. It is claimed that the only purpose of the coloring was to hide the character of the poor beans and to make them appear of the same character as the good coffee. The jury has found by its verdict that it was so colored as to conceal the damaged portions, or made it to appear better than it really was, or of greater value to the ordinary, untrained observer. In other words, that it was adulterated for the purposes of fraud and deception."

Applying the provisions of the health laws of the state of New York concerning the adulteration of food products already

referred to, it was decided that the court below had correctly held that there was no obligation on the part of the buyer to take delivery and pay for the coffee if fraudulently colored in violation of the prohibitions of the statute. Coming to consider the contention of the sellers, that the provision of the law of the state in question was repugnant to the commerce clause of the Constitution of the United States, the court of appeals said (p. 332, N. E. p. 1098) :

"The states have no power to regulate commerce with foreign countries or with each other. This power has been delegated to the Congress of the United States, and that body can, by law, determine what shall or shall not be permitted to be imported. With the right of importation follows the right of sale in original packages, and therefore the states cannot prohibit the sale of articles of commerce within their borders.

[196] *The states cannot, under the guise of inspection, or under their reserved police powers, prohibit the importation into their jurisdictions of sound meat, under the pretense that it may be damaged or decayed, or Texas cattle for fear they may be diseased, or spirituous or malt liquors for fear that they may intoxicate, or oleomargarine for fear it may be adulterated. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

Having thus fully conceded the plenary operation of the Constitution of the United States upon interstate and foreign commerce, the court proceeded to decide that the statute of the state of New York which it upheld was not repugnant to the commerce clause of the Constitution, because the state, in its enactment, but exerted its reserved police power to legislate for the protection of the health and safety of the community, and to provide against deception or fraud. In support of this theory the court cited from the decisions of this court, to which it had referred, as showing the general rule, and additionally fortified its conclusion by reference to, and citations from, the opinion of this court in *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

All but three of the many propositions embraced in the assignment of errors and urged at bar rest on the contention that the court of appeals misconceived the extent of the police power of the state, and therefore erroneously decided that the law of the

state of New York which was applied to the case was not repugnant to the commerce clause of the Constitution of the United States. We shall not at any length undertake to review the argument made at bar to sustain this proposition, since its unsoundness will be more fully demonstrated by a mere reference to the previous decisions of this court, upon which the court below based its conclusions. Indeed, every contention here urged to show that the law of New York is repugnant to the Constitution of the United States was fully and expressly considered and negated by the decision of this court in *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154. In that case a law of the *state of Massachusetts forbidding the [197] sale of oleomargarine which was artificially colored was applied to a sale in Massachusetts of an original package of that article which had been manufactured in, and shipped from, the state of Illinois. In the course of a full review of the previous cases relating to the subject it was said (p. 472, L. ed. p. 227, Inters. Com. Rep. p. 600, Sup. Ct. Rep. p. 158) :

"If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally, affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states. For, as said by this court in *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820: 'In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'"

Again, it was said (p. 478, L. ed. p. 229, Inters. Com. Rep. p. 606, Sup. Ct. Rep. p. 160):

[198] "And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use and eagerly sought by people in every condition of life are protected *by the Constitution in making a sale of it against the will of the state in which it is offered for sale, because of the circumstance that it is an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public."

The assertion that the statute of the state of New York which the court below applied is repugnant to the commerce clause of the Constitution of the United States being thus shown to be devoid of merit, there remains only to be considered the three propositions to which we have previously adverted. We shall briefly consider and dispose of them.

1st. It is insisted that, even although it was in the power of the state of New York to legislate for the prevention of fraud and deception by forbidding the sale of the adulterated food products, such prohibition could only operate upon contracts made within, or intended to be executed within, the state, and as the contract here in controversy was not of such character, therefore the law of the state of New York was erroneously held to control. This proposition is based on the assumption that because the buyers of the coffee were residents of Maryland, therefore the contract must be treated as having been made for the purpose of securing the shipment of the coffee from Rio Janeiro to the residence of the buyers, hence the city of New York was referred to in the contract merely as the port of entry. It is insisted, *per contra*, that this proposition was not relied upon at the trial, nor called to the attention of the court of appeals of the state of New York, and should not be now considered, because if it had been raised below

[199] it would *have been met by proof showing that the buyers, although residents in Maryland, were engaged in carrying on a business for the sale of coffee in New York city. The

suggestion that the proposition was not made below is borne out by the fact that it was not referred to by the court of appeals of the state of New York or in the several opinions handed down by the supreme court of the state of New York during the course of the protracted litigation which the cause has engendered. Be this as it may, however, we think the proposition is devoid of merit. The contract of sale was made in New York; the storage and delivery in the city of New York was therein provided for. It was clearly, therefore, a New York contract, and governed by the law of New York.

2d. It is urged that, even although there was power in the state of New York to legislate on the subject of adulteration of food, such legislation ceased to be operative as regards food products imported into the United States through the channels of foreign commerce after the passage of the act of Congress approved August 30, 1890, "providing for the inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases." 26 Stat. at L. 414, chap. 839 (U. S. Comp. Stat. 1901, p. 3185). The second section of that act, it is insisted, does not exclude from importation adulterated food, but simply adulterated food which is mixed with any poisonous or noxious chemical, drug, or other ingredient injurious to health, which, it is urged, was not the case with the coffee in question. The language of the section upon which this contention is based is as follows:

"That it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous, or malt liquors, adulterated or mixed with any poisonous or noxious chemical, drug, or other ingredient injurious to health."

We think it unnecessary to determine whether the statute lends even color to the proposition, since we think it is clear that its effect, whatever be its import, was not to deprive the *state of its police power to [200] legislate for the benefit of its people in the prevention of deception and fraud, and thus to control sales made within the state of articles so adulterated as to come within the valid prohibitions of the state statute.

3d. In the trial court the plaintiff tendered evidence to demonstrate that there was a demand in some portions of the country for artificially colored coffee, and, to the ruling of the court excluding such testimony as irrelevant, exception was saved. Although the court of appeals, in its opinion, did not make any special reference to the subject, it is insisted that the question was called to its attention, and that, in af-

firming the judgment, it in effect sustained the action of the trial court in excluding the testimony, and thereby deprived the plaintiff of rights secured under the Constitution of the United States. The effect of the evidence, it is argued, had it been admitted, would have been to show that coffee artificially colored as a means of fraud and deception was a recognized article of commerce, and therefore the right to deal in it was protected by the commerce clause of the Constitution of the United States, and such dealings could not, therefore, be controlled by the state law. To state the proposition we think is to answer it.

It, moreover, is disposed of by the decisions of this court to which we have previously referred. Besides, the question which the case involved was the right of the sellers to contract for and deliver in the state of New York an article so adulterated and fraudulent as to be within the prohibitions of the law of New York. Further, the proof tending to show that coffee so adulterated and artificially colored as to be the convenient means of accomplishing fraud and deceit was in demand in some places outside of the state of New York could have no legitimate tendency to cause the adulterated and fraudulently deceptive article to become legitimate commerce.

Affirmed.

[201]*COUNTY OF STANISLAUS, in the State of California, *et al.*, *Appts.*,
v.

EAN JOAQUIN & KING'S RIVER CANAL
& IRRIGATION COMPANY.

(See S. C. Reporter's ed. 201-217.)

Water rates — contract exemption from reduction — reserved power to amend or repeal — due process of law — equal protection of the laws.

1. No contract that the state would not thereafter authorize boards of supervisors to reduce water rates so as to yield to the stockholders less than 1½ per cent per month on the capital actually invested by a corporation organized under Cal. Stat. 1853, p. 87, as amended by Cal. Stat. 1862, p. 540, was created by the provision of § 3 of the latter act, that every such company should have power to establish its rates, which should be subject to regulation by the appropriate board of supervisors, but should not be reduced by them below that point.

NOTE.—Respecting legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L. R. A. 177.

On contract exemptions from legislative power to fix tolls, rates, or prices—see note to Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592.

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2. Assuming that a contract exemption from the reduction by a board of supervisors of water rates below a certain point was created in favor of the company organized under Cal. Stat. 1853, p. 87, as amended by Cal. Stat. 1862, p. 540, by the provisions of § 3 of the latter act, the legislature, in the exercise of its reserved power to alter or repeal, conferred by Cal. Const. 1849, art. 4, § 31, still could enact the provisions of Cal. Stat. 1885, p. 95, § 5, authorizing the supervisors to reduce the rates to not less than 6 nor more than 18 per cent upon the then value of the property actually used in supplying water to the public.

3. The reduction of water rates by a board of supervisors acting under the authority of Cal. Stat. 1885, p. 95, § 5, so as to give an annual income of 6 per cent upon the then value of the property of the water company actually used in supplying water to the public, does not necessarily amount to a taking of property without due process of law, or a denial of the equal protection of the laws.

[No. 80.]

*Argued November 13, 30, December 1, 1903.
Decided January 18, 1904.*

APPEAL from the Circuit Court of the United States for the Northern District of California to review a decree setting aside an ordinance regulating water rates. *Reversed* and the bill ordered dismissed without prejudice.

See same case below, 113 Fed. 930.

Statement by Mr. Justice **Peckham**:

The county above named has appealed directly to this court from a decree of the circuit court of the United States for the northern district of California, setting aside an ordinance adopted by the board of supervisors of Stanislaus county on June 24, 1896, designating the water rates which were to be charged by the company (appellee) to its water consumers for *the ensuing [202] year. The appeal here is on the ground that the case involved the construction or application of the Constitution of the United States, under § 5 of the act of 1891. (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549.)

The company was incorporated in 1871, under an act of the California legislature approved in 1853 (Stat. of 1853, p. 87), as amended in 1862 (Stat. of 1862, p. 540). After its incorporation and the obtaining of the necessary land, the company built a canal or reservoir at a cost, as alleged, of about a million dollars, and it is averred that the property was and is of that value. Subsequently to the completion of its works the company furnished water for irrigating purposes to its customers at rates fixed by it, which were not interfered with by the board of supervisors up to the time of the

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adoption of the above-mentioned ordinance of June 24, 1896. Soon afterwards the company commenced this suit for the purpose of obtaining a decree setting the ordinance aside and declaring it to be null and void, and decreeing that the company was entitled to have the rates for supplying its water to its customers and the users thereof generally so fixed that they would in the aggregate furnish a reasonable and just compensation for the services rendered, and a fair, just, and equitable return therefor.

The act of 1862 provided in § 3 as follows:

"Every company organized as aforesaid shall have power, and the same is hereby granted, . . . to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than 1½ per cent per month upon the capital actually invested." [Cal. Gen. Laws, 1850-1864, par. 978.]

[203] On March 12, 1885, the legislature passed an act (Cal. Stat. 1885, page 95) providing for the fixing, by the board of supervisors of a county, of the rates to be collected by water companies. Section 5 of that act authorized the various boards of supervisors in the state to regulate and control the water *rates that might be charged in their respective counties by any person, company, association, or corporation, and provided:

"Said boards of supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than 6 nor more than 18 per cent upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits the cost of any extensions, enlargements, or other permanent improvements of such water rights or water-works shall not be included as part of the said expenses of management, repairs, and operating of such works, but when accomplished may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said boards of supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto,

to the end and purpose that said rates shall be equal, reasonable, and just, both to such persons, companies, associations, and corporations and to said inhabitants." [Decreeing's Anno. Codes & Stat. p. 140.]

The complainant alleges in its bill that prior to March 12, 1885, at the time of the passage of the act of that date, the company and its incorporators had actually invested under the authority of the act of 1862 a capital amounting to \$971,113.13 in money, all of which was actually, reasonably, and necessarily expended by the complainant in the purchase and construction of its canals and other property actually used in and useful to the appropriation and furnishing of the water, and that the property was, on the last-named date, and still is, of the reasonable worth of \$971,113.13. The complainant averred that if the act of 1885 was construed as repealing, *altering, or amend-[204] ing the provisions of the act of 1862, as to rates to be charged by the company, then that the act of 1885 was in violation of, and repugnant to, the provisions of article I., § 10, of the Constitution of the United States, and, as thus construed, the act of 1885 impaired the obligation of the contract between the state of California and the complainant, entered into under the authority of § 3 of the act of 1862.

It was also averred that the rates, as fixed by the board under the act of 1885, would result in taking the property of the complainant without due process of law, and in depriving it of the equal protection of the laws.

An answer was put in, taking issue with the complainant on the averments in its bill, and a trial was had in the circuit court. That court held (113 Fed. 930) that there was a contract under the act of 1862, as contended for by the complainant; that the act of 1885 could not be so construed as to permit the board of supervisors, in fixing water rates by its authority, to entirely disregard the capital actually invested in the property of the corporation under the act of 1862, and that if otherwise construed the act of 1885 would run counter to the constitutional provision that no law impairing the obligation of a contract should be passed, and the statute would be subjected to the further objection that, as so construed, the state would deprive complainant of its property without due process of law, and would also deny to it the equal protection of the laws, as provided for in the Federal Constitution, and that such provision could not be held subordinate to the constitutional power conferred upon the state legislature to alter, amend, or repeal the general laws concerning corporations. It was also said by the court that it was the

duty of the board of supervisors to ascertain the amount of the capital actually invested in the corporation, that is to say, the amount of capital actually paid in and invested in constructing the canals and acquiring the other property used and made useful in supplying water to the customers of the corporation in Stanislaus county, and this fact should have been considered by the [205]*board in fixing the water rates which the complainant was entitled to charge under the statute; that when the board of supervisors fixed the rates no consideration was given by it to the evidence showing the amount of the capital actually put into the corporation, or the actual, reasonable, and proper cost of the works; that the evidence establishes the fact that the board failed to perform its duty in this respect, and that by reason thereof it deprived the complainant of its property without due process of law, and denied to it the equal protection of the laws.

The court found that the evidence showed that the rate fixed by the board of supervisors reduced the income of the company considerably below 6 per cent upon the capital actually invested in the property of the corporation, and if a corresponding reduction were made in Fresno and Merced counties its income would, under the most favorable conditions, be reduced to less than 5 per cent per annum on the value of the property as estimated by the board of supervisors.

The court also held that the company had waived the right to fix rates as high as permitted under the act of 1862, by failing to make them as high as therein permitted, prior to the passage of the act of 1885, and the act of 1885, "providing that the net annual receipts as adjusted by the board of supervisors should not be less than 6 nor more than 18 per cent per annum, is therefore properly applicable to the regulation of complainant's rates."

Mr. James P. Langhorne argued the cause, and, with *Messrs. Duncan Hayne* and *Frederic D. McKenney*, filed a brief for appellants:

The water rates and basis for fixing them, provided for by the act of 1862, did not constitute an unalterable contract with complainant, but were matters of regulation of a public use subject to the alterations made by the act of 1885, under the power reserved to the state of California in each of its Constitutions to alter from time to time, or repeal, laws relating to corporations.

Covington v. Kentucky, 173 U. S. 231, 43 L. ed 679, 19 Sup. Ct. Rep. 383; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Spring Valley Waterworks v. Schottler*,

110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Reagan v. Mercantile Trust Co.* 154 U. S. 417, 38 L. ed. 1030, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; *State, Morris & E. R. Co. Prosecutors, v. Railroad Taxation Commissioner*, 37 N. J. L. 228; *Phinney v. Shcppard & E. P. Hospital*, 88 Md. 633, 42 Atl. 59; *Ex parte Koehler*, 23 Fed. 529; *St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, 11 L. R. A. 452, 15 S. W. 18; *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 245, 19 S. W. 839; *Griffin v. Kentucky Ins. Co.* 3 Bush, 592, 96 Am. Dec. 259; *Watson Seminary v. Pike County Ct.* 149 Mo. 57, 45 L. R. A. 675, 50 S. W. 880; *Gas & Water Co. v. Downingtown*, 175 Pa. 341, 34 Atl. 799.

All this court has decided and said with reference to the right of a state, under its reserved constitutional power, reasonably to alter and amend statutory or other regulations of railroad rates and turnpike tolls, and as to exemptions from taxation, and as to the regulation of the exercise by private or by quasi-public corporations of public utilities, apply with special force to this case.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

The only qualification of, or limitation to, this rule is, as has been said in *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357, that such alterations must be reasonable; they must be made in good faith, and be sustained within the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.

While the cost of the works is an element to be considered, yet it is not the basis or chief element. The value of the property used and useful and the service rendered constitute the basis of valuation in arriving at the rates.

Osborne v. San Diego Land & Town Co. 178 U. S. 39, 44 L. ed. 969, 20 Sup. Ct. Rep. 860; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 441, 47 L. ed. 894, 23 Sup. Ct. Rep. 571; *Smyth v. Ames*, 169 U. S. 544, 42 L. ed. 848, 18 Sup. Ct. Rep. 418.

Depreciation of the works need not be included in their cost and valuation.

San Diego Land & Town Co. v. Jasper, 189 U. S. 446, 47 L. ed. 896, 23 Sup. Ct. Rep. 571; *Redlands, L. & C. Domestic Water Co. v. Redlands*, 121 Cal. 312, 53 Pac. 791.

What was paid by a company to its predecessor for property, or for property purchased at foreclosure sale or on reorganization, is not satisfactory evidence of the original cost.

Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.

What money stockholders may have paid into a corporation is not satisfactory proof of the value of the corporate property in this class of cases.

Ibid.

In enforcing the constitutional prohibition against the deprivation of property without due process of law, this court requires only that the rates shall be reasonable as between the corporation and the rate-payers, considering the use and value of the property employed, the service rendered, and the extent of territory actually under irrigation able to pay.

San Diego Land & Town Co. v. Jasper, 189 U. S. 446, 47 L. ed. 896, 23 Sup. Ct. Rep. 571; *San Diego Land & Town Co. v. National City*, 174 U. S. 755, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The actual income from the whole system is the test.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

The question of the reasonableness of the rates depends, not only upon the value of the works, but also upon the value of the service rendered.

Smyth v. Ames, 169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 755, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804.

The estimate based on the acreage actually irrigated and producing revenue is the most just to all concerned.

San Diego Land & Town Co. v. Jasper, 189 U. S. 445, 47 L. ed. 895, 23 Sup. Ct. Rep. 571; *Smyth v. Ames*, 169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 755, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804.

Mr. W. B. Treadwell argued the cause and filed a brief for appellee:

That such an act as that of 1862 constituted a contract is firmly settled by the decisions of this court.

Gordon v. Appeal Tax Ct. 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Bridge Proprietors v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *The Binghamton Bridge*, 3 Wall. 51, 18 L. ed. 137; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 192 U. S.

886, 20 Sup. Ct. Rep. 736; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

However broad may be the terms of a state constitution or statute reserving the right to amend the charter of a corporation, that power is not without limit. Notwithstanding such a reservation, the vested rights of the corporation are as inviolable as in other cases; nor can such a power be so exercised as to destroy the grant.

Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408, 2 Sup. Ct. Rep. 267; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *United States v. Union P. R. Co.* 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304.

Such a reservation does not confer upon the legislature the right to alter or revoke such a contract as the one here in question,—certainly not, so long as the state retains the consideration, or continues to enforce, as against the corporation, the stipulations on the part of the latter.

Sinking Fund Comrs. v. Green & B. River Nav. Co. 79 Ky. 73; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275; *Miller v. New York & E. R. Co.* 21 Barb. 513; *Com. v. Essex Co.* 13 Gray, 239; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692; *Ball v. Rutland R. Co.* 93 Fed. 513; *Hill v. Glasgow R. Co.* 41 Fed. 610; *State ex rel. White v. Neff*, 52 Ohio St. 375, 28 L. R. A. 409, 40 N. E. 720; *Orr v. Bracken County*, 81 Ky. 593; *Lothrop v. Stedman*, 13 Blatchf. 134; Fed. Cas. No. 8,519; *Sage v. Dillard*, 15 B. Mon. 340; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Los Angeles v. Los Angeles Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

The California Constitution confers upon the legislature no power to alter or repeal the charter of a corporation, and no power on the subject except to alter or repeal laws for the formation of corporations.

People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692.

Rates should be so fixed as to allow a reasonable income on the money actually expended in construction, unless that amount

of money was extravagantly, or unnecessarily, or fraudulently expended.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Amcs.* 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

First. The question which first arises in [206] this case is whether *there was a contract with the company under the act of 1862, by reason of which the state could not thereafter authorize the board of supervisors to reduce the rates so low as to yield less than 1½ per cent per month upon the capital actually invested.

The acts of 1853 and 1862 are general laws, the former providing for the formation of corporations of the character named therein, and the latter amending that act, and especially providing for the incorporation of canal companies, and the construction of canals. No special charter was given the company directly from the legislature otherwise than is contained in the powers granted by the two acts above named. A company, although organized under a general statute, may nevertheless thereby enter into and obtain a contract from the state which may be of such a nature that it can only be altered in case power to alter was, prior thereto, provided for in the Constitution or legislation of the state.

In *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373, 20 L. ed. 611, it was said by Mr. Justice Bradley, in delivering the opinion of the court, page 378, L. ed. p. 614, that—

“Corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that state, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters. ‘The act is as special to each bank,’ says Justice McLean, delivering the opinion of this court, ‘as if no other institutions were incorporated under it.’ In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that, during the existence of any corporation formed under the act, the stipulation or exemption specified in it is to operate.”

The language used in conferring power to fix rates in the act of 1862 is to be taken as if it were contained in a special charter granted by the legislature to this company. The question then arises whether language

such as is contained in the 3d *section of [207] that act, and which is set forth in the foregoing statement of facts, amounts to a contract, to be protected by the Constitution of the United States. We think it does not.

It seems to us that language of this nature cannot properly be construed as a promise or pledge that the limitation as to rates may not be altered at any time when, in the judgment of the legislature, it may be proper so to do. Water rates which might have been perfectly reasonable at the time of the passage of the act of 1862, although amounting to 1½ per cent per month upon the capital actually invested, might, in the course of years, become exceedingly burdensome to those who used the water, and amount to a very unreasonable compensation to the company for the water it sold. Irrigation by means of corporations formed to supply water was in its infancy in 1862 in California, and the risks necessarily taken in the organization of such companies, and the prosecution of their work, were then not only very large, but also extremely uncertain in character. Consequently, a rate of compensation was proper at that time which, in the course of years and the accumulated experience as to the necessary cost of such works, and of their successful operation, including the consideration of the risk attendant upon their operation, would make a water rate, as provided by the act of 1862, a very unreasonable overcharge. These facts must have been present in the minds of those who enacted the legislation of 1862, and it would be most unreasonable to suppose that it was intended by any such legislation to forever thereafter tie the hands of the state in regard to all companies organized under the act of 1862, and before the passage of the act of 1885.

The authority given by the act of 1862 enabled the board of supervisors to conditionally regulate the rates. There is no promise made in the act that the legislature would not itself subsequently alter that authority. The state simply authorized its agents, the boards of supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be *implied that the state might not there-[208] after authorize the boards to reduce them, or that it might not itself do so directly. Even as between individuals, such an implication would not be a reasonable one from the language used, and as the contract, if it existed, would take away from the legislature its otherwise undoubted right of regulation upon a subject of great public importance, there is still less reason for imply-

ing a contract which would prevent the state from using its power to that end for the future. The language of this portion of the act applies to the boards and limits their right of reduction leaving unhampered the right of the state to interfere directly or by authorizing the boards to reduce the rates below the point stated in the act. In order to make such a contract the language must be plain, and susceptible of no other reasonable construction. *Freeport Water Co. v. Freeport City*, 180 U. S. 587-599, 45 L. ed. 679-688, 21 Sup. Ct. Rep. 493, citing *Railroad Commission Cases*, 116 U. S. 307-325, 29 L. ed. 636-642, 6 Sup. Ct. Rep. 334, 388, 1191.

In our belief, the language of the act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the legislature, to so remain until subsequently altered by it. The cases heretofore decided in this court are authority for this view. Some of them are now referred to.

In *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. ed. 602, the following language was used in the statute: "The real property, including ground rents, now belonging and payable to Christ Church hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." A subsequent law provided that all property belonging to an association or incorporated company which was then by law exempt from taxation should thereafter be subject to taxation in the same manner as other property. The later law was held not be in violation of the Constitution of the United States. It was held that language such as this was nothing but in the nature of a privilege, which existed only during the pleasure of, and might be revoked by, the sovereign power whenever it chose so to do.

[209] **East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373, 20 L. ed. 611, was a case where the court held that the language used was that conferring a bounty, and that it did not amount to a contract in such a sense that it could not be repealed, although it did grant an exemption from taxation of the property used for the purpose of obtaining salt. In regard to the language exempting the property from taxation, the court said:

"The law in question says to all: You shall have a bounty of 10 cents per bushel for all salt manufactured, and the property used shall be free from taxes. But it does not say how long this shall continue; nor do the parties who enter upon the business promise how long they will continue the manufacture. It is an arrangement de-

terminable at the will of either of the parties, as much so as the hiring of a laboring man by the day."

In *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805, it was also held that an act of the legislature exempting property of a railroad company from taxation was not a contract to exempt it unless there were a consideration for the act; that, without it, the promise was of a gratuity, spontaneously made, which might be kept, changed, or recalled, at pleasure, and that the rule applies to the agreements of states made without consideration as well as to those of persons.

In *Welch v. Cook*, 97 U. S. 541, 24 L. ed. 1112, the act of the legislative assembly of the District of Columbia of June 26, 1873, exempted from general taxes for ten years thereafter such real and personal property as might be actually employed within the District for manufacturing purposes. It was held that the language did not create an irrevocable contract with the owners of such property, but simply conferred a bounty, liable at any time to be withdrawn.

In *Grand Lodge, F. & A. M. v. New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523, the language exempted the property from taxation "so long as it is occupied as a Grand Lodge of the F. and A. Masons;" and it was held that it did not constitute a contract between the state and the plaintiff, but was a mere continuing gratuity, *which the legislature was at [210] liberty to terminate and withdraw at any time.

In *Wisconsin & M. R. Co. v. Powers*, decided at this term (191 U. S. 379, ante, 229, 24 Sup. Ct. Rep. 107), the language of the act was: "That the rate of taxation fixed by this act or any other law of this state shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude, until the same has been operated for the full period of ten years, unless the gross earnings shall equal \$4,000 per mile." After the railroad company had been organized, and while that act was in force, and on June 4, 1897, the state passed a law levying a specific tax upon the property and business of every railroad corporation operated within the state. The road in question would have been entitled to the exemption stated in the prior law if it were in force. The railroad contended that it had a contract by virtue of the language above set forth. This court held that no contract arose from the language used, and that consequently the subsequent act providing for taxation did not violate the Federal Constitution in regard to contracts.

Sufficient cases have been cited to show that language quite as strong as that used in the act of 1862 does not amount to a contract. It is true that the cases cited involved questions of alleged contracts for exemption from taxation, in regard to which it has been said that no presumption exists in favor of a contract by a state to exempt lands from taxation, and that every reasonable doubt should be resolved against it. Statutes of California, providing that the use of all water appropriated for sale, rental, or distribution should be a public use, and subject to public regulation and control, are valid (*San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804), and companies formed for the purpose of furnishing water for irrigation purposes have been held in that state to be public municipal corporations, and the use of the water for the purpose mentioned a public use. See cases cited in *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 159, 41 L. ed. 369, 388, 17 Sup. Ct. Rep. 56. To regulate or es-

[211]tablish rates for which *water will be supplied is in its nature the execution of one of the powers of the state, and the right of the state so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain. *Owensboro v. Owensboro Waterworks Co.* 191 U. S. 358, ante, 217, 24 Sup. Ct. Rep. 82.

In our judgment the language of the act of 1862 did not amount to a contract that the rates for the use of water should never be lowered below the amount provided for in that act.

Second. But assuming there was a contract, we think the rates could be changed under that provision of the Constitution of the state adopted in 1849, article 4, § 31, which provided:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

This court has had frequent occasion to discuss the meaning and extent of the power thus reserved, as it exists in about all the states, either by constitutional or statutory provisions.

Tomlinson v. Jessup, 15 Wall. 454, 21 L. ed. 204, held that the object of reserving a power to amend or repeal (p. 458, L. ed. p. 206) was—

"To prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time

require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which, without that provision, would be ir-repealable, and protected from any measures affecting its obligation."

It was also said (p. 459, L. ed. p. 206):

"The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities, derived by its charter directly from the state."

In *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357, it was stated that by virtue of the power to alter, revoke, or repeal an act, as provided in *the Constitution of Ohio, §[212] 2, article 1, the legislature did not impair the obligation of a contract in prescribing rates for passenger transportation by a new consolidated company, although one of the original companies, prior to the adoption of the Constitution, was organized under a charter which imposed no limitation as to rates.

In *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408, 2 Sup. Ct. Rep. 267, it was again held that a power reserved in the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of the charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.

The same principle was decided in *Sinking Fund Cases*, 99 U. S. 700, 720, 25 L. ed. 496, 501; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437, and *United States v. Union P. R. Co.* 160 U. S. 1, 33, 40 L. ed. 319, 330, 16 Sup. Ct. Rep. 190.

Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383, decided that language describing certain property, and providing that it should be and remain forever exempt from state, county, and city tax, did not prevent the legislature from withdrawing such exemption, and subjecting the property to taxation, in view of the statute that all charters and grants of the corporations should be subject to amendment or repeal at will of the legislature. Mr. Justice Harlan, in delivering the opinion of the court, said (p. 238, L. ed. p. 682, Sup. Ct. Rep. p. 386):

"We are of opinion that the exemption from taxation embodied in that act did not tie the hands of the commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption, and subject the property in question to taxation. The act of 1886 was passed subject to the provision in a general statute of Kentucky, above re-

ferred to, that all statutes 'shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed.' If that act in any sense constituted a contract between the city and the commonwealth, the reservation [213] in an *existing general statute of the right to amend or repeal it was itself a part of that contract."

To the same effect is *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531.

These cases also hold that there is a limitation, even to the power of amendment, when reserved in the constitution or a statute of a state. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is not without limit; that the alterations must be reasonably made, in good faith, and consistent with the scope and object of the act of incorporation, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolable as in other cases. In reiterating this view of the power, we think that a mere reduction of rates, while still leaving reasonable, fair, or just compensation for the use of the property, is not prohibited, and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the act of 1862 as to provide for the fixing of rates as set forth in the act of 1885.

It is not confiscation, nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of 6 per cent upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had, prior thereto, been allowed to fix rates that would secure to it 1½ per cent a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, we think that a law which reduces the compensation therefore allowed to 6 per cent upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it.

[214] The original cost may have been too great; mistakes of construction, even though honest, may have been made, which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purpose in-

tended. Other circumstances might exist which would show the original rates much too large for fair or reasonable compensation at the present time. Notwithstanding such facts, are the shareholders in the company to be forever entitled to 18 per cent upon this cost, and does a reduction in amount, as provided for in the act of 1885, take away property, in violation of the provisions of the Federal Constitution? We think not.

In this case much of the total amount expended in the course of the construction of the works was not proved by those who made such expenditures, and the items and total amount of the cost of construction were only proved by the books. What such books did not prove was the reasonableness of that cost, its propriety or necessity. There were statements that appeared in the minutes of the meetings of the shareholders which were put in evidence, that showed at least a dispute as to the proper cost of the works, and at one of these meetings a shareholder said there had been a waste in the management of the affairs of the company amounting to \$350,000, which was caused by the chief engineer, who had been in charge of the canal, and that his mistakes had cost the company a good deal of money. There would seem to have been more of a dispute as to who was responsible for this loss than over the fact of loss. At another meeting held in December, 1881, the president had said in his remarks to the meeting that, in his opinion, with careful management the canal would pay a fair revenue on what it ought to have cost. Although these minutes did not conclusively prove the fact of the excessive cost of the work, yet, where the books of the company were substantially the only evidence of the amount expended, and there was no other satisfactory evidence of the reasonableness of the expenditures, it would not be surprising if the board should have *regarded the state-[215] ments in the minutes relating to excessive cost as a justification, if not a requirement, for the reduction of the cost of construction, upon which rates might be fixed, by at least the amount mentioned,—\$350,000.

Other considerations, in the shape of facts, circumstances, and conditions pertinent to the alleged cost of the work, and appearing in the course of the inquiry, may have been considered by the supervisors, and the conclusion arrived at, after a consideration of all the material facts, that the rates fixed would result in justice to both the company and the consumers, as called for by the act.

Judging by this record, we are unable to say the board of supervisors failed to pro-

vide just and fair compensation for the use of the property by the public.

In *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804, it was held (following *Smyth v. Ames*, 169 U. S. 466, 543, 544, 42 L. ed. 819, 848, 18 Sup. Ct. Rep. 418), that what the company was entitled to demand in order that it might have just compensation was a fair return upon the reasonable value of the property at the time it was being used for the public. The appellants in that case contended that in fixing what were just rates the court should take into consideration the cost of the plant and of its annual operation, the depreciation of the plant, and a fair profit to the company above its charges for its services. It was observed by the court that undoubtedly all these matters ought to be taken into consideration and such weight be given them, when rates are being fixed, as, under all the circumstances, would be just to the company and to the public. The same principle is reaffirmed in *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 47 L. ed. 892, 894, 23 Sup. Ct. Rep. 571.

After taking such facts into consideration, the company might still be directed to receive rates that would be nothing more than a fair and just compensation or return upon the reasonable value of the property at the time it was being used for the supplying of the water to the public.

To take the amount actually invested into "estimation" does not mean necessarily that [216] such amount is to control the *decision of the question of rates. Other language would have been employed to express that thought. The cost may be estimated, says the act, but that leaves open a reference to the other facts adverted to in the latter part of § 5, and it is upon a consideration of the whole case that the board is to determine what shall be reasonable, just, and equal to all parties. The record would seem to show that the board did take these various matters into consideration in coming to the conclusion it did in regard to the value of the property, although giving much less weight to such alleged cost than the company thought was proper. The board added over \$25,000 to the amount proved as the present cost of the construction of the canals, based on the prices of material, supplies, and labor, of the date when the estimate was made, that estimate being \$312,000, while the board fixed the valuation at \$337,000.

Much of the capital was invested between twenty and thirty years ago, and to be able still to realize 6 per cent upon the money originally invested is more than most people are able to accomplish in any ordinary

investment, and more than is necessary in order to give just compensation for property at the time it is used for the public purpose originally intended.

It is, of course, impossible to say what rates may be adopted in the other counties through which this canal runs, and that is one of the embarrassments under which the parties suffer from the language of the statute of 1885. Heretofore the company has fixed its own rates therein. Exactly how the question may be hereafter determined as to the percentage of income, where there are three different boards of supervisors who may fix rates for their respective counties, each differing from the other, is not made clear by the statute. The complainant admits that the rates provided for by the supervisors under the act of 1885, if applied to all three counties, would allow complainant an income of substantially 6 per cent on \$337,000, being \$25,000 more than the present cost of the work would be, as shown by uncontradicted and satisfactory evidence. Those rates exist in the other counties at present.

*Hereafter, in case the other counties [217] should fix rates in such manner that, taken as a whole, the rates in the three counties would not insure an income of at least 6 per cent, as provided for in the act of 1885, the company would, of course, not be bound to accept such rates, and a decree in this case would not bind it in regard to the propriety of rates for the future, as fixed by the ordinance of 1896 for the county of Stanislaus.

The judgment of the Circuit Court must be reversed and the bill dismissed without prejudice.

So ordered.

THOMAS C. BEDFORD and Emma Bedford, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 217-225.)

Eminent domain — what constitutes a taking.

The injury from overflow and erosion to the lands of a riparian proprietor as the result of the action of the Mississippi river through a series of years is not such a direct consequence of the construction by the Federal government farther up the stream of a revetment along the banks, which did not change the course of the river as it then existed, but operated to prevent further changes, as

NOTE.—As to what constitutes a taking of property by eminent domain—see note to *Memphis & C. R. Co. v. Birmingham*, S. & T. River R. Co. 18 L. R. A. 166.

to make such governmental action a taking of private property for public use within the meaning of the 5th Amendment to the Federal Constitution.

[No. 23.]

Argued December 9, 1903. Decided January 18, 1904.

APPEAL from the Court of Claims to review a judgment dismissing a petition for an award of damages to real property, alleged to be the result of the construction of certain public works by the United States. *Affirmed.*

See same case below, 36 Ct. Cl. 474.

Statement by Mr. Justice **McKenna**:

The appellants were owners of land on the Mississippi river in the state of Louisiana, amounting to 5,000 or 6,000 acres, upon which were cabins, other buildings, and fences. They brought suit in the court of claims for damages to their lands, alleged to have resulted from certain works of the United States. The damages consisted, as found by the court, of the erosion and overflow of about 2,300 acres of the land. The works of the government, and their operation, are described by the court in the following findings:

[218] "Prior to the spring of 1876 the Mississippi river flowed *around a narrow neck of land known as De Soto point; and, in going around this point, flowed by the city of Vicksburg in a southwesterly direction. In the spring of 1876 De Soto point became so narrow by erosion that the river broke through, leaving De Soto point as an island, thereby shortening the distance of the stream about 6 miles, and taking its course immediately to the south with great velocity against the Mississippi bank at what is known as the cut-off of 1876. The result was that the city of Vicksburg was left some miles away from the main channel of the river, and the old channel in front of the city was continually filled up, making the approach from the river to the docks along the river difficult, if not impossible.

"Between 1878 and 1884 the United States constructed about 10,700 feet of revetment along the banks of the Mississippi river at Delta point, Louisiana, for the purpose of preventing the further erosion of that point. The revetment consisted of willow mattresses weighted down by stones, and were placed on sand banks below high-water mark. The revetment was neither upon nor in contact with the claimant's land. The object of the construction was to prevent the navigable channel of the river from receding farther from the city of Vicksburg, which had been left some distance from the main

channel of the river by the cut-off of 1876, as aforesaid. The revetment was repaired slightly in 1866 and 1889, and more extensively in 1894, all of which work was paid for from time to time out of the appropriations made therefor by Congress, as found in 20 Stat. at L. 363, 366, chap. 181; 21 Stat. at L. 181, chap. 211; 21 Stat. at L. 470, chap. 136; 26 Stat. at L. 450, chap. 907; 26 Stat. at L. 1116.

"In making the improvement aforesaid, the defendants did not recognize any right of property in the claimants in and to the right alleged to be affected, and did not assume to take private property in and by the construction of the revetment, but proceeded in the exercise of a claimed right to improve the navigation of the river.

"After the cut-off at De Soto point in 1876, and the construction of the revetment, as aforesaid, the channel and current *of the [219] Mississippi river were gradually directed toward the lands of the claimants, situated about 6 miles below said cut-off, and did, about the year 1882, reach said lands and thereafter erode and overflow about 2,300 acres of their lands, which overflow has ever since continued. About 400 acres of their lands so eroded and overflowed was prior to the death of said George M. Bedford, through whom the claimants claim title, and about 900 acres of which were overflowed thereafter and prior to said judicial sale, and the residue after said sale. Of the lands so overflowed about 1,300 acres thereof were cleared and in cultivation, of which about 700 acres were so cleared prior to May 2, 1895.

"The damage to the claimants, and each of them, by reason of the washing away of their lands during their respective ownership, as aforesaid, is an excess of \$3,000.

"The cause of the deflection of the river upon the claimants' land was the cut-off, which shortened the distance of the stream 6 miles, and thereby increased the velocity of the current, and forced the current to turn, when it struck the Mississippi bank, at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point as it then was. If the revetment had not been built, the cut-off would have continued to widen toward the Louisiana bank, and the channel would have continued to move in the same direction. With the widening of the cut-off and the shifting of the channel the angle of the turn below the cut-off would have gradually become less abrupt, and the deflection of the stream upon the claimants' land would have grown less, and the consequent injury to the claimants' land would have been decreased. To what extent the injury would

have been decreased is conjectural. The injury done to the claimants' land was an effect of natural causes; the injury caused by the government was by interrupting the further progress of natural causes, *i. e.*, the further change in the course of the river, and is also conjectural."

[220] The court deduced from the facts that the claimants were *not entitled to recover, and dismissed their petitions. 36 Ct. Cl. 474.

Mr. John C. Chaney argued the cause, and, with *Messrs. E. T. Brookshire and Dabney & McCabe*, filed a brief for appellants:

Land, not being subject to servitude to navigation, was appropriated outright by the government to a public use, and the Constitution guarantees payment therefor.

United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 181, 20 L. ed. 561.

An implied contract consequently arises to pay for such appropriation of property.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; *United States v. Berdan Firearms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. See also *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668.

A serious interruption to the common and necessary use of property is a taking of it, and it is not necessary that the land be absolutely taken.

Angell, *Water Courses*, § 465a.

This is a "taking" of appellants' lands for public use.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 181, 20 L. ed. 561; Angell, *Water Courses*, § 465a; *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477; *Rowe v. Granite Bridge Corp.* 21 Pick. 344; *Canal Appraisers v. People*, 17 Wend. 604; *Lackland v. North Missouri R. Co.* 31 Mo. 180; *Stevens v. Middlesex Canal*, 12 Mass. 466.

Although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the ob-

ligation cast by the 5th Amendment, of paying just compensation.

United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Seranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

Permanent flooding of private property may be regarded as a taking.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.

Assistant Attorney General Pradt argued the cause, and, with *Mr. William H. Button*, filed a brief for defendant in error:

A riparian owner may preserve existing conditions, although he may not erect constructions which will change those conditions. Subject to this limitation, he may preserve his property irrespective of the consequences to his neighbors.

Angell, *Water Courses*, 7th ed. § 333; *Barnes v. Marshall*, 68 Cal. 569, 10 Pac. 115; *Gulf, C. & S. F. R. Co. v. Clark*, 41 C. C. A. 597, 101 Fed. 678.

It would seem that the same principle will apply to the United States in its protection of the property interests intrusted to its care.

The damage is too remote to constitute a taking.

Northern Transp. Co. v. Chicago, 99 U. S. 642, 25 L. ed. 338; *Gibson v. United States*, 166 U. S. 273, 41 L. ed. 1001, 17 Sup. Ct. Rep. 578; *Seranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

Damages that are speculative and conjectural in their nature cannot be recovered.

Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Central Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293.

Mr. Justice McKenna delivered the opinion of the court:

There is no dispute about the power of the government to construct the works which, it is claimed, caused the damage to appellants' land. It was alleged by appellants that they were constructed by the "United States in the execution of its rights and powers in and over said river, and in pursuance of its lawful control over the navigation of said river, and for the betterment and improvement thereof." And also that the works were not constructed upon appellants' land, and their immediate object was to prevent further erosion at De Soto point. In other words, the object of the works was to preserve the conditions made by natural causes. By constructing works to secure that object, appellants contend there was given to them a right to compensation. The contention asserts a right in a

riparian proprietor to the unrestrained operation of natural causes, and that works of the government which resist or disturb those causes, if injury result to riparian owners, have the effect of taking private property for public use within the meaning of the 5th Amendment of the Constitution of the United States. The consequences of the contention immediately challenge its soundness. What is its limit? Is only the government so restrained? Why [224] not as well riparian proprietors? *Are they also forbidden to resist natural causes, whatever devastation by floods or erosion threaten their property? Why, for instance, would not, under the principle asserted, the appellants have had a cause of action against the owner of the land at the cut-off if he had constructed the revetment? And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. Asserting the rights of riparian property, it might make that property valueless. Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility.

There is another principle by which the rights of riparian property and the power of the government over navigable rivers are better accommodated. It is illustrated in many cases.

The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision. An excellent illustration is found in *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578. The distinction is there instructively explained, and other cases need not be cited. It is, however, necessary to refer to *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349, as it is especially relied upon by appellants. The facts are stated in the following excerpt from the opinion:

"It appears from the 5th finding, as amended, that a large portion of the land flooded was, in its natural condition, between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the government works was to take away the

[225] possibility of drainage. But findings IX.

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and X. show that, both by seepage and percolation through the embankment and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about 18 inches; that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken."

The question was asked: "Does this amount to a taking?" To which it was replied: "*The case of Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, answers this question in the affirmative." And further: "*The Green Bay Company*, as authorized by statute, constructed a dam across Fox river, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land." In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the *Lynah Case* in the cause and manner of the injury. In the *Lynah Case* the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river, and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore, the damage to appellants' land, if it can be assigned to the works at all, was but an incidental consequence of them.

Judgment affirmed.

*DAN ROGERS, *Plff. in Err.*, [226]
v.

STATE OF ALABAMA.

(See S. C. Reporter's ed. 226-231.)

Error to state court—Federal question—negroes as grand jurors—equal protection of the laws.

1. A decision upon a Federal question respect-

NOTE.—On negroes as grand jurors—see notes to *State v. Russell*, 28 L. R. A. 204; *Carter v. Texas*, 44 L. ed. U. S. 839.

ing the constitutional guaranty of the equal protection of the laws is involved in the ruling of a state court upon a motion to quash an indictment because of the exclusion of negroes from the grand-jury lists, by which such motion, though but two printed octavo pages in length, was struck from the files under the color of local practice for prolixity, because it contained an allegation that certain provisions of the newly adopted state Constitution, claimed to have the effect of disfranchising negroes because of their race, worked as a reason and consideration in the minds of the jury commissioners for their action.

2. A denial of the equal protection of the laws is made by a ruling of a state court upon a motion to quash an indictment because of the exclusion of negroes from the grand-jury lists, by which such motion, though but two printed octavo pages in length, was struck from the files under the color of local practice for prolixity, because it contained an allegation that certain provisions of the newly adopted state Constitution, claimed to have the effect of disfranchising negroes because of their race, worked as a reason and consideration in the minds of the jury commissioners for their action.

[No. 407.]

Submitted January 4, 1904. Decided January 18, 1904.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a conviction of murder in the Montgomery City Court of that State. *Reversed* and remanded for further proceedings.

The facts are stated in the opinion.

Mr. Wilford H. Smith submitted the cause for plaintiff in error.

Mr. Massey Wilson submitted the cause for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to the supreme court of Alabama, brought on the ground that the plaintiff in error, one Rogers, has been denied the equal protection of the laws guaranteed by the 14th Amendment of the Constitution of the United States. Rogers was indicted for murder, and in due time filed a motion to quash the indictment because the jury commissioners appointed to select the grand jury excluded from the list of persons to serve as grand jurors all colored persons, although largely in the majority of the population of the county, and although otherwise qualified to serve as grand jurors, solely on the ground of their race and color and of their having been disfranchised and deprived of all rights as electors in the state of Alabama by the provisions

of the new Constitution of Alabama. The motion alleged that the grand jury was composed exclusively of persons of the white race, and concluded with a verification. To show the reality of the second reason alleged for the exclusion of blacks from the grand-jury list, the motion, as a preliminary, alleged that the sections of the new Constitution which were before this court in *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639, were adopted for the purpose, and had the effect, of disfranchising all the blacks on account of their race and color and previous condition of servitude. On motion of the state this motion to quash was stricken from the files. Rogers excepted, but his exceptions were overruled by the supreme court of the state, seemingly on the ground that the prolixity of the motion was sufficient to justify the action of the court below. The Civil Code of Alabama provides by § 3286, "if any pleading is unnecessarily prolix, irrelevant, or frivolous, it may be stricken out at the costs of the party so pleading, on motion of the adverse party."

We follow the construction impliedly adopted by the supreme court of Alabama, and assume that this section was applicable to the motion. We also assume, as said by the court, that the qualifications of the grand jurors are not in law dependent upon the qualifications of electors, and that any invalidity of the conditions attached to the suffrage could not of itself affect the validity of the indictment. But in our opinion that was not the allegation. The allegation was that the conditions said to be invalid worked as a reason and consideration in the minds of the commissioners for excluding blacks from the list. It may be that the allegation was superfluous and would have been hard to prove, but it was not irrelevant, for it stated motives for the exclusion which, however mistaken, if proved, tended to show that the blacks were excluded on account of their race, as part of a scheme to keep them from having any part in the administration of the government or of the law. The whole motion takes two pages of the printed record, of the ordinary octavo size. A motion of that length, made for the sole purpose of setting up a constitutional right, and distinctly claiming it, cannot be withdrawn for prolixity from the consideration of this court, under the color of local practice, because it contains a statement of matter which, perhaps, it would have been better to omit, but which is relevant to the principal fact averred.

It is a necessary and well-settled rule that the exercise of jurisdiction by this

court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 443, 17 L. ed. 173, 177. But that is merely an illustration of a more general rule. On the same ground (231) *there can be no doubt that if full faith and credit were denied to a judgment rendered in another state upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See *German Sav. & L. Soc. v. Dormitzer* (Jan. 4, 1904) 192 U. S. 125, ante, 373, 24 Sup. Ct. Rep. 221. In *Chapman v. Goodnow*, 123 U. S. 540, 547, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211, where the parties sought to avoid the obligation of a former decree by new matter, this court said that the effect of what was done was not a Federal question, but proceeded to inquire in terms whether that ground of decision was the real one, or whether it was set up as an evasion, and merely to give color to a refusal to allow the bar of the decree. We are of opinion that the Federal question is raised by the record, and is properly before us. That question is disposed of by *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687, and it was error not to apply that decision. The result of that and the earlier cases may be summed up in the following words of the judgment delivered by Mr. Justice Gray: "Whenever, by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the 14th Amendment of the Constitution of the United States. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Neal v. Delaware*, 103 U. S. 370, 397, 26 L. ed. 567, 574; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904." Our judgment upon this point makes it unnecessary to consider a motion to quash the panel of the petit jury for similar reasons, which was disposed of as having been made too late.

Judgment reversed, and case remanded for further proceedings not inconsistent herewith.

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*MARY SHAPPIRIO and Jacob I. Shap-[232] pirio, *App'ts.*,

v.

MINNIE D. GOLDBERG and George Goldberg.

(See S. C. Reporter's ed. 232-243.)

Appeal — amount in dispute — rescission of contract for fraud — misrepresentations which do not deceive — use of property after discovery of the fraud.

1. The amount in dispute in a suit for equitable relief because of fraud in a sale of real property exceeds the sum of \$5,000, which is essential, under the act of February 9, 1893 (27 Stat. at L. 434, chap. 74, U. S. Comp. Stat. 1901, p. 573), to enable the Supreme Court of the United States to review a judgment of the court of appeals of the District of Columbia, although the bill prays for the conveyance of a strip of land of slight value, where, if such relief is denied, the complainant seeks, in the alternative, to have the contract rescinded and the payment decreed of the sum of \$6,000, the purchase money, with costs and interest.
2. Misrepresentations by a vendor of real property with reference to its area are not actionable, where a correct description of the property was given in the deed and recorded chain of title, which the purchaser's agent undertook to investigate and report upon, and the vendor made no effort to prevent a full investigation.
3. A purchaser of real property cannot rescind the contract of sale because of the vendor's misrepresentations with reference to its area, where, after discovering the fraud, he collected rents for some months upon the property, corresponded with the vendor as to future terms of rental, declined to reduce the rent, made repairs, and performed other acts of ownership.

[No. 87.]

*Argued and submitted December 9, 1903.
Decided January 18, 1904.*

APPEAL from the Court of Appeals of the District of Columbia to review a judgment which affirmed a decree of the Supreme Court of the District dismissing a bill filed by a purchaser of real property to obtain equitable relief because of the fraud of the vendor. *Affirmed*.

See same case below, 20 App. D. C. 185.

The facts are stated in the opinion.

NOTE.—*As to amount in dispute necessary to give United States Supreme Court jurisdiction*—see notes to *Schunk v. Moline*, M. & S. Co. 37 L. ed. U. S. 256; *Commercial Bank v. Buckingham*, 12 L. ed. U. S. 169.

On fraudulent representations as ground of rescission of contract—see note to *Meeks v. Garner*, 11 L. R. A. 196.

On the right to rely upon misrepresentations made to effect contract as the basis for a charge of fraud—see note to *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.* 37 L. R. A. 593.

Mr. Leo Simmons argued the cause and filed a brief for appellants:

A bracket 3x5 is 3 feet by 5 feet or 3 feet on one side and 5 on the other.

Jaqua v. Witham & A. Co. 106 Ind. 545, 7 N. E. 314.

The words "by" or "from," used to express boundaries, are lines of exclusion, unless by necessary implication they are used in a different sense.

Wells v. Jackson Iron Mfg. Co. 48 N. H. 538; *Breck v. Young*, 11 N. H. 485; *Enfield v. Day*, 11 N. H. 520.

The back yard and stable were appurtenant to the house.

Manogue v. Bryant, 15 App. D. C. 245; *Shepherd v. Pepper*, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438.

If Goldberg did not own the small piece of land, and did not intend it should be so understood, it was his duty to disclose the fact, and state that it would not be included in the sale.

Crosby v. Buchanan, 23 Wall. 454, 23 L. ed. 142; *Kerr, Fraud & Mistake*, 101; *Henderson v. Henshall*, 4 C. C. A. 357, 7 U. S. App. 565, 54 Fed. 320; *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; *Stewart v. Wyoming Cattle Ranch Co.* 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101; *Smith v. Richards*, 13 Pet. 26, 10 L. ed. 42; *Pom. Eq. Jur.* § 877.

Mrs. Goldberg is a party to this fraud, and aided her husband in the practice of it, and is chargeable as well as he.

Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106.

A man to whom a representation is made has a right to rely upon it, and need not make further inquiry.

Kerr, Fraud & Mistake, 80, 81; *Low v. Trundle*, 78 Va. 68; *Mead v. Bunn*, 32 N. Y. 275; *David v. Park*, 103 Mass. 501.

The fact that he has the means of knowing or obtaining information of the truth, which he did not use, is not sufficient. It is not, indeed, enough that he may have been wanting in caution.

Kerr, Fraud & Mistake, 79, 80.

The effect of what would be otherwise noticed may be destroyed, not only by actual misrepresentations, but by anything calculated to deceive, or even to lull suspicion upon a particular point.

Kerr, Fraud & Mistake, 81.

The maxim, *Caveat emptor*, does not apply when there is a positive misrepresentation, essentially material to the subject in question, provided proper diligence be used by the purchaser in the course of the transaction. The rule at least of *caveat emptor*, where there is a misrepresentation, if applicable at all, must be applied with great care. Nor will a condition in the particulars

of a sale, that misdescription or errors in sale shall not annul the sale, cover a fraudulent misrepresentation.

Kerr, Fraud & Mistake, 81, 82.

A person upon whom fraud has been practised has a right to understand all the facts and circumstances, and be fully advised of his rights, before beginning suit,—especially if no rights of third parties have intervened.

Dickson v. Patterson, 160 U. S. 586, 40 L. ed. 546, 16 Sup. Ct. Rep. 373; *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420.

When a party injured by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon discovery, and mere submission to an injury after the act inflicting it is completed cannot, in the absence of other circumstances, take away the right of action.

Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; *Kerr, Fraud & Mistake*, 305; *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420.

A party is entitled to wait a reasonable time after the discovery of a fraud before bringing suit to rescind.

Galling v. Newell, 9 Ind. 572; *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; *Neblett v. Macfarland*, 92 U. S. 101, 23 L. ed. 471; *Marston v. Simpson*, 54 Cal. 190.

Richold was Goldberg's agent, he being employed by him.

Story, Agency, 9th ed. 31.

It is no objection to specific enforcement of a contract to convey land that the legal title is not held by a party to the contract, where such a person is a party to the suit, and it appears that he holds the title in trust for the vendor.

McDonald v. Yungbluth, 46 Fed. 836.

Where one who agrees to sell certain land receives the full consideration therefor, and then fraudulently gives a deed conveying only part of the land, a specific enforcement of the contract may be had in equity, even though the contract be oral.

Ibid.

Where the parties stand upon the land they are bargaining for, and examine the same, and it is marked by fences 5 feet high and other monuments, and a deed is made conveying more than the land inclosed and viewed, even if both parties mutually understand and believe the description of the property in the deed is correct, the court will require the grantee to reconvey so much or such part as is not within the inclosed lines.

Goode v. Riley, 153 Mass. 585, 28 N. E. 228.

The rule that a contract cannot be rescinded unless the parties can be placed *in statu quo* does not apply where one party has obtained advantage over the other by means

of fraud, and such rescission would further the ends of justice, and the court can still reach and enforce equities between them; or if fraud or the act of the parties prevent such placing *in statu quo*.

Coffee v. Ruffin, 4 Coldw. 487.

Likewise, where a party who wishes to rescind a contract restores, or offers to restore, what he has received under the contract without unreasonable delay, the fact that the other party by his default renders full restoration impossible will not defeat the former's right to rescind.

Hammond v. Pennoek, 61 N. Y. 145.

A party practising a fraud may be required by bill in equity to do what he agreed to do. If he cannot, the contract will be rescinded.

Kerr, Fraud & Mistake, 333.

Where the conduct of the defendants has not been such as to commend them to the favor of the court of equity, any doubt and difficulty should be resolved against them.

Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566.

As to what constitutes fraud and misrepresentation see —

Crosby v. Buchanan, 23 Wall. 454, 23 L. ed. 142; *Stewart v. Wyoming Cattle Ranch Co.* 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101; *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; *Smith v. Richards*, 13 Pet. 26, 10 L. ed. 42; *Henderson v. Henshall*, 4 C. C. A. 357, 7 U. S. App. 565, 54 Fed. 320; Kerr, Fraud & Mistake, 81, 101; Pom. Eq. Jur. §§ 877, 880; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228.

On the question as to what time action should be begun, see —

Dickson v. Patterson, 160 U. S. 586, 40 L. ed. 546, 16 Sup. Ct. Rep. 373; *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; Kerr, Fraud & Mistake, 305; *Neblett v. Macfarland*, 92 U. S. 101, 23 L. ed. 471; *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; *Gatling v. Newell*, 9 Ind. 572; *Marston v. Simpson*, 54 Cal. 190.

Mr. Thomas M. Fields submitted the cause for appellees:

It is settled law that a fraud on one person is no ground for redress or relief on behalf of a stranger to the transaction. It is a general rule that a person cannot complain of false representations, either for the purpose of maintaining an action for deceit, or for the purpose of avoiding a contract, unless the representations were made, either directly to him, with the intention that they should be acted upon by him, or, if made to some other person, unless they were made

with the intention that they should be communicated to him, and acted upon by him.

14 Am. & Eng. Enc. Law, 2d ed. p. 148.

Notice to the vendee's title examiner is notice to the vendee.

Eldridge v. Connecticut General L. Ins. Co. 3 MacArth. 301.

Where the record discloses facts sufficient to put a purchaser upon inquiry, he cannot be considered an innocent purchaser without notice.

Beckett v. Tyler, 3 MacArth. 319.

Fraud in fact will never be presumed, but must be proved. All other things being equal, the motive and design of a representation will be attributed to honest, rather than corrupt, motives. A purchaser of a title under a slave marriage, having notice of doubts as to the validity of the marriage, cannot claim that he was induced to purchase by fraudulent representations as to the marriage.

Security Invest. Co. v. Garrett, 3 App. D. C. 69.

One who takes a deed upon the personal credit of the grantor, without examining the title or making inquiries as to the premises, cannot be held to be a purchaser without notice.

Waters v. Williamson, 21 D. C. 24.

Notice to an agent or attorney of the purchaser as to facts affecting the title is notice to the purchaser, although the facts were not communicated to him, and although the importance of the facts may not have been understood by the agent.

Security Invest. Co. v. Garrett, 3 App. D. C. 69.

One who buys without examination of title, or causes such examination to be made by reckless or incompetent persons, where a proper examination would show a defective title, cannot claim to be a purchaser in good faith without notice, as against the claims of the lawful owner.

Anderson v. Reid, 14 App. D. C. 54.

The acts and declarations of an agent of the vendor (or vendee), in the course of his employment, in relation to the title of land sold or exchanged, bind the vendor (or vendee).

Main v. Aukam, 12 App. D. C. 375.

Having the means of knowledge, and negligently remaining ignorant, is equivalent, in creating a liability, to actual knowledge.

Mercy Docks v. Gibbs, 11 H. L. Cas. 687; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Washington Market Co. v. Clagett*, 19 App. D. C. 12.

Knowledge of an agent that improvements were being made on property at the time he took a mortgage thereon for his principal charges the mortgagee with notice of a mechanic's lien arising out of such improve-

ments, which entitled the lien to priority under a statute.

Re Wagner, 110 Fed. 931.

Where a party desires to rescind a contract upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred.

McLean v. Clapp, 141 U. S. 429, 35 L. ed. 804, 12 Sup. Ct. Rep. 29; *Warner v. Godfrey*, 186 U. S. 365, 46 L. ed. 1203, 22 Sup. Ct. Rep. 852.

If a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties.

Hennessy v. Bacon, 137 U. S. 78, 34 L. ed. 605, 11 Sup. Ct. Rep. 17.

Where a plaintiff exchanged his farm for a stock of goods, his conduct in selling from the stock was held to preclude any rescission on the ground of fraud.

Moore v. Howe, 115 Iowa, 62, 87 N. W. 750.

Where a purchaser of goods, after a fair opportunity of inspection, unconditionally accepts them, or deals with them as his own, he cannot repudiate such acceptance and refuse to pay.

Harper v. Baird, 3 Penn. (Del.) 110, 50 Atl. 326.

Misrepresentation, to vitiate the contract of sale, must relate to a material fact, constituting an inducement to the contract, of which the complaining party had no means of knowledge, and upon which he relied, and by which he was actually misled to his injury.

Slaughter v. Gerson, 13 Wall. 379, 20 L. ed. 627.

The neglect to make reasonable examination will preclude a purchaser from rescinding a contract of purchase on the ground of false and fraudulent representations. He is also precluded when it appears that he did make such examination, and relied on the evidence furnished by such examination, and not upon the representations.

Farnsworth v. Duffner, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164.

In a suit in equity to set aside a contract and conveyances by which lands were exchanged, for false and fraudulent representations, where the evidence shows that, in making the exchange no reliance was placed upon the representations, but that the party acted upon his own judgment and upon information obtained from third persons, no

ground is shown for maintaining the suit.

Hoyt v. Hanbury, 128 U. S. 584, 32 L. ed. 565, 9 Sup. Ct. Rep. 176.

Where means of knowledge are at hand, and are equally available to both parties, and the subject of purchase is open for inspection, if the purchaser does not avail himself of these means he will not be heard to say, to impeach the contract, that he was deceived by the vendor's misrepresentations.

Slaughter v. Gerson, 13 Wall. 379, 20 L. ed. 627.

Such will be the case if the party to whom the representation is made resorts to the proper means of verification, so as to show that he in fact relied on his own inquiries; or if the means of investigation and verification are at hand, and his attention is drawn to them; or if the representation regards a mere matter of opinion or inference with respect to which both parties have equal means of forming a judgment.

Adams, Eq. *177.

Where both parties stand upon an equality of footing the fraud must consist of false representation of a material fact, and the party to whom it is made must not be able, by the exercise of reasonable caution and vigilance, to detect its falsity.

Finlayson v. Finlayson, 17 Or. 347, 3 L. R. A. 801, 21 Pac. 57.

Where both parties have equal means of information, so that by the exercise of ordinary prudence and diligence either may rely upon his own judgment, misrepresentations, though false, will not be considered fraudulent.

Adams, Eq. *177.

A person alleging the fraudulent procurement of a contract must allege (and prove) that the false representations of the defendant gave rise to the contract, and that the contract would not have been made but for such representations.

Security Invest. Co. v. Garrett, 3 App. D. C. 69.

If one, after discovering the fraud or other invalidating circumstance, delays, or continues to deal with the property as before, he affirms the sale or other transaction; and, though he may afterwards discover other invalidating facts, he cannot disaffirm.

Clements v. Smith, 9 Gill, 160; *Howard v. Carpenter*, 11 Md. 259. See also *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798.

A vendee of real estate was held not to be entitled to a rescission on the ground of misrepresentations where the facts relative to which the representations were made were obvious.

Trammell v. Ashworth, 99 Va. 646, 39 S. E. 593.

Where a vendee of a house and lot occupied the same for a considerable time without claiming misrepresentations on the part of the vendor, it was held that she was not entitled to a rescission because of misrepresentations.

Ibid.

Where the vendor gave the vendee every opportunity he possessed to inform himself of the location, condition, and title to the lands under negotiation, and requested him to call on the proper persons and officers to ascertain the facts regarding the lands, the vendee cannot have relief on the ground of misrepresentations as to the title.

Sanders v. Lyon, 2 MacArth. 452.

One who contracts for the purchase of real estate in reliance on the representations of the vendor, but after he has had the means of verifying such statements, cannot avoid the contract on the ground that they were false.

Brown v. Smith, 109 Fed. 26.

Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.

Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927; *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 343, 44 L. ed. 1095, 20 Sup. Ct. Rep. 906.

Mr. Justice **Day** delivered the opinion of the court:

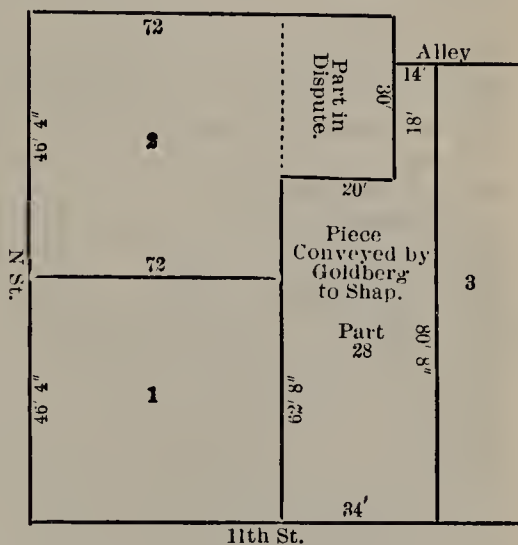
This was an action begun in the supreme court of the District of Columbia by Mary Shappirio and Jacob Shappirio, her husband, against Minnie D. Goldberg and George Goldberg, her husband, having for its object equitable relief because of alleged fraud of the respondents in the sale of certain property in Washington, District of Columbia, to the complainant, Mary Shappirio.

It appears that the sale was made through one Richold, a broker in real estate. George Goldberg was the owner of the property, and by memorandum made on May 11, 1900, authorized Richold to sell the property known as lots Nos. 1245 and 1247, being part of lot 28, square 977, fronting 34 feet on 11th street S. E., by 80 feet deep to an alley. Richold sold the property to Jacob Shappirio, for whom he was seeking an investment, for the price of \$6,000. The terms were cash, \$100 having been paid down at the making of the sale. This property, having two buildings upon it, and being part of lot 28, is described as follows:

"Beginning for the same at the southeast corner of said lot and running thence north on Eleventh street thirty-four (34) feet; thence west eighty (80) feet eight (8) inches to an alley; thence south on said alley fourteen (14) feet; thence east eighteen

(18) feet; thence south twenty (20) feet, and thence east sixty-two (62) feet eight (8) inches to the place of beginning."

In the rear of the premises there was a strip 20 by 30 feet, having upon it a shed or stable, which, before the sale, was in the possession of Goldberg under an arrangement for its use, and was used by him in connection with the premises. This piece was not fenced off at the time of sale, and might well be taken to be a part of the premises by any person examining the same without accurate knowledge of the extent of the property actually owned by Goldberg. The annexed plat shows the part of lot 28 covered by the description in the deed, and the part of lot 2 in dispute:



Although the purchase was made by Jacob Shappirio, the deed was made to Mary Shappirio, June 5, 1900. On September 28, 1900, a conveyance by the owner of the title to lot 2 was made of the part of that lot in the rear of the premises to Minnie D. Goldberg, wife of George Goldberg, for the consideration of \$300. Mary Shappirio and Jacob Shappirio on *June 5, 1900, executed a deed [234] of trust upon the property conveyed to her, in the sum of \$4,500. In the trust deed the property was accurately described.

After the property had been conveyed to Mary Shappirio it was rented to Goldberg, the vendor, who continued to occupy the same for eleven months. Upon asking a reduction of the rent, which was refused, Goldberg left the premises. On May 18, 1901, the present bill was filed, in which it was charged that Goldberg, in order to induce the sale in question, falsely represented that the property in the rear of lot 28 belonged to him, and would be included in the property sold, and notwithstanding the appearance of the property and the representations of Goldberg, the part conveyed did not include

the part of lot 2 in the rear of lot 28; that George Goldberg afterwards purchased the property, part of lot 2, and caused the same to be conveyed to Minnie D. Goldberg, his wife, as a part of a scheme to defraud the plaintiff; that the wife was a party to the fraud, and had no interest in the property except to hold it for her husband.

The bill prays that this parcel of ground, part of lot 2, be decreed to be held by Minnie D. Goldberg for the use of the plaintiff, Mary Shappirio, and be conveyed to her. If this relief cannot be granted, the prayer is that the sale be rescinded, and Goldberg be required to pay back the amount of the purchase money, with costs and charges, and, upon default of payment, the property be sold.

A general denial of the allegations of fraud and deceit is made in the answer, together with the averment that the plaintiffs relied upon their own investigation, and if they were deceived as to the extent of the property, it was the result of the want of due care upon their part.

In the supreme court the bill of the complainant was dismissed, which decree was affirmed in the court of appeals.

[240] The first question raised for our consideration involves the *jurisdiction of this court on appeal, it being claimed that the matter in dispute, exclusive of costs, does not exceed the sum of \$5,000. By the act of February 9, 1893 (chap. 74, 27 Stat. at L. 434, U. S. Comp. Stat. 1901, p. 573), jurisdiction to review the final judgments of the court of appeals of the District of Columbia is given where the matter in dispute exceeds the sum of \$5,000, exclusive of costs. In determining this question we may look to the allegations and prayer of the bill to ascertain the relief sought and the real extent of the controversy between the parties. The bill contains a prayer for the conveyance of the small strip of ground, which was purchased for \$300, and if that were the only subject-matter of the suit, the amount required to give this court the right of review would not be in controversy. But if this relief is denied, the complainant seeks, in the alternative, to have the contract rescinded and the payment of the sum of \$6,000, the purchase money, with costs and interest, decreed against the respondent. Upon the pleadings we are of opinion that this sum is also in dispute between the parties, and therefore this court has jurisdiction. To ascertain the right of jurisdiction in such a case we look, not to a single feature of the case, but to the entire controversy between the parties. *Stinson v. Dousman*, 20 How. 461, 15 L. ed. 966.

In this case the issues are mainly those of fact, and, in the absence of clear showing of error, the findings of the two lower courts

will be accepted as correct. *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; *Dravo v. Fabel*, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170. An examination of the record in the light of these findings does not enable us to reach the conclusion that error has been committed, to the prejudice of the appellants.

As to what was said by Goldberg at the time of the purchase of the property, in conversation with Richold, the broker, and at the time the premises were visited by Shappirio with a view to purchase, there is much conflict of testimony. The use of the premises as a connected whole might well lead the purchaser to believe, in the absence of accurate knowledge, that it was all under the ownership of one person, and would be *in-[241] cluded in the sale of the property to him; and, as said by the court of appeals, we believe that Shappirio may have been ignorant of the true condition of the title. But it was also found by that court that a correct description of the property was given in the deed and recorded chain of title. Richold, who made the sale, was intrusted by Shappirio with the examination of the deed and title, and thirty days were given to complete the purchase. For this purpose Richold was the agent of Shappirio, and, it not appearing in the proof that he was misled by the representations of Goldberg, or that by any scheme or plan he was kept from a full examination of the title and the description of the property contained in the deed furnished, he must be held chargeable with knowledge which the opportunity before him afforded to investigate the extent and nature of the property conveyed and which he undertook to examine for the purchaser. It is true that Richold testifies that he was misled by the silence of Goldberg, and by the situation and use of the property, and stoutly denies that he had the knowledge which a reading of the accurate description of the deed would give. But he undertook to investigate the matter and report upon the title. A casual reading of the description in the deed or examination of the recorded plat would have shown that the premises were not of a uniform depth of 80 feet, and had the L-shape extension in the rear of the lot, which excludes any part of lot 2 from the premises conveyed. For the purpose of this examination Richold was the agent of Shappirio, and his knowledge and means of information must be imputed to the purchaser. There are cases where misrepresentations are made which deceive the purchaser, in which it is no defense to say that had the plaintiff declined to believe the representations, and investigated for himself, he would not have been deceived. *Mead v. Bunn*, 32 N. Y. 275.

But such cases are to be distinguished from the one under consideration. When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the

[242] *purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor. *Slaughter v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; *Farnsworth v. Duffner*, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164.

If this action is viewed as one to rescind a contract, in the light of the testimony and the findings of the courts below, the appellant stands upon no better ground.

It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract. *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *McLean v. Clapp*, 141 U. S. 429, 35 L. ed. 804, 12 Sup. Ct. Rep. 29. In other words, when a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged, by the rescission of the contract. If he choose the latter remedy, he must act promptly, "announce his purpose and adhere to it," and not by acts of ownership continue to assert right and title over the property as though it belonged to him. In the present case, some months before the beginning of this action, probably in October, 1900, Shappirio learned that the conveyance did not include the premises, part of lot 2, in the rear of lot 28. It may be that the mere lapse of time in this case would not of itself have defeated the right to rescind, as a purchaser has a reasonable time in which to make election of such remedy after discovery of the fraud (*Neblett v. Macfarland*, 92 U. S. 101-105, 23 L. ed. 471, 472), but he cannot, after such discovery, treat the property as his own and exercise acts of ownership over it which show an election to regard the same as still his, and at the same time preserve his right to rescission. In the present case, after discovering that the part of lot 2 had not been con-

[243]veyed by the *deed, Shappirio collected rents for some months upon the property, corresponded with Goldberg as to future terms

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of rental, declined to reduce the rent, made some repairs upon the property, and performed other acts of ownership. This conduct is wholly inconsistent with an election to undo the transaction and stand upon his right to rescind the contract.

We find no error in the judgment of the Court of Appeals affirming the decree of the Supreme Court, and it is affirmed.

COMMERCIAL NATIONAL BANK OF
PORTLAND, Plff. in Err.,

v.

HENRY WEINHARD. (No. 109)

COMMERCIAL NATIONAL BANK OF
PORTLAND, Plff. in Err.,

v.

GEORGE H. WILLIAMS. (No. 110)

(See S. C. Reporter's ed. 243-253.)

*National banks—power of directors—levy of
assessment ordered by Comptroller.*

Directors of a national bank are not empowered, without action of the stockholders, to levy the assessment ordered by the Comptroller for the purpose of restoring its capital and enabling it to continue in business, by U. S. Rev. Stat. §§ 5136, 5145 (U. S. Comp. Stat. 1901, pp. 3455, 3463), investing them with authority to transact the usual and ordinary business of national banks, since the provision of § 5205 (U. S. Comp. Stat. 1901, p. 3495), for the appointment of a receiver to close up the business of the banking association in case it fails to pay up its capital stock, and refuses to go into liquidation, evidently confers upon the association the privilege of declining to make good the deficiency, and to elect, instead, to go into voluntary liquidation, the exercise of which would seem to be a matter in which the owners, and not the managers, of the bank primarily are interested.

[Nos. 109, 110.]

*Argued December 17, 18, 1903. Decided
January 18, 1904.*

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed the judgment of the Circuit Court for Multnomah County in that State in favor of plaintiffs in actions upon separate demands to recover the value of stock held by them in a national bank. *Affirmed.*

See same case below, 41 Or. 359, 68 Pac. 806.

Statement by Mr. Justice Day:

These actions were brought in the circuit court of the state of Oregon for Multnomah

county upon separate demands to recover the value of stock severally held by Weinhard and Williams in the Commercial National Bank of Portland, Oregon; Williams owning 60 shares of the par value of \$6,000, and Weinhard 100 shares of the par value of \$10,000. By stipulation the cases were heard together in the circuit court; a jury being waived and a trial had to the court. The cases were considered together as one appeal in the supreme court of Oregon, which affirmed the judgment of the lower court (41 Or. 359, 68 Pac. 806) assessing [244] the value of the stock, and giving *judgment in favor of the plaintiffs, now defendants in error. The same facts and questions are involved in the cases, and they will be considered together. The one question arises from a motion on the part of the bank for nonsuit, on the ground that the plaintiffs below had introduced no testimony, as a part of the case in chief, tending to show the value of the stock for which a recovery was sought. As appears in the record, much testimony was taken, and the Oregon supreme court regarding the stock as of some value; at least, it was held that if there was any error in overruling the motion for nonsuit, it was cured by the subsequent action in submitting testimony as to the value of the stock. In any event, this feature of the case does not present a Federal question, and upon writ of error from the judgment of a state court we are to consider in the first instance only the Federal questions involved. If those were correctly decided the judgment must be affirmed. *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429. The plaintiffs below recovered judgment for the value of the stock upon the theory that there had been a conversion thereof, because the board of directors and the stockholders directed the assessment resulting in the sale of the stock of the plaintiffs below in satisfaction thereof.

The Commercial National Bank of Portland was duly organized under the national banking act, and carried on business in the city of Portland, Oregon. It appeared that the capital of the bank had become impaired, and thereupon such proceedings were had that on December 5, 1896, the Comptroller issued the following notice to the bank:

Treasury Department,
Office of Comptroller of the Currency,
Washington, D. C., Dec. 5, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial National Bank, Portland, Oregon, has become impaired to an extent which makes necessary [245] an assessment of two hundred *and fifty

thousand dollars (\$250,000) upon the shareholders of said association to make good such deficiency:

Now, therefore, notice is hereby given to said association, under the provisions of § 5205 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3495) to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of § 5234 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3507).

In testimony whereof, I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

James H. Eckels,
Comptroller of the Currency.

To the Commercial National Bank, Portland, Oregon.

After receipt of this notice, upon December 12, 1896, the board of directors passed this resolution:

"Resolved, That in accordance with the notice served upon this association by the Comptroller of the Currency, under date of December 5, 1896, and received by this bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this bank of 50 per cent or \$50 per share, payable at this bank on or before March 11, 1897.

"And, resolved, That the cashier of this bank be, and he hereby is, authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail."

Upon December 17, 1896, notice of this assessment was served upon each of the stockholders of the bank. The defendants in error having failed to pay this assessment, on *March 18, 1897, the board of directors [246] passed a resolution directing the sale of the delinquent's stock to be made at public auction on May 5, 1897. In pursuance of this order, and on the day named, the stock was sold for the amount of the assessment. The Federal question is whether the board of directors, in thus assessing and selling the stock of the defendants in error, exceeded their powers under the national banking act; it being claimed that a valid assessment could only be made by the action of

the stockholders, and that the sale by the directors upon this assessment was unlawful, and amounted to a conversion of the stock.

Mr. E. S. Pillsbury argued the cause, and, with *Messrs. Platt & Platt*, filed a brief for plaintiff in error:

The general business and management of a national bank, which is defined by the national bank act to be a "body corporate," are intrusted to its board of directors.

First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. ed. 679.

Within the powers of the corporation, except as expressly modified by the act under which its charter is held, the board of directors is intrusted generally with the management of the business and affairs of the bank, and its acts, done in good faith, cannot be called in question.

Dana v. Bank of United States, 5 Watts & S. 223; *Hutchinson v. Green*. 91 Mo. 367, 1 S. W. 853; *Beveridge v. New York Elevated R. Co.* 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489.

The shareholder in a national bank, by entering into that relation, subjects himself to all the obligations created by the statute.

Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463.

The payment of an assessment to make up impaired capital is not in the nature of a further investment in the capital stock by the shareholder. His holding of stock remains the same, but has thereby cost him a greater amount; not that the investment is actually greater, in contemplation of law, than before payment, but because a part of the original investment has disappeared, and under his contract with the association the shares are to remain fully paid up. As a shareholder he becomes subject to this liability until legally relieved therefrom.

Earle v. Carson, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. Rep. 254.

The bank was formed to exist and do business pursuant to the policy of the act, and not to liquidate or go into the hands of a receiver. The act contemplates that the capital of a bank may become impaired, and it is the policy of the law to have that deficiency made up. The act also expressly contemplates the continuance of business by a bank when its reserve has been impaired.

Ibid.

The levy of this assessment effected no such radical change in the management as an assignment of the property of the corporation for the benefit of creditors, which the directors might unquestionably make.

Hutchinson v. Green, 91 Mo. 375, 1 S. W. 853; *De Camp v. Alward*, 52 Ind. 468.

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The levy of assessments to meet the requirements of corporations engaged in various enterprises is a matter of such common occurrence as to require no enumeration or elaboration. Under the general rule of decision at this day these assessments, when authorized by the charter or the law under which the corporation is created, are made by the directors, although they may not be specially empowered to do so by the statute creating such corporation. This is undoubtedly so as to calls for unpaid capital.

Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; *Ambergate R. Co. v. Mitchell*, 4 Exch. 540; *Cook, Stock & Stockholders*, § 109.

The same rule should apply to the assessment in these cases, as both calls and assessments are classed together in U. S. Rev. Stat. § 5205. The terms are often used interchangeably.

Budd v. Multnomah Street R. Co. 15 Or. 413, 15 Pac. 659; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; 2 Clark & M. Priv. Corp. § 497, p. 1524.

The law gives the directors no discretion to decide whether the bank shall continue or liquidate, but it is their duty to keep the bank going until the holders of two thirds of the stock vote otherwise; the levying of an assessment is not a discretionary act on their part, if an impairment of capital has been declared by the Comptroller to exist, and the statute creates no more presumption of inability to continue business on account of such impairment than if the reserve had been reduced below the legal requirement.

Earle v. Carson, 188 U. S. 45, 47 L. ed. 375, 23 Sup. Ct. Rep. 254.

The construction given to a statute by those charged with its execution, though not controlling, is entitled to the highest consideration of this court, and will not be overruled without cogent reasons.

United States v. Moore, 95 U. S. 760, 24 L. ed. 588; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112.

In case of ambiguity, contemporaneous and uniform executive construction is regarded as decisive.

Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648.

This court will take judicial notice of the rules and regulations prevailing in the office of the Comptroller of the Currency, and the acts of that official.

Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290; *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; *Heath v. Wallace*, 138 U. S. 573, 34 L. ed. 1063, 11 Sup. Ct. Rep. 380.

As a general proposition, the powers of stockholders are more restricted than those of directors. They cannot, either separately or collectively, contract for the corporation, nor make a sale or mortgage of corporate property.

Smith v. Hurd, 12 Met. 371, 46 Am. Dec. 690; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Blood v. La Serena Land & Water Co.* 113 Cal. 221, 45 Pac. 252; *Allemong v. Simmons*, 124 Ind. 199, 23 N. E. 768.

Mr. Thomas O'Day argued the cause, and, with Messrs. George H. Williams and George H. Durham, filed a brief for defendant in error:

A corporation can only be created by the sovereign power of the state, and in the creation of a corporation, such as the defendant herein, the government grants to it certain powers which are a part of the state's sovereignty. When these powers are granted, until revoked, the corporation may exercise the powers granted.

1 Thomp. Corp. § 35; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274.

The corporation can only act through such officers or agents as the grant or charter prescribes or designates.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; *Bank of United States v. Deveau*, 5 Cranch, 61, 3 L. ed. 38.

When the acts of a corporation are challenged, it must not only appear that the corporation had the power to do the act, but the act itself must have been done in the manner and through the officers named in the charter or grant of power.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274.

While directors may, as a general rule, exercise the ordinary powers of the corporation, yet all extraordinary powers as contradistinguished from the ordinary powers of the corporation must be exercised by the shareholders alone.

Morse, Banks & Banking, § 127; *Chicago City R. Co. v. Allerton*, 18 Wall. 233, 21 L. ed. 902; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 365, 34 L. ed. 364, 10 Sup. Ct. Rep. 1004; Boone, Banking, §§ 83, 84, 197; Thomp. Corp. §§ 2076, 3977-3979; *Brown v. Bradford*, 103 Iowa, 378, 72 N. W. 648; *Livesey v. Omaha Hotel Co.* 5 Neb. 74.

The directors cannot give away the funds of the bank without authority from the shareholders.

Boone, Corp. § 83; Morse, Banks & Banking, § 127; *Holder v. Lafayette, B. & M. R. Co.* 71 Ill. 196, 22 Am. Rep. 89; *Bedford R. Co. v. Bowser*, 48 Pa. 29

While the directors have full power, control, and charge of the funds of the corporation, and for this reason may make an assignment for the benefit of creditors, still the directors have no power to create a fund, that being the duty of the stockholders.

2 Thomp. Corp. § 2076.

Where the legislature gives power to raise a fund in addition to the capital stock by assessment on the stockholders, the directors cannot levy such an assessment without authority from the shareholders.

Marlborough Mfg. Co. v. Smith, 2 Conn. 579.

It is essential that the terms "call" and "assessment" should not be used as synonymous terms. A "call" is for an amount due upon a subscription to stock, but an "assessment" is an amount levied upon a stockholder after his stock has been fully paid up.

23 Am. & Eng. Enc. Law, 1st ed. p. 803.

When one becomes a stockholder of a corporation his relation to the corporation is that of a contract; and, if the directors could raise a fund and change the status of this contract without the consent of the stockholder, it would be giving a power to the board of directors which has been denied to the law-making power. It would allow the board of directors to change the contractual relations of the stockholder to the corporation.

United States v. Knox, 102 U. S. 422, 23 L. ed. 216.

It has been held that a board of directors has no authority to pass a by-law providing that a person who transfers his stock shall cease to be a member of the corporation.

Com. v. Gill, 3 Whart. 228.

It is also held that a board of directors invested with "all corporate powers" has no authority to accept for the corporation an amendment of its charter enlarging the powers of the corporation.

Venmer v. Atchison, T. & S. F. R. Co. 28 Fed. 581; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Hope Mut. F. Ins. Co. v. Beckmann*, 47 Mo. 93; *Com. ex rel. Claghorn v. Cullen*, 13 Pa. 133, 53 Am. Dec. 450.

Nor have the directors of a railway any authority, without the consent of the shareholders, to appropriate money of the company to build a passenger depot in a state foreign to that in which it was created and one to which its lines did not extend.

Nashua & L. R. Corp. v. Boston & L. R. Corp. 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004.

Manifestly the creating of this new fund to give new life to a bank is as great a power as to create the bank in the first instance.

Hulitt v. Bell, 85 Fed. 98; *Delano v. Butler*, 118 U. S. 634, 30 L. ed. 260, 7 Sup. Ct. Rep. 39.

When notice is given, the corporation ceases to exist as a bank after three months, but the stockholders may extend the life of the corporation by levying and paying the assessment on the stock; but this is clearly an act for the stockholders, and does not in any sense come within the ordinary affairs of the bank, which the directors are authorized to conduct and control.

Delano v. Butler, 118 U. S. 634, 30 L. ed. 260, 7 Sup. Ct. Rep. 39.

Where words are used in a statute and given a meaning, it will be presumed that they have the same meaning at all times subsequently used.

Factors' & T. Ins. Co. v. New Harbor Protection Co. 37 La. Ann. 233; *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566.

When a notice has been received from the Comptroller of the Currency that the stock is impaired, it is the duty of the shareholders to decide whether an assessment shall be made upon the shareholders, or whether the bank shall go into liquidation; this is a matter solely for the shareholders, and not for the directors.

Hulitt v. Bell, 85 Fed. 98; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Ex parte Winsor*, 3 Story, 411, Fed. Cas. No. 17,884; *Delano v. Butler*, 118 U. S. 634, 30 L. ed. 260, 7 Sup. Ct. Rep. 39; *Eidman v. Bowman*, 58 Ill. 448, 11 Am. Rep. 90; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156.

So where a statute provides: "If at any time the capital stock paid into said corporation shall be impaired, by losses or otherwise, the directors shall forthwith repair the same by assessment,"—it is held that, by this statute, a personal liability is not imposed upon the stockholders, and that they cannot be assessed for the purpose of paying the creditors; that the purpose of said provision was rather to prevent the continuance of business with impaired capital.

Dewey v. St. Albans Trust Co. 57 Vt. 337; 2 Waterman, Corp. § 119, pp. 92-95.

When an assessment is for the benefit of creditors or third parties, it is made by the Comptroller alone, but where it is made to repair the capital stock, it is made by the association. The only office of the Comptroller in this respect is merely a negative one, which says to the bank: Your assets are sufficient to pay your creditors, but you cannot continue business with impaired capital stock.

Delano v. Butler, 118 U. S. 634, 30 L. ed. 260, 7 Sup. Ct. Rep. 39.

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It is presumed that the assets of the bank will pay its debts, and for that reason the statute provides that, in case the assessment is not made within three months after notice, a receiver will be appointed and the assets delivered to the creditors of the bank and the surplus to the stockholders; so that when an assessment is called for under U. S. Rev. Stat. § 5205, it is not for the benefit of the creditors of the bank, but merely for the purpose of keeping the bank in existence.

Dewey v. St. Albans Trust Co. 57 Vt. 337.

The object of this section is to create new capital, not in the interests of the creditors of the bank, but merely to affect its status as a going concern. The raising of this new capital is, in no respect, a part of the ordinary affairs of the bank under the control of the directors. It affects what are called "constituent matters which demand the authorization of the stockholders" in contradistinction to the "business affairs of the corporation."

Wells v. Green Bay & M. Canal Co. 90 Wis. 442, 64 N. W. 69; *Re Sovereign Life Assur. Co.* [1892] 3 Ch. 279.

The shareholder's relation to the corporation is that of a contract, affecting his property rights, which cannot be impaired without the consent of the shareholder.

2 Waterman, Corp. pp. 92-95; *Ireland v. Palestine, B. N. & N. W. Turnp. Co.* 19 Ohio St. 369; *Thomp. Corp.* § 5161.

Mr. Justice **Day** delivered the opinion of the court:

This case requires the construction of § 5205 of the Revised Statutes of the United States as amended (U. S. Comp. Stat. 1901, p. 3495). The section is as follows:

"Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as *provided by law, for three[247] months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four (U. S. Comp.

Stat. 1901, p. 3507). [And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.]”

The assessment in this case was made by the board of directors without any action of the stockholders of the association, and the defendants in error having failed to pay the same upon notice, their stock was sold as directed in the statute. It is claimed that an assessment by the directors without action of the stockholders was without authority of law, and amounted to a conversion of the stock. This view was sustained in the supreme court of Oregon. The assessment ordered by the Comptroller was for the purpose of restoring the capital of the bank and thus enabling it to continue its business. Ample power is conferred upon the Comptroller for this purpose. His action is in aid of other sections of the law preventing a withdrawal of the capital, or the making of dividends when losses have been sustained equal to the undivided profits. Sections 5202-5204, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 3494, 3495). When the notice is received from the Comptroller by the bank under § 5205, the association has no authority to review or gainsay the necessity thereof. That question is concluded by the action of the Comptroller. The money to be raised for the continuance of the business may or may not be used in the liquidation of debts. The assessment is [248] entirely different from that provided *for in § 5151 (U. S. Comp. Stat. 1901, p. 3465), calling upon the individual responsibility of shareholders for the payment of debts. Under the last-named section the stockholder is required to pay such assessments as may be made, to meet the outstanding obligations of the bank, within the limit of an amount equal to the par value of the stock in addition to the amount invested therein. He has no election of payment, but is required to meet this liability, created by law for the benefit of creditors. Under § 5205 the amount paid is subject to the control of the board of directors in the continued operations of the bank. If the stockholders are to have a voice in making or declining

to make the assessment, they may well hesitate to intrust more capital to the control of a board under whose management it has already been impaired. Certain powers are conferred by law upon the directors.

Section 5136 (U. S. Comp. Stat. 1901, p. 3455) provides that the association shall have power—

“Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

“Seventh. To exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.”

And, again, by § 5145 (U. S. Comp. Stat. 1901, p. 3463), it is declared that the “affairs” of the corporation “shall be managed by not less than five directors.”

Thus the directors are given authority to transact the usual and ordinary business of national banks. Obviously, the *power [249] conferred may be exercised in all usual transactions through the executive officers of the bank, without consultation with the stockholders. In the present case the question to be dealt with is vital to the continuance of the life of the association, as only by complying with the requirement of the Comptroller in assessing a sum sufficient to make up the impaired capital of the bank can its business be continued. The shareholders, by their contracts of subscription, have agreed to pay in the amount of capital stock subscribed, and to discharge the additional liability imposed by the statute. They have not contracted to meet assessments at the will of the directors to perpetuate the business of a possibly losing concern. It would be going far beyond the usual powers conferred upon directors to permit them to thus control the corporation. Corporate powers conferred upon a board of directors usually refer to the ordinary business transactions of the corporation. *Chicago City R. Co. v. Allerton*, 18 Wall. 233, 21 L. ed. 902. The assessment is required by the Comptroller, not by the directors. The association is to receive notice thereof, and action must be taken by the association to meet the requirements of the

Comptroller under the statute. It is provided that if the association fail to pay up its capital stock, and refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of § 5234. This important provision is entitled to much weight in determining the proper construction of the statute. The assessment may be avoided, and the amount required is not payable, if the association decides to go into liquidation. Provision for voluntary liquidation is made in § 5220 (U. S. Comp. Stat. 1901, p. 3503), wherein authority is given to liquidate upon a vote of shareholders owning two thirds of the stock. Such liquidation does not prevent the assessment of stockholders under § 5151 for the benefit of creditors, and the enforcement of the liability of the shareholders in an action by a receiver or directly by the creditors. Rev.

[250] Stat. § 5234 (U. S. Comp. Stat. 1901, p. 3507); § 2, act of June 30, 1876 (19 Stat. at L. 63, chap. 156), as amended, U. S. Comp. Stat. 1901, p. 3509. The section referred to (5234) directs the appointment of a receiver to take possession of the books, records, and assets of the association, to collect the debts and claims belonging to it, and, among other things, if necessary to pay the debts of the association, to enforce the individual liability of the shareholders.

We are of opinion that § 5205 is intended to and does confer upon the association the privilege of declining to make the assessment to make good the deficiency to the capital, and to elect instead to wind up the business of the bank under § 5220, which provides for voluntary liquidation by a vote of two thirds of the shareholders. The question is, Who shall exercise this privilege, and determine the future of the association,—is it the directors or the shareholders who have this right of decision? The origin and continuation of the association would seem to be matters in which the owners, and not the managers, of the bank are primarily interested. If these are privileges of the shareholders, and only exercisable by them, this case presents a total lack of the exertion of the power by those upon whom it is legally conferred, as no action of the shareholders was had in the present case in making the assessment. Action upon the Comptroller's order involves extraordinary action of the association, and determines its future operations or liquidation, and is not found within the powers conferred upon the directors for the management of the business of the bank. If

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this were not so, then the decision of a question of such vital importance is left to the directors, who may or may not be large holders of stock. As it is a matter foreign to the powers of such boards, and not conferred by statute or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders. Whether a given power is to be exercised by the directors or the shareholders depends upon its nature and the terms of the enabling act. In certain instances the law specifically requires the action of the association to be taken by its *incorporators or shareholders. Sections [251] 5133, 5134, 5136, 5143, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 3454, 3455, 3463). These sections regulate matters not pertaining to the ordinary business of the bank intrusted to the directors. They deal with the exercise of those powers which concern the organization of the corporation, the amount of its capital stock, and kindred matters.

In § 5205 the requirement of the Comptroller is that the association make the assessment. It is the "association" which is required to pay up the stock or go into liquidation. The payment of the assessments must come from the shareholders, and we are of the opinion that the statute contemplates action upon the alternatives presented in the statute by the association composed of its shareholders. It is true, as suggested by the learned counsel for the plaintiff in error, that it requires a two-thirds vote of the stockholders to put the bank into liquidation under § 5220; but if the assessment is not carried, and the shareholders have not a two-thirds vote favoring liquidation, the bank is put in liquidation, and the shareholders' liability is the statutory one for the benefit of creditors, and not a venture of more capital in the enterprise, with a possible stockholders' liability upon the liquidation of the bank if it shall ultimately fail. Again, if the determination of this matter is entirely left to the directors, they may, by declining to make the assessment, force a liquidation of the bank, although the shareholders—the real owners of the property—be willing to make good the impaired capital, and continue the business. On the other hand, if the directors may assess to make good impaired capital, the shareholder must pay the assessment or submit to the sale of his stock. Such extraordinary powers are far beyond those required in the management of the bank's affairs or conferred in the sections of the law defining those conferred upon the directors.

In *Delano v. Butler*, 118 U. S. 634, 653, 30 L. ed. 260, 265, 7 Sup. Ct. Rep. 39, 46, while the question was not directly involved, in speaking of assessments under the act, Mr. Justice Matthews, delivering the opinion of the court, said:

[252] *"The assessment imposed upon the stockholders by their own vote, for the purpose of restoring their lost capital, as a consideration for the privilege of continuing business, and to avoid liquidation under § 5205 of the Revised Statutes, is not the assessment contemplated by § 5151, by which the shareholders of every national banking association may be compelled to discharge their individual responsibility for the contracts, debts, and engagements of the association. The assessment as made under § 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment in the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors, and, in the ordinary course of business, certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas, under § 5151, the individual liability does not arise, except in case of liquidation, and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably."

We concur in this reasoning. The assessment under § 5205 provides for a sum to continue the operations of the bank, and if unpaid subjects the stock of the shareholders to sale to make good the deficiency in its collection. Shareholders are given the right to go into liquidation, subjecting themselves, it is true, to the liability of the assessment for the benefit of creditors under § 5151, to an amount equal to the par value of their stock, if needed to make good the indebtedness of the bank, but risking no further investment of new capital in the continued business of the bank. The choice of methods is with the shareholders, and to them is addressed the decision of the question and the making of the assessment if that course is determined upon. *Hulitt v. Bell*, 85 Fed. 98. In the present case the assessment was made by the directors without action by the shareholders, and, not being [253] *within the statute, was void. It follows that the supreme court of Oregon properly affirmed the judgment of the lower court in which the value of the stock sold was recovered.

Judgment affirmed.

ROBERT A. CHESEBROUGH, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 253-264.)

Internal revenue — action to recover back stamp tax — voluntary payment — effect of application to refund.

A written application to the Commissioner of Internal Revenue to refund a sum expended in the voluntary purchase of revenue stamps from a collector, to be affixed to a conveyance, though it may be sufficient to justify favorable action by the commissioner, under U. S. Rev. Stat. § 3220 (U. S. Comp. Stat. 1901, pp. 2086, 2087), is not the equivalent of an appeal to him from an adverse decision by the collector, which, under §§ 3226-3228 (U. S. Comp. Stat. 1901, pp. 2088, 2089), is essential to the maintenance of a suit for the recovery of internal taxes alleged to have been erroneously or illegally assessed or collected.

[No. 152.]

Argued December 3, 4, 1903. Decided January 25, 1904.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to, and dismissing, a petition to recover a sum paid to a collector of internal revenue for the purchase of stamps to be affixed to a conveyance. *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

Robert A. Chesebrough filed his petition in the district court of the United States for the southern district of New York, May 23, 1902, to recover the sum of \$600 from the United States, alleged to have been paid to the collector of internal revenue for the second district of New York for the purchase of certain internal revenue stamps to be affixed to a deed for the conveyance of real estate. Petitioner alleged that on May 28, 1900, he entered into an agreement with the Chesebrough Building Company to convey to that corporation certain real estate which he then owned, and to execute and deliver a deed therefor on the 5th day of June, 1900. That on that day he made, executed, and delivered to the corporation a deed of conveyance of the real estate, and received the consideration *therefor. That at [254] the time of the execution and delivery of the deed the act of Congress of June 13, 1898, "to provide ways and means to meet war ex-

NOTE.—As to when taxes illegally assessed may be recovered back—see notes to *Phelps v. New York*, 2 L. R. A. 626; *State ex rel. McCarty v. Nelson*, 4 L. R. A. 300; and *Erskine v. Van Arsedale*, 21 L. ed. U. S. 63.

penditures, and for other purposes," was in force, which provided in part as follows:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

"Schedule A.

"Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents."

"Sec. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and [255] such instrument, document, *or paper, as aforesaid, shall not be competent evidence in any court." [30 Stat. at L. 451, chap. 448, U. S. Comp. Stat. 1901, p. 2290.]

The petition then averred that "the Chesebrough Building Company, as was known to petitioner, was unwilling to accept the said deed of conveyance unless and until the petitioner had placed thereon the stamps required by the aforesaid act, and that petitioner, under compulsion of said law, and in order to receive from the purchaser the shares of stock named as the consideration for such conveyance, and in order to entitle such deed to be recorded under the provisions of said act, and to be received as evidence in the Federal courts, as therein provided, and in order to enable the petitioner to fulfill his aforesaid contract

with said Chesebrough Building Company to make, execute, and deliver to said company a good and sufficient deed of conveyance of said real estate and premises, and in order to give to said company a good and clear title to said real estate and premises, free from doubt, did purchase from Charles H. Treat, the United States collector of internal revenue for the second district of New York, and place upon the said deed of conveyance, stamps to the amount of six hundred dollars (\$600) the proceeds of sale of which stamps your petitioner believes were thereupon by said collector paid over to the United States as required by law, and said moneys are now held by the United States."

It was further averred that prior to the institution of the action, and in pursuance of the laws of the United States and the regulations of the Treasury Department in that behalf, petitioner made a written application on January 9, 1902, to the United States Commissioner of Internal Revenue for the refunding of the amount so paid by him for stamps as aforesaid, which application was denied. Petitioner then charged that the act was unconstitutional and void, and prayed judgment. To this petition a demurrer was filed on behalf of the United States, assigning the ground that the petition did "not state facts which would constitute a claim on the part of the claimant against the United States." The demurrer was sustained *and the petition dismissed, [256] and this writ of error was thereupon allowed.

Sections 3220, 3226, 3227, and 3228 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 2086, 2088, 2089) are as follows:

"Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty: *Provided*, That where a second assessment is made in case of a list, statement, or return which, in the opinion of the collector or deputy collector, was false or fraudulent, or contained any understatement or undervaluation, such as-

assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation."

"Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of [the] Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, [257] That if such decision *is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner, at any time within the period limited in the next section.

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which

was already barred by any statute on that date."

Messrs. Frederic R. Coudert, Jr., and Paul Fuller argued the cause, and, with *Mr. Henry M. Ward*, filed a brief for plaintiff in error:

A "protest" is merely satisfactory evidence that the payment was involuntary, but where the parties are not on equal terms, where one compels the payment by threats or duress, the law presumes that the payment was not made at free will.

Swift & Co. & B. Co. v. United States, 111 U. S. 22, 28, 28 L. ed. 341, 343, 4 Sup. Ct. Rep. 244.

The provisions of the Revised Statutes for the refunding of internal revenue taxes are remedial, and therefore entitled to a most liberal construction in favor of the taxpayer.

Real Estate Sav. Bank v. United States, 16 Ct. Cl. 335.

In lieu of protest an application must be made to the Commissioner of Internal Revenue for a refund at any time within two years from the date of payment. This is the statutory equivalent of a common-law protest or notice of suit.

Elliott v. Swartwout, 10 Pet. 137, 152, 9 L. ed. 373, 379; *Erskine v. Van Arsdale*, 15 Wall. 75, 77, 21 L. ed. 63, 64.

Assistant Attorney General Purdy argued the cause and filed a brief for defendant in error:

An internal revenue tax if paid "voluntarily," without "protest," or "notice of suit," could not be recovered.

Cooley, Taxn. 3d ed. p. 1495; *Elliott v. Swartwout*, 10 Pet. 137, 152, 9 L. ed. 372, 379; *Erskine v. Van Arsdale*, 15 Wall. 75, 77, 21 L. ed. 63, 64.

In order to entitle a taxpayer to maintain a suit against the United States or the collector, for the recovery of such a tax, it must appear that the tax was paid under protest, or with notice of suit.

Chatham v. United States, 92 U. S. 85, 88, 23 L. ed. 561, 562; *Wright v. Blakeslee*, 101 U. S. 178, 25 L. ed. 1049.

There must be such a thing as a voluntary payment of an internal revenue tax.

Schmitt v. Trowbridge, 3 Cin. Law Bull. 1029, Fed. Cas. No. 12,468; *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 554, 39 L. ed. 809, 15 Sup. Ct. Rep. 673.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without

compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal, and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment. from which the latter has no other means of immediate *relief than such payment. *Little v. Bowers*, 134 U. S. 547, 554, 33 L. ed. 1016, 1019, 10 Sup. Ct. Rep. 620; *Union P. R. Co. v. Dodge County*, 98 U. S. 541, 544, 25 L. ed. 196, 197; *Radich v. Hutchins*, 95 U. S. 210, 24 L. ed. 409, citing *Brumagin v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176, a case in respect of stamps purchased, in which the subject is discussed by Mr. Justice Field, then chief justice of California.

In *Union P. R. Co. v. Dodge County*, Mr. Chief Justice Waite, speaking for the court, said:

"There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Elliott v. Swartwout*, 10 Pet. 137, 9 L. ed. 373, and *Bend v. Hoyt*, 13 Pet. 266, 10 L. ed. 155, which were customs cases, the payments were made to release goods held for duties on imports; and the protest became necessary, in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia v. The Collector*, 5 Wall. 730, 18 L. ed. 616, and *The Collector v. Hubbard*, 12 Wall. 13, 20 L. ed. 276, which were internal revenue tax cases, the actions were sustained 'upon the ground that the several provisions in the internal revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy.' It is so expressly stated in the last case, p. 14, L. ed. 276. As the case of *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. ed. 63, followed these, and was of the same general character, it is to be presumed that it was

put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand."

The stamps in question were purchased from the collector of internal revenue for the second district of New York, for the *pur-[261] pose of affixing them to a deed of conveyance to the building company, but the collector was not informed at the time of the purchase of the particular purpose, and no intimation was given him, written or oral, that petitioner claimed that the law requiring such stamps was unconstitutional, and that he was making the purchase under duress. The petition did allege that the building company was unwilling to accept an unstamped conveyance, and that the stamps were thereupon affixed in order to complete the transaction and obtain the consideration, but if that constituted duress as between Chesebrough and his building company it was a matter with which the collector had nothing to do. On the face of the petition the purchase was purely voluntary and made under mutual mistake of law if the law were unconstitutional. But it is said that protest or notice would have made this payment involuntary, and that because something over nineteen months after the payment petitioner made "a written application" to the Commissioner of Internal Revenue for the amount he had paid for the stamps, the ordinary rule did not apply, inasmuch as such an application was "the statutory equivalent of a common-law protest or notice of suit."

The reference is to § 3220 of the Revised Statutes, which provides that the Commissioner of Internal Revenue, on appeal to him, may remit, refund, and pay back all taxes erroneously or illegally assessed or collected, or that appear to have been unjustly assessed or excessive in amount, or in any manner wrongfully collected; and also "repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit;" while §§ 3226, 3227, and 3228 provide that no suit shall be maintained for the recovery of internal taxes alleged to have been erroneously or illegally assessed or collected "until appeal shall have been duly made to the Commissioner of the Internal Revenue;" or unless brought within two years after the cause *of action accrued; and that the claim[262] for refunding shall be presented to the Commissioner within two years.

The words "until appeal shall have been duly made," appear to us to imply an adverse decision by the collector, at least a

compelled payment, or official demand for payment, from which the appeal is taken.

In *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849, this court treated the language as providing for "an appeal," and we think correctly. The opinion considered § 19 of the act of July 13, 1866, 14 Stat. at L. 152, chap. 184 (U. S. Comp. Stat. 1901, p. 2088), carried forward into § 3226, and § 44 of the act of June 6, 1872, 17 Stat. at L. 257, chap. 315 (U. S. Comp. Stat. 1901, p. 2089), from which §§ 3227 and 3228 were drawn. We give them in the margin.†

[263] *This petition did not set up any ruling of the collector, either specific or resulting from a demand to which petitioner yielded under protest or with notice, and from which he appealed to the Commissioner, but averred that he "made a written application" to the Commissioner to refund the amount he had paid.

We do not say that this was not sufficient to justify action by the Commissioner, but the averment as it stands is not equivalent to stating a previous adverse decision appealed from. The inference is that the application was a mere afterthought, and if an afterthought, the payment was voluntary.

The Commissioner might nevertheless have allowed the claim, and doubtless would have done so, in the interest of justice, if there were no particular circumstances to discredit it, and the law had been held unconstitutional by this court. But he rejected it, and petitioner was remitted to his suit in no different plight, so far as his cause of action was concerned, that if he had not sought the Commissioner at all.

In *United States v. Real Estate Sav. Bank*, 104 U. S. 728, 26 L. ed. 908, it was held that the allowance of a claim by the Commissioner was equivalent to an account

stated between private parties, and binding on the United States until impeached for fraud or mistake, and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the court of claims; while if the claim were rejected, an action might be prosecuted against the collector. It was not, however, ruled that in the latter situation a recovery could be had if the original payment had been voluntary and without objection.

It is one thing for the government to correct mistakes, return overcharges, or refund amounts exacted without authority, when satisfied such action is due to justice, and quite another thing for the government to be compelled to repay amounts which, in its view, have been lawfully collected.

By § 3220 authority is given and opportunity afforded to do what justice and right are found to require, and the conditions which govern contested litigation may well be regarded *as waived; but it does not fol- [264] low that there is any statutory waiver of such conditions when the government is proceeded against *in invitum*.

As we have said, the purchase of these stamps was purely voluntary, and if, notwithstanding, recovery could be had, it could only be on protest or notice, and there was none such here, written or verbal, formal or informal.

It is argued that the provision of § 3220 for the repayment of judgments against the collector rendered protest or notice unnecessary for his protection; but it was clearly demanded for the protection of the government in conducting the extensive business of dealing in stamps, which were sold and delivered in quantities, and without it there would not be the slightest vestige of involuntary payment in transactions like that under consideration. And we find no

†Sec. 19, Act of July 13, 1866:

"Sec. 19. *And be it further enacted*, That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

Sec. 44, Act of June 6, 1872:

"Sec. 44. That all suits and proceedings for the recovery of any internal tax alleged to

have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued, and not after; and all claims for the refunding of any internal tax or penalty shall be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued, and not after: *Provided*, That actions for claims which have accrued prior to the passage of this act shall be commenced in the courts or presented to the Commissioner of Internal Revenue within one year from the date of said passage: *And provided further*, That where a claim shall be pending before said Commissioner the claimant may bring his action within one year after such decision, and not after: *And provided further*, That no right of action barred by any statute now in force shall be revived by anything herein contained."

right of recovery, expressly or by necessary implication, conferred by statute, in such circumstances.

Judgment affirmed.

[265]*SINGER MANUFACTURING COMPANY,
Petitioner,
v.

HERMAN CRAMER.

(See S. C. Reporter's ed. 265-286.)

Patents — primary invention — vertical double brace as support for sewing-machine treadle — construction of claim — infringement.

1. The devising of means for utilizing a vertical double or cross brace cast in one piece as a support for a sewing-machine treadle cannot be deemed to have involved such an exercise of the inventive faculty as to make the Cramer patent, No. 271,426, for a new and improved sewing-machine treadle, a primary one, and entitle the patentee to a liberal construction of his claim, where, at the time of his alleged invention, a vertical cross brace and a lower cross brace or the rod were common adjuncts of sewing machines, and it was customary to support the lower cross rod or brace in the web of the legs of sewing machines, and to utilize the legs as bearings, and the employment of solid castings as bearings or supports for oscillating shafts where a fixed alignment was essential was a well-known method of machine construction.
2. The claim of the Cramer patent, No. 271,426, for the use in combination of a vertical double brace and a sewing-machine treadle provided with trunnions fitted to oscillate in such brace on bearings therein "substantially as specified," must be deemed to cover only elements in combination having substantially the form and constructed substantially as described in the final specifications and shown in the accompanying drawing, where the Patent Office, after twice refusing to allow the patent because of certain prior patents, evidently was led to take favorable action because of the peculiar form of the described bearing when situated in a vertical cross brace, such as was shown in the drawing, with the described accessories.
3. No infringement of the claim of the Cramer patent, No. 271,426, for the use, in combination, of a vertical double brace and a sewing-machine treadle fitted to oscillate in the brace on bearings therein "substantially as specified," results from the employment of the device covered by the Diehl patent, No. 306,

NOTE.—On what constitutes infringement of patent—see notes to Royer v. Coupe, 36 L. ed. U. S. 1073, and Dashlell v. Grosvenor, 40 L. ed. U. S. 1025.

Upon the question what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent—see note to Royer v. Coupe, 36 L. ed. U. S. 1073.

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469, for improvements in sewing-machine stands and treadles, in which the treadle supports, though serving the same purpose as the device described in the Cramer patent, are substantially different in construction.

[No. 18.]

Argued March 18, 19, 1903. Decided February 1, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of California entered on a verdict in favor of plaintiff in an action to recover damages for the infringement of a patent. *Reversed*, and remanded to the Circuit Court for a new trial.

See same case below, 48 C. C. A. 588, 109 Fed. 652.


Statement by Mr. Justice **White**:

This controversy relates to an alleged infringement by the petitioner, a New Jersey corporation, of United States letters patent No. 271,426, issued to the respondent on January 30, 1883, for "a new and improved sewing-machine treadle." For convenience the petitioner will be hereafter referred to as the Singer Company and the respondent as Cramer.


The treadle device used by the Singer company on its sewing machines, which it was charged infringed the Cramer patent, was covered by letters patent No. 306,469, dated October 14, 1884, issued to the Singer company as the assignee of one Diehl.

The file wrapper and contents exhibit the following proceedings in the Patent Office respecting the Cramer patent: The *original [266] application was filed on May 25, 1882, and was for the grant of letters patent to Cramer "as the inventor for the invention set forth in the annexed specification." The specification and oath thereto read as follows:


"I, Herman Cramer, of the city of Sonoma, in Tuolumne county, in the state of California, have invented certain improvements in a treadle, to be used in sewing machines, or other machinery where a noiseless treadle may be required, of which the following is a specification:

"My invention consists of the usual platform marked 'A' in Fig. 1 of diagram on treadle bar. The ends of said treadle bar, marked 'B,' are shaped like the letter V, and rest in socket in lower end of a brace 'C,' the socket being  shaped, the brace 'C' cast in one piece, and the treadle bar and platform on the bar is also cast in one piece.

"The treadle bar rests in socket in brace 'C,' which is immediately above a cross brace usually in machines to keep them from spreading apart, the nut on end of cross brace is marked 'D.' Letter 'M' immediately beneath cross brace and treadle bar is an oil receiver to retain any drippings of oil from the bearings of treadle bar.

"My invention consists in having the ends of the treadle bar V-shaped to fit in hole in brace 'C,' also  shaped to receive the ends of the treadle bar.

"This V-shaped treadle bar in brace 'C' entirely prevents noise from the treadle, is self-adjusting, and does away with the necessity of cones and set screws now in use. This I claim as my invention. Fig. 1 represents platform 'A' and treadle bar, the ends of which are V-shaped and marked 'B.'

"Fig. 2 represents the lower end of brace 'C' with hole  shaped to receive the ends of treadle bar 'B.' 'D' represents nut on end of cross brace immediately below treadle bar.

"State of California, }
County of Tuolumne. }

[267] "Herman Cramer, the above-named petitioner, being duly *sworn, deposes and says that he verily believes himself to be the original and first inventor of the improvement in a noiseless self-adjusting treadle described in the foregoing specification, that he does not know and does not believe that the same was ever before known or used, and that he is a citizen of the United States."

The application was referred to the examiner, who, on May 29, 1882, wrote to Cramer, in care of his attorneys, as follows:

"The application is not prepared in conformity with the rules of the office. The specification is written on both sides of the pages, while the rules direct that it should be written on one side of each page only.

"No claim is appended to the specification. The oath is incomplete, as § 39 of the rules requires applicants to state under the oath if the invention has been patented to them, or with their knowledge and consent to others in any foreign country, and, if so, the number, date, and place of such patent or patents. Reference is made to the patent to G. W. Gregory, No. 256,563, April 18, 1882, which exhibits the alleged invention."

On August 3, 1882, the following substitute specification, concluding with an oath similar to that appended to the prior specification, was sent to the Patent Office:

"I, Herman Cramer, of the city of Sonora, in Tuolumne county, in the state of California, have invented certain improvements in

a treadle and brace, to be used in sewing machines or other machinery where a noiseless treadle may be required, of which the following is a specification:

"My invention consists in a combination of the usual platform marked 'A,' in Fig. 1 of diagram on treadle bar. The ends of said treadle bar marked 'B' are to bear against mufflers.

"The treadle-bar bearings are in and on brace 'C.' The treadle bar rests in socket in brace 'C,' which is immediately above a cross bar usually in machines to keep them from spreading apart.

*"The nut on end of cross bar is marked [268] 'D.' Letter 'M,' immediately beneath cross bar, and treadle bar, is an oil receiver to retain any drippings of oil from the bearings of treadle bar.

"The treadle bar, mufflers, and brace 'C' are held between the right and left legs of the machine by means of a brace bar underneath the treadle bar.

"This brace and socket or bearing in or on brace is in one piece.

"The treadle bar with mufflers on the ends, working or bearing in or on brace, entirely prevents noise from the treadle, is self-adjusting, and does away with the necessity for cones and set screws now in use.

"Fig. 1 represents platform 'A' and treadle bar, the ends of which may be V-shaped, or any shape to suit, marked 'B.'

"Fig. 2 represents the lower end of brace 'C.'

"'D' represents nut on end of cross bar immediately below the treadle bar.

"What I claim is a combination of brace 'C' with socket or bearing in it or on it, to receive the treadle bar with the mufflers at the ends of treadle bar or in or on brace 'C' in connection with said brace 'C,' and the treadle bar in connection with brace 'C,' and mufflers to work in or on brace 'C,' substantially as set forth."

On August 14, 1882, the examiner wrote Cramer, in care of his attorneys, as follows:

"Applicant's amended claims are met by the patent to J. E. Donovan, June 28, 1881, No. 243,529, in view of which a patent is again refused."

Following this rejection there was filed a revocation of the power of attorney which had been executed by Cramer in favor of the attorneys who had theretofore conducted the proceedings, and an appointment of other attorneys for the further prosecution of the application. On October 17, 1882,, the substituted attorneys sent to the Patent Office a new drawing and an amendment of the specification on file, which amendment consisted in canceling all the specification ex-

[269]cept the *signature and substituting for the matter so stricken out the following:

"Be it known that I, Herman Cramer, of Sonora, in the county of Tuolumne and state of California, have invented a new and improved sewing-machine treadle; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawing, forming part of this specification.

"My invention relates to improvements in the bearings of sewing-machine treadles, and it has for its object to provide means, first, to keep the treadle bearings rigidly in line and at a fixed distance apart to avoid friction, and second, to make its movement in use noiseless. To this end my invention consists in the construction and combination of parts hereinafter fully described and claimed, reference being had to the accompanying drawings in which—

"Fig. 1 is a perspective view of a portion of a sewing machine showing my invention.

"Fig. 2 is a transverse vertical section through one bearing of the treadle.

"A represents the treadle provided with the usual pitman connection by which to run the sewing-machine wheel. B represents the two trunnions cast as a portion of the treadle and extending from its sides into loopholes in the common cast-iron cross brace C. These trunnions are sharpened to an edge or corner along their lower sides, and the lower end of the loophole is hollowed to an angle more obtuse than the edge of the trunnion, to serve as a bearing for the same and permit the rocking motion common to treadles.

"C represents the usual cast-iron double brace connecting the two end legs diagonally in a plane generally vertical. The lower ends of this brace are secured directly to the web of the legs by bolts *d*, and for convenience and strength I make the two ends of the common cross bar D serve as these bolts. The upper ends of the brace are secured as usual, either to the web of the legs or to the table of the machine near the legs.

[270] *—"The treadle and its trunnion bearings are wholly independent of the cross bar D, except its service as stated, to hold the brace to the legs. The bearing holes in the brace are formed into long vertical loops to permit the entrance of the treadle.

"Pieces of leather F, or other soft material, cover the top and end of each trunnion to serve as cushions to keep the same close in its bearing, to prevent the noise which would result were the trunnions permitted to bounce and thump endways, when the treadle is in motion. The leather F is fitted to the curve of the upper side of the

trunnion, which is an arc of a cylinder, whose center of oscillation is the lower edge of the trunnion; the same leather also interposes between the end of the trunnion and the adjacent iron. *f* is a block serving as a mere backer to which the cushion F is attached. This block conforms to the back and top side of the cushion and fills the loophole in the brace above the trunnion. It also has tangs or projections *e*, resting in suitable recesses in the brace C, which are held between the brace and the web of the leg E, by which means the block and cushion are held in place. Below the bearings of the trunnions B, I provide cups, M, attached to the ends of brace C, to catch the oil that usually drips from such bearings.

"By this construction my treadle bearings are rigidly fixed and in no way liable to get out of line or to require adjustment; the usual noise is prevented, and overflowing of oil is caught before it can do damage.

"I am aware that sewing-machine treadles have before been provided with V-shaped bearings, and I do not claim the same as my invention; but—

"What I claim and wish to secure by letters patent is—

"1. The vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified.

*"2. The sewing-machine legs E, the vertical [271] double brace C secured thereto and provided with holes to serve as bearings for the treadle A, and the treadle provided with trunnions B to oscillate in said bearings, in combination with the cushion F and the block *f*, as and for the purpose specified."

Accompanying the new specification was the following communication, signed by the attorney:

"A new oath is herewith filed. Gregory, referred to, pivots the grooved trunnions of his treadle upon knife edges secured within the upper loops of two collars, which are secured to the cross bar by means of set screws to keep them from turning. Donovan pivots his treadle upon its trunnions having sharpened edges, in grooves in the cross bar, where it is held by collars provided with flanges projecting over the trunnions. Applicant pivots his treadle upon the sharpened edges of its trunnions in loop holes in the two ends of the brace which is bolted to the legs of the machine by the two ends of the cross bar. This service of the cross bar might be as well performed by two

short bolts: but, the bar being a usual cross tie to stiffen the legs, applicant uses its ends as bolts to hold his brace ends to the legs. We have rewritten the specification to elucidate the inventor's claim. Should the case meet with favorable consideration a new drawing will be furnished. For the purpose of examination, see pencil sketch on sheet of drawing filed."

On October 19, 1882, the examiner wrote Cramer, in care of his attorney, as follows:

"The case has been reconsidered in connection with the substituted specification filed the 17th inst., and the examiner holds that the references previously cited—that of Gregory in particular—meets the alleged invention. The case is accordingly rejected."

To this letter the following reply was made by the attorneys for Cramer:

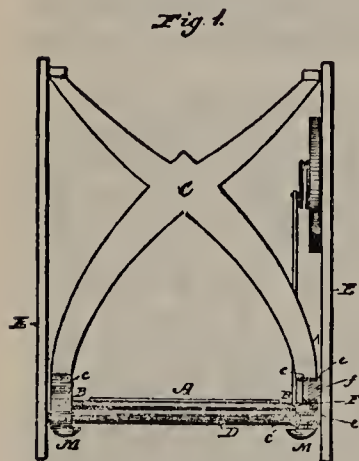
"The examiner will please notice that applicant's invention places both bearings of the treadle in the cross brace.

"By this means they may be made perfectly true in line, *either by casting or drilling, and they cannot be thrown out of line, either by use, or by the most awkward setting up.

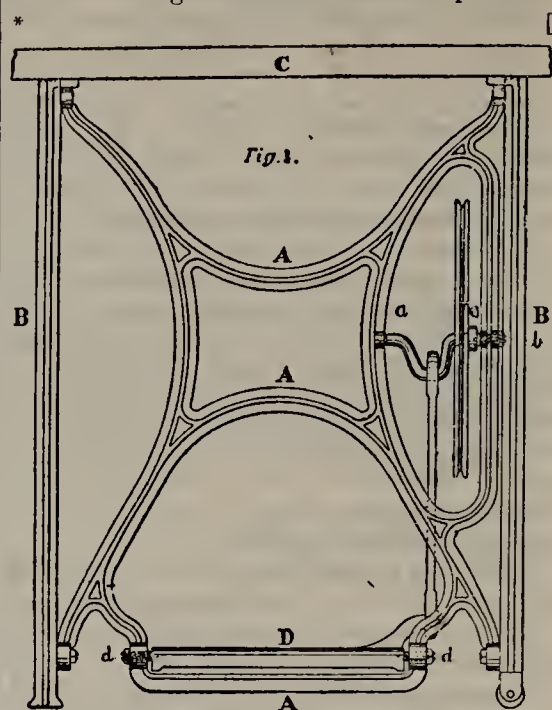
"Therefore, one source of friction is avoided. All the references have shown bearings made of two separate pieces which could readily be set up out of line, or even be worked loose. The advantage is obvious.

A reconsideration is respectfully asked."

This closed the correspondence. Soon afterwards notification was given that the patent had been allowed, and letters patent embodying the specification last above set forth, headed "Treadle for sewing machines," etc., were issued, bearing date January 30, 1883. The following is a fac simile of the drawing referred to in the specification:



on the following fac simile of the first sheet of the drawing attached to the Diehl patent:



In this specification Diehl declared his invention to consist in "certain new and useful improvements in sewing-machine stands and treadles;" and the object to be "to secure a permanent and reliable support and adjustment for both the band wheel and treadle, and to preserve their respective relative positions, so that they will always co-operate to produce the best results with the least danger of friction or binding." The claims were five in number, as follows:

"1. In a sewing-machine stand, a cross brace having supports for both the band wheel and the treadle integral with said brace.

"2. In a sewing-machine stand, a cross brace having supports for both the band wheel and the treadle integral with *said brace, and provided also with means for adjusting and taking up the wear of such band wheel and treadle.

"3. In a sewing-machine stand, a cross brace adapted to connect the legs or side pieces thereof, provided at one side with bearings for the fly-wheel crank shaft, and having a support at its base for the treadle, substantially as set forth.

"4. The combination, with the cross brace of a sewing-machine stand, of a crank shaft and a treadle, both mounted in the said brace, substantially as set forth.

"5. A cross brace for sewing-machine stands, having at its base a cross bar, combined with a treadle mounted in said cross bar, substantially as set forth."

To recover damages for alleged infringement of the first claim of the Cramer patent,

The alleged infringing device is delineated

in the use by the Singer company of the Diehl device just referred to, Cramer brought this action at law against the Singer company on October 8, 1896, in the circuit court of the United States for the northern district of California. By amendment of the declaration the recovery was limited to damages sustained by infringements committed within the northern district of California. In the answer filed on behalf of the Singer company,—in addition to excepting to the jurisdiction of the court and pleading as *res judicata* a former judgment rendered in favor of the defendant in an action brought by Cramer against one Fry, an employee of the Singer company (68 Fed. 201),—defenses were interposed of want of novelty and utility and lack of invention, and infringement was denied.

A trial was had which resulted (by direction of the court, sustaining the plea of *res judicata*) in a verdict and judgment for the defendant. This judgment was reversed by the circuit court of appeals for the ninth circuit. 35 C. C. A. 508, 93 Fed. 636. On a second trial a verdict was rendered for Cramer and judgment was entered thereon for the sum of \$12,456. On appeal this judgment was affirmed by the circuit court of appeals for the ninth circuit. 48 C. C. A. 588, 109 Fed. 652. A writ of certiorari was thereafter allowed by this court.

Messrs. Charles C. Linthicum and **Charles K. Offield** argued the cause and filed a brief for petitioner:

The construction of a patent is solely a matter of law for the court.

Hald v. Rice, 104 U. S. 737, 26 L. ed. 910.

In all cases where the claim is for an improvement on a machine, it will be incumbent upon the patentee to show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.

Evans v. Eaton, 3 Wheat. 454, 4 L. ed. 433.

A failure on the part of the patentee in those prerequisites of the act which authorize a patent is a bar to a recovery in an action for its infringement, and the validity of this defense does not depend on the invention of the inventor, but is a legal inference upon his conduct.

Grant v. Raymond, 6 Pet. 248, 8 L. ed. 386.

Where the ingredients are all old, the invention in such a case consists entirely in the combination, and the requirement of the patent act that the invention shall be fully and exactly described applies with as much force to such an invention as to any other
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class, because if not fulfilled all three of the great ends intended to be accomplished by that requirement would be defeated.

Gill v. Wells, 22 Wall. 25, 22 L. ed. 710.

A question of infringement is best determined by the court by comparison.

Seymour v. Osborne, 11 Wall. 517, 20 L. ed. 33; *McCormick v. Talcott*, 20 How. 409, 15 L. ed. 932.

In patents for combination of mechanism, limitations and provisos imposed by the inventor—especially such as were introduced into an application after it had been persistently rejected—must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers.

Sargent v. Hall Safe & Lock Co. 114 U. S. 86, 29 L. ed. 76, 5 Sup. Ct. Rep. 1021.

A comparison of the patent as granted, with the application, very conclusively establishes the limits within which the patentee's claims must be confined.

Sutter v. Robinson, 119 U. S. 540, 30 L. ed. 492, 7 Sup. Ct. Rep. 376.

The patentee, as to an improvement or patentable combination, before he can expect to extend his patent or claim beyond substantially the form and statement of construction shown and described in his patent for such improvement or combination, must so indicate and express in his patent.

James v. Cambell, 104 U. S. 356, 26 L. ed. 786; *Mahn v. Harwood*, 112 U. S. 360, 28 L. ed. 667, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451; *Fay v. Cordesman*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 236; *Keystone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 274, 24 L. ed. 344; *White v. Dunbar*, 119 U. S. 51, 30 L. ed. 304, 7 Sup. Ct. Rep. 72; *Burns v. Meyce*, 100 U. S. 671, 25 L. ed. 738; *McClain v. Ortmyer*, 141 U. S. 424, 35 L. ed. 802, 12 Sup. Ct. Rep. 76; *Lehigh Valley R. Co. v. Mellon*, 104 U. S. 112, 26 L. ed. 639.

The construction given by this court in *Snow v. Lake Shore & M. S. R. Co.* 121 U. S. 629, 30 L. ed. 1008, 7 Sup. Ct. Rep. 1343, to a combination claim, in view of the statements in the specifications, is controlling in this case.

The conditions necessary to entitle a patentee to be called a pioneer, or his invention broad and basic, have been clearly defined by this court.

McCormick v. Talcott, 20 How. 405, 15 L. ed. 930; *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 24 L. ed. 1053; *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 273, 32 L. ed. 719, 9 Sup. Ct. Rep. 299; *Miller v. Eagle Mfg. Co.* 151 U. S. 207, 38 L. ed. 130, 14 Sup. Ct. Rep. 310.

Under the construction for the Cramer

patent, contended for by his counsel, such patent represents a mere aggregation, and not a patentable combination.

Wright v. Yuengling, 155 U. S. 47-53, 39 L. ed. 64-66, 15 Sup. Ct. Rep. 1.

The patent manufactured and justified under is prima facie evidence of the truth of the facts asserted in it, and prima facie evidence that the device manufactured under such patent is not an infringement of a previously granted patent sued upon.

Corning v. Burden, 15 How. 252, 271, 14 L. ed. 683, 691; *Boyd v. Janesville Hay Tool Co.* 158 U. S. 260, 261, 39 L. ed. 973, 974, 15 Sup. Ct. Rep. 837; *American Nicolson Pavement Co. v. Elizabeth*, 4 Fish. Pat. Cas. 189, Fed. Cas. No. 312; *Robinson, Patents*, pp. 1016, 1041; *Ney v. Ney Mfg. Co.* 16 C. C. A. 293, 37 U. S. App. 371, 69 Fed. 405, 408; *Powell v. Leicester Mills Co.* 103 Fed. 476, 487; *Illinois Steel Co. v. Kilmer Mfg. Co.* 70 Fed. 1012, 1015; *Ransome v. Hyatt*, 16 C. C. A. 185, 29 U. S. App. 715, 69 Fed. 148.

The burden of proof establishing infringement is upon the plaintiff.

Agawam Woolen Co. v. Jordan, 7 Wall. 583, 19 L. ed. 177; *Seymour v. Osborne*, 11 Wall. 516, 20 L. ed. 33; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. ed. 103; *Imhaeuser v. Buerk*, 101 U. S. 647, 25 L. ed. 945.

The theory of the patentee and his opinion as to his invention are of no consequence upon the question of infringement.

Foss v. Herbert, 2 Fish. Pat. Cas. 31, Fed. Cas. No. 4,957.

The act of infringement is a tort or wrong, and the burden of proof is always upon the plaintiff, and is never shifted to establish such fact of infringement.

Seymour v. Osborne, 11 Wall. 516, 20 L. ed. 33; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. ed. 103; *Imhaeuser v. Buerk*, 101 U. S. 647, 25 L. ed. 945; *Agawam Woolen Co. v. Jordan*, 7 Wall. 583, 19 L. ed. 177.

The inventor of the first improvement cannot invoke the doctrine of mechanical equivalence to suppress all other improvements which are not merely colorable invasions of the first.

McCormick v. Talcott, 20 How. 405, 15 L. ed. 931.

It is not the same combination if it substantially differs from it in any of its parts.

Prouty v. Ruggles, 16 Pet. 341, 10 L. ed. 987.

Westinghouse v. Boyden Power Brake Co. 170 U. S. 561, 42 L. ed. 1145, 18 Sup. Ct. Rep. 707, contains the most recent, clear, and conclusive statement and argument of this court upon the question of pioneer patents, and is peculiarly applicable to the facts in this case.

Mr. John H. Miller argued the cause and filed a brief for respondent:

The petitioner in this proceeding must make out a very strong case before it can hope to persuade this court that the learned judge of the lower court should have peremptorily ordered the jury to find a verdict for the defendant, and thereby deprive Cramer of his constitutional right to a trial by jury.

Coupe v. Royer, 155 U. S. 575, 39 L. ed. 267, 15 Sup. Ct. Rep. 199; *Tucker v. Spalding*, 13 Wall. 455, 20 L. ed. 516; *Bischhoff v. Wethered*, 9 Wall. 814, 19 L. ed. 830; *Patton v. Texas & P. R. Co.* 179 U. S. 660, 45 L. ed. 363, 21 Sup. Ct. Rep. 275.

If there was any evidence whatever on the question of infringement, there was no error in submitting the matter to the jury.

Curtis, Patents, § 469; 3 *Robinson, Patents*, p. 378; *Coupe v. Royer*, 155 U. S. 565, 579, 39 L. ed. 263, 268, 15 Sup. Ct. Rep. 199; *Battin v. Taggart*, 17 How. 84, 15 L. ed. 41; *Bischhoff v. Wethered*, 9 Wall. 812, 19 L. ed. 829; *Hills v. Evans*, 31 L. J. Ch. N. S. 463; *Betts v. Menzies*, 10 H. L. Cas. 117; *Tucker v. Spalding*, 13 Wall. 453, 20 L. ed. 515; *Keyes v. Grant*, 118 U. S. 25, 30 L. ed. 54, 6 Sup. Ct. Rep. 950; *Royer v. Schultz Belting Co.* 135 U. S. 319, 34 L. ed. 214, 10 Sup. Ct. Rep. 833; *Mitchell v. Tilghman*, 19 Wall. 418, 22 L. ed. 144.

In making a motion to direct a verdict, the defendant necessarily concedes the truth of all the evidence adduced by the plaintiff.

Parks v. Ross, 11 How. 362, 13 L. ed. 730; *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601 (followed in *Bank of United States v. Smith*, 11 Wheat. 177, 6 L. ed. 445, and *Merrick v. Giddings*, 115 U. S. 300, 29 L. ed. 403, 6 Sup. Ct. Rep. 65).

Where a motion is made to direct a verdict, the court should consider, not only all the facts which the evidence tends to establish, but all such fair and reasonable inferences of fact as the jury might lawfully draw from the evidence.

New York Dry Goods Store v. Pabst Brewing Co. 50 C. C. A. 295, 112 Fed. 381.

A drawing alone and unaided cannot anticipate.

New Process Fermentation Co. v. Koch, 21 Fed. 580; *Briton v. White Mfg. Co.* 61 Fed. 95; *Reeves v. Keystone Bridge Co.* 5 Fish. Pat. Cas. 468, Fed. Cas. No. 11,660; *Parsons v. Colgate*, 21 Blatchf. 171, 15 Fed. 600; *Robinson, Patents*, § 325; *Seymour v. Osborne*, 11 Wall. 555, 20 L. ed. 42.

It is sufficient for a patentee to claim his invention in the specific forms shown by the drawings and specification, whether that invention be a broad or narrow one.

Winans v. Denmead, 15 How. 330, 14 L. ed. 717; *Western Electric Co. v. La Rue*,

139 U. S. 601, 606, 35 L. ed. 294, 296, 11 Sup. Ct. Rep. 670; *Hoyt v. Horne*, 145 U. S. 302, 309, 36 L. ed. 713, 716, 12 Sup. Ct. Rep. 922; *Eddy v. Dennis*, 95 U. S. 569, 24 L. ed. 365; *George Frost Co. v. Silvermann*, 62 Fed. 465; *Hoe v. Scott*, 65 Fed. 609; *McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 259, 37 U. S. App. 299, 69 Fed. 394; *Hcap v. Greene*, 34 C. C. A. 86, 63 U. S. App. 56, 91 Fed. 794; *Norton v. Jensen*, 1 C. C. A. 452, 7 U. S. App. 103, 49 Fed. 866; *Long v. Pope Mfg. Co.* 21 C. C. A. 533, 33 U. S. App. 551, 75 Fed. 838; *Independent Electric Co. v. Jeffrey Mfg. Co.* 76 Fed. 991; *Metallic Extraction Co. v. Brown*, 43 C. C. A. 568, 104 Fed. 353; *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 194, 21 U. S. App. 244, 61 Fed. 958; *Devlin v. Paynter*, 12 C. C. A. 188, 28 U. S. App. 115, 64 Fed. 398; *Ives v. Hamilton*, 92 U. S. 426, 23 L. ed. 494; *Clough v. Gilbert & B. Mfg. Co.* 106 U. S. 166, 27 L. ed. 134, 1 Sup. Ct. Rep. 188; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799.

If the invention is a broad one, the court will give the claim a broad construction, notwithstanding the fact that the claim is framed in specific language; but if the invention is a narrow one, then the court will place upon the claim a narrow construction, and limit it to its exact language.

Deering v. Winona Harvester Works, 155 U. S. 286, 39 L. ed. 153, 15 Sup. Ct. Rep. 118; *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 568, 42 L. ed. 1147, 18 Sup. Ct. Rep. 707; *Murphy v. Eastham*, 5 Fish. Pat. Cas. 306, Fed. Cas. No. 9,949; *Metallic Extraction Co. v. Brown*, 43 C. C. A. 568, 104 Fed. 346; *McCormick Harvesting Mach. Co. v. C. Aultman & Co.* 16 C. C. A. 259, 37 U. S. App. 299, 69 Fed. 371.

Patents for inventions are not to be treated as mere monopolies, and therefore odious in the eyes of the law, but are to receive a liberal construction, and, under the fair application of the rule, *Ut res magis valeat quam pereat*, are, if practicable, to be so interpreted as not to destroy the right of the inventor.

Turrill v. Michigan S. & N. S. R. Co. 1 Wall. 510, 17 L. ed. 672.

A patent should be construed in a liberal spirit to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what it is, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail where the fate of a patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius and labors.

Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. ed. 566.

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A mere reversal of parts, or change of location of elements, without producing any new result, does not avoid infringement.

Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; *Winans v. Denmead*, 15 How. 330, 14 L. ed. 717; *Hoyt v. Horne*, 145 U. S. 308, 36 L. ed. 715, 12 Sup. Ct. Rep. 922; *Ives v. Hamilton*, 92 U. S. 426, 23 L. ed. 494; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co.* 113 U. S. 158, 28 L. ed. 939, 5 Sup. Ct. Rep. 513; *Devlin v. Paynter*, 12 C. C. A. 188, 28 U. S. App. 115, 64 Fed. 398; *J. Cleret Societe v. Rehfuß*, 75 Fed. 658; *Harmon v. Struthers*, 57 Fed. 638; *McEvilla v. Hall & S. Lumber Co.* 43 Fed. 139; *Adams v. Joliet Mfg. Co.* 3 Bann. & A. 1, Fed. Cas. No. 56; *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.* 10 C. C. A. 194, 21 U. S. App. 244, 61 Fed. 958.

Where a patent calls for a structure consisting of two parts cast in one piece, infringement is not avoided by casting the two parts in separate pieces and subsequently uniting them together to act in combination.

Wheeler v. Clipper Mower & Reaper Co. 10 Blatchf. 193, 6 Fish. Pat. Cas. 1, Fed. Cas. No. 17,493; *Strobridge v. Lindsay*, 6 Fed. 510; *Roots v. Hyndman*, 6 Fish. Pat. Cas. 449, Fed. Cas. No. 12,040; *Hyndman v. Roots*, 97 U. S. 224, 24 L. ed. 975; *Westinghouse v. New York Air-Brake Co.* 59 Fed. 581; *Westinghouse Air-Brake Co. v. New York Air-Brake Co.* 11 C. C. A. 528, 26 U. S. App. 248, 63 Fed. 962, 65 Fed. 99.

The substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself.

Union Paper-Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

Sixty-eight exceptions were taken by the Singer company during the trial of the action in the circuit court, and were pressed upon the attention of the circuit court of appeals in sixty-nine assignments of error. These exceptions were all in effect relied upon in the argument at bar; but from the view we take of the case it is unnecessary to consider and decide any other assignment than that based upon the exception to the refusal of the court, at the close of all the evidence, to instruct a verdict for the defendant on the ground that "no infringement whatever had been shown." As in each of the patents in question it is apparent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or to apply the descriptions to the subject-matter, and as we are able, from mere comparison, to

comprehend what are the inventions described in each patent, and, from such comparison, to determine whether or not the Diehl device is an infringement upon that of Cramer, the question of infringement or no infringement is one of law, and susceptible of determination on this writ of error. *Heald v. Rice*, 104 U. S. 737, 26 L. ed. 910; *Market Street Cable R. Co. v. Rowley*, 155 U. S. 621, 625, 39 L. ed. 284, 287, 15 Sup. Ct. Rep. 224.

Whether error was committed in refusing to direct a verdict is, then, the question to be decided. The claims of the Cramer patent are two in number, and read as follows:

"1. The vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified.

[276] "2. The sewing-machine legs E, the vertical double brace C secured thereto and provided with holes to serve as bearings for the treadle A, and the treadle provided with trunnions B to oscillate in said bearings, in combination with the cushion F and the block f, as and for the purpose specified."

Infringement is charged only in respect to the first claim. In substance, the contention for Cramer is that the conception or idea of the practicability and desirability of utilizing a vertical double brace as a support for a sewing-machine treadle was new with Cramer, and the combination devised by him produced such new and useful results, and exhibited such an exercise of the inventive faculty, as to cause the patent to be a pioneer, and, therefore, entitle the patentee to demand that the claim of the patent should be broadly and liberally construed. For the Singer company it is contended that the availability of use of a vertical cross brace as a support for a sewing-machine treadle was apparent to any person possessing ordinary mechanical skill, that the invention in question if patentable was in no just sense one of a primary nature, and that the combination described by Cramer is to be restricted narrowly to the mere details of the mechanism described as constituting the combination. We must first determine which of these contentions is correct.

Discussing the significance of the term "pioneer" as applied to a patented invention, this court, in *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 43 L. ed. 1136, 18 Sup. Ct. Rep. 707, said (p. 561, L. ed. p. 1145, Sup. Ct. Rep. p. 718):

"To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary

parlance a 'pioneer.' This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before. Most conspicuous examples of such patents are: The one to Howe of the sewing machine; *to Morse of the electrical tele- [277] graph; and to Bell of the telephone. The record in this case would indicate that the same honorable appellation might be safely bestowed upon the original air brake of Westinghouse, and perhaps, also, upon his automatic brake. In view of the fact that the invention in this case was never put into successful operation, and was to a limited extent anticipated by the Boyden patent of 1883, it is, perhaps, an unwarrantable extension of the term to speak of it as a 'pioneer,' although the principle involved subsequently and through improvements upon this invention became one of great value to the public."

To ascertain whether the patented invention of Cramer is entitled to be embraced within the term "pioneer" as just defined, we will consider it in connection with the state of the art.

In the history of the art it is unquestioned that, long prior to the application by Cramer for the grant of the patent in question, devices similar to the vertical cross brace C and the lower cross bar or tie rod D, shown in the drawing of the Cramer patent, were commonly employed in sewing machines. This is conceded by Cramer in statements made in the progress of his application through the Patent Office. Thus, in the specification which forms a part of the patent the vertical brace C is referred to (italics not in original) as "the common cast-iron brace C," and "the usual cast-iron double brace;" while in the first of the proposed specifications, as well as in that which was finally adopted, the lower bar or tie rod D is referred to (italics not in original) as "the common cross brace or cross bar." And in both the first and second specifications the usual purpose subserved in sewing machines by this cross bar was "to keep them (the machines) from spreading apart." It is, of course, obvious that such was also the purpose of the employment of the vertical double or cross brace.

The vertical double cross brace C, as shown in the Cramer drawing, is a solid piece of casting. But it is also an undisputed fact that, long prior to the alleged invention of Cramer, it was a well-known method of construction when revolving *or [278] oscillating shafts were to be placed in bear-

ings or supports, to have both bearings or supports of such shafts attached to a solid metal casting. Instances of such practices, testified to by witnesses, may be referred to. One was a device to hold a saw mandrel or saw arbor, the former being cast in one piece for the purpose of connecting both journals of the arbor to keep it in absolute line. Another device is the head stock of an ordinary engine lathe or machine lathe, where, in order to have a proper working machine, it is absolutely necessary that the shaft bearings shall be in exact alignment with each other, and firmly in one place. Still another illustrative device employed for a great many years is embodied in a high-speed engine. So, also, in the sewing-machine art, as evidenced by the Wilcox patent No. 106,242 of date August 9, 1870, to be hereafter noticed, the legs of sewing machines had long before Cramer's application been used as bearings for treadle bars, the bearings being cored out of the leg castings.

A vertical cross brace and a lower cross brace or tie rod being common adjuncts of sewing machines at the time of Cramer's alleged invention, and it being also customary to support the lower cross rod or brace in the web of the legs of sewing machines and to utilize the legs as bearings, and it being old in machinery to employ solid castings as bearings or supports for oscillating shafts where a fixed alignment was essential, we readily conclude that there was no merit in the mere conception or idea that a vertical double brace was capable of being advantageously utilized as bearings for sewing-machine treadles, and that the devising of means for so utilizing such a brace did not involve such an exercise of the inventive faculty as entitled Cramer to assert in himself a right to claim a patent broadly for the use in combination of a vertical double brace and a sewing-machine treadle. In view of this, and of the fact that the principal elements of the Cramer combination were old, we hold that the Cramer patent was not a primary one, and that it is not, therefore, entitled to receive the broad construction which has been claimed for it. Let us, therefore,

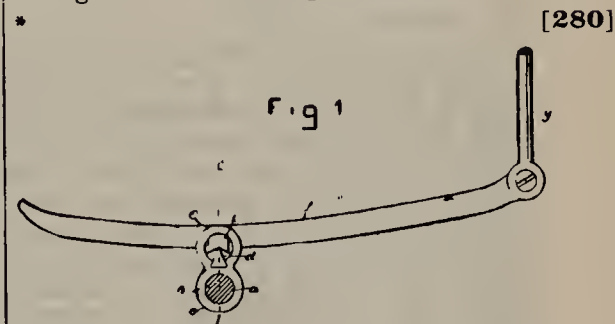
[279]*examine the first claim of the patent in connection with the proceedings in the Patent Office anterior to the allowance of the patent, in order to fix its precise import, as a preliminary to considering whether, as correctly construed, it is infringed by the Singer appliance. The claim reads as follows:

"The vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted

to oscillate in said bearings, substantially as specified."

In the first specification sent to the Patent Office, the object sought to be attained is declared to be the elimination of the noise caused by the operation of a loose treadle, whether used in sewing machines or other machinery. The applicant evidently had in mind treadles which oscillated upon rigid bars and rested on cone bearings or analogous supports, attached to the rigid bars by set screws,—such bearings needing adjustment from time to time as the friction of the parts from the operation of the treadle caused wear and looseness of the parts. It was recited that the treadle bar and the platform on such bar (*i. e.*, the foot rest) was to be cast as one piece. The invention was declared to consist "in having the ends of the treadle bar V-shaped to fit in hole in brace C, also heart shaped to receive the ends of the treadle bar."

The application based upon this first specification was rejected, as mentioned in the statement of facts, upon a reference to the patent to G. W. Gregory, No. 256,563, April 18, 1882, which the examiner stated exhibited "the alleged invention." Gregory termed his invention "an improvement in treadle supports for sewing machines." It is illustrated in the following fac simile of one of the figures of the drawing of the patent:



The invention consisted in attaching to the lower cross bar or rod of a sewing machine two devices styled collars, each collar having two circular openings, one above the other. The upper opening contained a V-shaped bearing. The cross bar was fitted into the lower opening. The treadle or foot rest was provided on each side with short projections termed ears, which fitted on the V-shaped bearings in the upper portion of each collar. The specification contained the following statement:

"I am aware that V-shaped or scale bearings are old in connection with the sewing-machine treadles,—as, for instance, a long rod to which the treadle is secured has been provided at its ends in the set frames of the machine stand with V-shaped bearings."

At the close of the descriptive portion of the specification it was further stated:

"I am aware that sewing-machine treadles have had V-shaped bearings, as in United States patent Nos. 148,759 and 106,242; but neither of said patents shows a bearing constructed in accordance with my invention."

No. 106,242 was a patent granted to C. H. Willeox on August 9, 1870. It covers the following device:

[281]

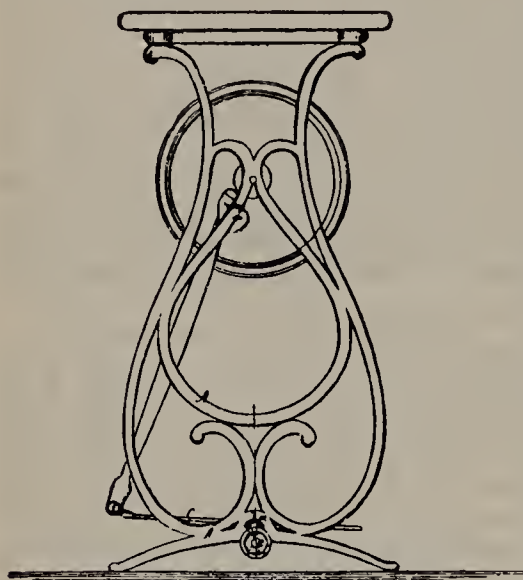


Fig. 1.

The device shows the character of treadle support now employed in the Willeox & Gibbs sewing machine. The stand is devoid of a vertical cross brace, the legs of the machine being braced near the bottom by the ordinary cross bar or tie rod. Just above this rod is exhibited the invention, being a "rockshaft B, beveled at the ends, and provided with V-shaped bearings *b*, extending to the center of motion of the rockshaft B, and supported in a V-shaped bearing seat *a*, in combination with a treadle movement." Elsewhere in the specification the bearings or supports in legs of the machine to receive the ends of the rockshaft B are referred to as "V-shaped bearings." The statement is also made that "the bar is prevented from having any undue lateral movement by the washers upon the ends of the tie rod *c*, which holds the lower part of the frame together." An alternate mode of construction of the bearings to support the rockshaft was thus described (*italics not in original*):

"The V-shaped seat of the bearings *a* may be formed of a separate piece of hard metal let into a groove in the frame, or otherwise applied to it, and the ends *b* may be formed also of *a piece of hard metal, so that the wear of the parts in contact will be very

slight, and all rattling or loose jarring motions entirely prevented."

Although the first refusal to allow a patent was made on May 29, 1882, it was not until August 3 following that the attorneys for Cramer transmitted an amended application to the Patent Office. In the substituted specification the object to be attained is stated as in the previous specification. An addition to the combination was made, however, in the use of what were styled "mufflers," against which it was said the ends of the treadle bars were to bear. A patent was again refused, however, the examiner noting that "applicant's amended claims are met by the patent to J. E. Donovan, June 28, 1881, No. 243,529."

The drawing of the Donovan patent exhibits a sewing-machine stand containing a vertical double brace. One form of treadle bar constituting a part of the invention was represented as situated just below the vertical cross brace, and as having a rounded edge, supported in V-shaped bearings, in the legs or sides of the frame. A shoulder was indicated on each end of the bar, and a substitute device was also shown called a button fastener, which was to be attached from the outside of the frame to meet the end of the bar. It was said in the specification that the treadle bar might be made of cast iron and cast on and with the treadle. It was further stated (*italics not in original*):

"The bearing supports are preferably made by coring out the frame in the manner shown in the drawings. It is obvious that other forms of supporting these bearings may be provided."

Several modified forms of ordinary knife-edge bearings and inclined fastening and adjusted devices were also shown. In such modified forms the treadle was represented as designed to oscillate on a rigid bar, in oblong grooves therein; lugs, having knife-edge bearings underneath, being cast on each side of the treadle. Adjustable collars were shown, fastened to the shaft or bar, with inclined lugs on the side of the collars, *projecting laterally over and resting[283] against shoulders on the lugs upon each side of the treadle. The object of the invention was declared to be (*italics not in original*) "to secure a more substantial table frame to the driving mechanism, and to provide adequate means for the employment of V-shaped treadle bearings, so as to obviate the difficulty heretofore occasioned by lost motion, consisting in vertical and endwise play of the treadle bar or shaft." It was further observed by the applicant just preceding his statement of claims as follows (*italics not in original*):

"Frequent attempts have been made to use

knife-edge bearings for the treadle in sewing machines, but *it has been found to be difficult to prevent lateral lost motion and to adjust the parts so as to compensate for their wear and to prevent rattling of the treadle, which has been a serious objection in their employment.* My herein-described improvements have overcome all the serious objections hitherto attending their use."

Following the second rejection of his application, Cramer changed his attorneys as mentioned in the statement of facts. In the specification drafted by the new attorneys, and which became the basis of the allowed patent, the asserted invention was limited to its use in sewing machines, eliminating the statement of its adaptability "in other machinery." Concerning the "mufflers," which in the previous specifications were simply referred to as bearing against the end of the treadle bars, or as being on the ends of such bars, the following statement was made (*italics not in original*):

"Pieces of leather F, or other soft material, cover the top and end of each trunnion to serve as cushions *to keep the same close in its bearing, to prevent the noise which would result were the trunnions permitted to bounce, and thump endways, when the treadle is in motion.* The leather F is fitted to the curve of the upper side of the trunnion, which is an arc of a cylinder whose center of oscillation is the lower edge of the trunnion; the same leather also interposes between the end of the trunnion and the adjacent iron. *f* is a block serving as a [284] mere backer to which **the cushion F* is attached. This block conforms to the back and top side of the cushion and fills the loop-hole in the brace above the trunnion. It also has tangs or projections *e*, resting in suitable recesses in the brace C, which are held between the brace and the web of the leg E, by which means the block and cushion are held in place. Below the bearings of the trunnions B, I provide cups, M, attached to the ends of brace C, to catch the oil that usually drips from such bearings."

It is not a strained deduction that the elaborate provision just referred to, respecting the mode of use of, and the purpose to be subserved by, the mufflers, was, in part at least, induced by the statement in the Willcox and Donovan patents above quoted, concerning the difficulties which existed in connection with the use of knife-edge or V-shaped bearings. Be this as it may, however, we are of opinion that the Patent Office, after twice refusing to allow the patent because of the prior patents referred to, was led to take favorable action, owing to the peculiar form of the described bearing, when situated in a vertical cross brace such as was shown in the drawing, with the de-

scribed accessories, and that it was the purpose of the Patent Office to limit the patent to the particular device of treadle bar and bearing described and shown when employed in combination with a particular form of vertical cross brace. And this view is supported by the claim in question. It contains words of limitation. It is recited therein that the combination is to be "substantially as specified," that is, as described in the specifications and shown in the drawings. *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 558, 43 L. ed. 1136, 1144, 18 Sup. Ct. Rep. 707. On referring to the specification we find it there expressly declared that the invention consisted "in the construction and combination of parts hereinafter fully described and claimed, reference being had to the accompanying drawing." Nowhere, either expressly or by reasonable inference, is it asserted that simply the best or a preferable construction of the whole or any part of the combination is what is described. On the contrary, starting with the well-known vertical cross brace, a **usual accessory to sewing machines,* a spe-[285] cific mode of construction of the treadle bar and of the bearings or supports in the vertical cross brace is set forth, and the specification is concluded with the following declaration (*italics mine*):

"By this construction my treadle bearings are rigidly fixed and in no way liable to get out of line or to require adjustment; the usual noise is prevented, and overflowing of oil is caught before it can do damage."

To prevent a broadening of the scope of the invention beyond its fair import, in the light of the circumstances surrounding the issuance of the patent, the words of limitation contained in the claim must be given due effect, and, giving them such effect, the statement in the first claim of the elements entering into the combination must be construed to refer to elements in combination having substantially the form and constructed substantially as described in the specification and shown in the drawing.

Having determined the proper construction of the claim of the Cramer patent, which is relied upon, it remains only to consider whether, as correctly construed, infringement resulted from the employment by the Singer company of the device covered by the Diehl patent. We find no difficulty in reaching a conclusion on this branch of the case. The treadle supports devised by Diehl, though they serve the same purpose as the device described and shown in the Cramer patent, are substantially different in construction. Irrespective of the question whether the treadle in the Diehl device is hung in the vertical cross brace proper, or in an addition thereto properly to be re-

garded as the lower cross rod or cross tie of the machine, it is manifest that the bearing is essentially different in construction from that of Cramer, and is not adapted to receive an oscillating bar; while the treadle is not supplied with long projections fitted to oscillate in the vertical cross bar on bearings therein, but is constructed to turn on point center screws which fit tightly in circular openings in projections from the vertical

[286]cross bar. There is *no substantial identity in the character of the two devices, unless, by substantial identity, is meant every combination which produces the same effect. The differences between the Diehl device and the Cramer construction are substantial, and not merely colorable.

The trial court should have granted the motion to direct a verdict for the defendant. In affirming the action of the trial court in overruling the motion, the Circuit Court of Appeals erred, and its judgment must, therefore, be reversed. The judgment of the Circuit Court is also reversed and the cause is remanded to that court with directions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice **McKenna** took no part in the decision of this cause.

STATE OF SOUTH DAKOTA, *Complainant*,
v.

STATE OF NORTH CAROLINA, Charles
Salter, and Simon Rothschilds.

(See S. C. Reporter's ed. 286-354.)

Original jurisdiction—suits between states on state bonds—necessary parties defendant.

1. Individual owners of bonds issued by the state of North Carolina, each of which is secured by a separate mortgage of ten shares of railroad stock belonging to that state, are not necessary parties defendant to a suit by the state of South Dakota, as the owner of certain of these bonds, to compel payment and a subjection of the mortgaged property to the satisfaction of the debt.
2. The original jurisdiction of the Federal Supreme Court, under U. S. Const. art. 3, § 2, over "controversies between two or more states," extends to a suit by the state of South Dakota as the donee of the holders of certain bonds issued by the state of North Carolina, and secured by a mortgage of railroad stock belonging to that state, to compel payment of the bonds and a subjection of

the mortgaged property to the satisfaction of the debt.

[No. 8, Original.]

Argued April 13, 14, 15, 1903. Ordered for reargument November 30, 1903. Reargued January 8, 11, 12, 1904. Decided February 1, 1904.

ORIGINAL SUIT by the State of South Dakota against the State of North Carolina, on bonds issued by the latter state, and secured by a mortgage of railroad stock belonging to such state, to compel payment of the bonds and a subjection of the mortgaged property to the satisfaction of the debt. Decree for the amount due on the bonds and coupons in suit; and, in default of such payment, for the sale, at public auction, of the interest of the state of North Carolina in certain railroad stock mortgaged by it as security for the payment of the bonds.

Statement by Mr. Justice **Brewer**:

By an act passed in 1849 (chap. 82, Laws 1848-49), the North Carolina Railroad Company was chartered by the state of North Carolina with a capital of \$3,000,000, divided into 30,000 shares of \$100 each. The state subscribed for 20,000 shares. The statute authorized the borrowing of money to pay the state subscription, and pledged as security therefor the stock of the railroad company held by the state. In 1855 a further subscription for 10,000 shares was authorized by statute (chap. 32, Laws 1854-55), to be issued on the same terms and with the same security. At the same session an act was passed incorporating the Western North Carolina Railroad Company (chap. 228, Laws 1854-55), which authorized a subscription by the state and the issue of bonds secured by the stock held by the state in said company. On December 19, 1866, a further act was passed (chap. 106, Laws 1866-67), entitled "An Act to Enhance the Value of the Bonds to be Issued for the Completion of the Western North Carolina Railroad, and for Other Purposes," which, after referring to the prior acts of the state authorizing the issue of bonds, and stating that a portion of them had already been issued, added:

"And, whereas, it is manifestly the interest of the people of the whole state that the residue of the bonds, when issued, shall command a high price in market; therefore,

"Sec. 1. *Be it enacted by the general assembly of the state of North Carolina, and it is hereby enacted by the authority of the same*, *That the public treasurer be, and he [288] is hereby, authorized and directed, whenever it shall become his duty under the provi-

NOTE.—On Federal jurisdiction of suits against a state—see notes to *Tindall v. Wesley*, 13 C. C. A. 165; and *Hans v. Louisiana*, 33 L. ed. U. S. 842.

sions of said acts, passed at the sessions of 1854-55 and 1860-61, to issue bonds of the state to the amount of \$50,000 or more, to mortgage an equal amount of the stock which the state now holds in the North Carolina Railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond, a deed of mortgage for an equal amount of stock to said North Carolina Railroad, said mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and, further, that such mortgages shall have all the force and effect, in law and equity, of registered mortgages without actual registry."

Under this last act bonds were issued in the sum of \$1,000 each, having this indorsement:

State of North Carolina, }
Treasury Department. }
Raleigh, July 1, 1867.

Under the provisions of an act of the general assembly of North Carolina, entitled "An Act to Enhance the Value of the Bonds to be Issued for the Completion of the Western North Carolina Railroad Company, and for Other Purposes," ratified 19th December, 1866, ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the state, are hereby mortgaged as collateral security for the payment of this bond.

Witness the signature of the public treasurer and seal of office, and the countersignature of the comptroller.

Kemp P. Battle,
Public Treasurer.

S. W. Burgin, Comptroller.

[289] These bonds ran thirty years, and became due in 1897. In 1879 the state of North Carolina appointed commissioners to adjust and compromise the state debt, and all of the last-mentioned *bonds have been compromised with the exception of about \$250,000. Simon Schafer and Samuel M. Schafer, either individually or as partners, owned a large proportion of these outstanding bonds, having held them for about thirty years. In 1901 Simon Schafer gave ten of these bonds to the state of South Dakota. The letter accompanying the gift was in these words:

Office of Schafer Brothers, No. 35 Wall St.,
New York, September 10th, 1901.

Hon. Charles H. Burke.

Dear Sir:—

The undersigned, one of the members of the firm of Schafer Bros., has decided, after
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consultation with the other holders of the second-mortgage bonds issued by the state of North Carolina, to donate ten of these bonds to the state of South Dakota.

The holders of these bonds have waited for some thirty years in the hope that the state of North Carolina would realize the justice of their claims for the payment of these bonds.

The bonds are all now about due, beside, of course, the coupons, which amount to some 170 per cent of the face of the bond.

The holders of these bonds have been advised that they cannot maintain a suit against the state of North Carolina on these bonds, but that such a suit can be maintained by a foreign state or by one of the United States.

The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving, and the unfortunate.

These bonds can be used to great advantage by states or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.

If your state should succeed in collecting these bonds it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such *governments as may be able to [290] collect from the repudiating state, rather than accept the small pittance offered in settlement.

The donors of these ten bonds would be pleased if the legislature of South Dakota should apply the proceeds of these bonds to the state university or to some of its asylums or other charities.

Very respectfully,
Simon Schafer.

Prior thereto, and on March 11, 1901, the state of South Dakota had passed the following act (Session Laws South Dakota, chap. 134, p. 227):

An Act to Require the Acceptance and Collections of Grants, Devises, Bequests, Donations, and Assignments to the State of South Dakota.

Be it enacted by the legislature of South Dakota:

Sec. 1. That whenever any grant, devise, bequest, donation, or gift or assignment of money, bonds, or choses in action, or of any property, real or personal, shall be made to this state, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this state; and all such bonds, notes, or choses in action, or the proceeds thereof when collect-

ed, and all other property or thing of value, so received by the state as aforesaid, shall be reported by the governor to the legislature, to the end that the same may be covered into the public treasury or appropriated to the state university or to the public schools, or to state charities, as may hereafter be directed by law.

[291] Sec. 2. Whenever it shall be necessary to protect or assert the right or title of the state to any property so received or derived as aforesaid, or to collect or to reduce into possession any bond, note, bill, or chose in action, the attorney general is directed to take the necessary and proper proceedings and to bring suit in the name of the state in any court of competent jurisdiction, state or Federal, and to prosecute all such suits, and is authorized *to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the state, and shall be entitled to reasonable compensation out of the recoveries and collections in such suits and actions.

This act was passed on the suggestion that perhaps a donation of bonds of southern states would be made to the state. On November 18, 1901, the state of South Dakota, leave having been first obtained, filed in this court its bill of complaint, making defendants the state of North Carolina, Simon Rothschilds (alleged to be one of the holders and owners of the bonds originally issued by the state and secured by a pledge of the stock in the North Carolina Railroad Company under the acts of 1849 and 1855), and Charles Salter (alleged to be one of the holders of the bonds issued under the act of 1855 and 1866, on account of the subscription to the Western North Carolina Railroad Company), the two individuals being made defendants as representatives of the classes of bondholders to which they severally belong. In it the plaintiff, after setting forth the facts in reference to the several issues of bonds and its acquisition of title to ten, prayed that an account might be taken of all the bonds issued by virtue of these statutes; that North Carolina be required to pay the amount found due on the bonds held by the plaintiff, and that in default of payment North Carolina and all persons claiming under said state might be barred and foreclosed of all equity and right of redemption in and to the 30,000 shares of stock held by the state, and that these shares, or as many thereof as might be necessary to pay off and discharge the entire mortgage indebtedness, be sold, and the proceeds, after payment of costs, be applied in satisfaction of the bonds and coupons secured by such mortgages; and also for a receiver and an injunction.

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Defendant Rothschilds made no answer. On April 2, 1902, the state of North Carolina and the defendant Charles Salter, filed separate answers. North Carolina in its answer denied both the jurisdiction of this court and the title of the plaintiff; averred that the bonds were not issued in conformity with the *statute; admitted the ownership of 30,000 shares of stock; denied that the mortgages were properly executed or that they had the effect of conveyances or transfers, either in law or equity, of said stock, or conferred any lien by way of pledge or otherwise upon the same; denied that she ever had any compact or agreement whatever other than that contained in the Constitution of the United States with South Dakota, or that South Dakota had ever informed North Carolina of any claim against her, or made any demand in respect to it, or any effort to settle or accommodate. Salter's answer was mainly an admission of the allegations of the bill, with a claim that all the stock should be sold in satisfaction of the mortgage bonds of which he was charged to be the representative. Testimony was taken under direction of the court, before commissioners agreed upon by the parties.

Mr. Wheeler H. Peckham argued the cause, and, with *Mr. R. W. Stewart*, filed a brief for complainant:

Where the language used in a constitution or statute is plain, clear, and free from ambiguity, there is no room or occasion for interpretation, and the language must be construed according to its plain meaning and intent.

Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508.

Nothing is more unfortunate than a disturbance of the plain language of the legislature by an attempt to use equivalent terms.

Everard v. Poppleton, 5 Q. B. 183; *Gadsby v. Barrow*, 8 Scott N. R. 804.

One state may sue another state in the Supreme Court under its original jurisdiction, either on the question of boundaries or any other question.

Curtis, U. S. Courts, 2d ed. Boston, '96, p. 15; *Cohen v. Virginia*, 6 Wheat. 406, 407, 5 L. ed. 291, 292.

A state is also liable to be sued by the United States in this court.

United States v. Texas, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488; *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920.

The United States also may be sued by a state in this court, pursuant to a statute.

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Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650.

The ground of the jurisdiction is that the states have, by adopting the Constitution, agreed to submit controversies between themselves to the determination of this court.

Rhode Island v. Massachusetts, 12 Pet. 720, 9 L. ed. 1258.

When a state enters into the markets of the world as a borrower, she for a time lays aside her sovereignty and becomes responsible as a civil corporation.

Louisiana v. Jumel, 107 U. S. 740, 27 L. ed. 458, 2 Sup. Ct. Rep. 128.

States and cities, when they borrow money and contract to pay it, with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as similar contracts between private persons. Hence, instead of there being in the undertaking of a state or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.

Murray v. Charleston, 96 U. S. 445, 24 L. ed. 763.

The complainant state is competent to become the owner and holder of the obligations of the defendant state.

Texas v. White, 7 Wall. 700, 19 L. ed. 227.

It is incident to the sovereign power both to draw and purchase bills.

United States v. Bank of the Metropolis, 15 Pet. 377, 10 L. ed. 774.

Also to become a donee, whether by legacy or otherwise.

Re Merriam, 141 N. Y. 479, 36 N. E. 505; *Cullom's Estate*, 5 Misc. 173, 25 N. Y. Supp. 699, Affirmed in 145 N. Y. 593, 40 N. E. 163. See also *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192.

Nor does subd. 1, § 10, art. 2, of the Constitution, which forbids a state to enter into any agreement or compact with another state, affect the right of the complainant to hold these bonds.

The compacts or agreements intended are those of a political nature, such as could be made between sovereigns only. It does not forbid ordinary business agreements, such as could be transacted between individuals,—least of all was it intended to forbid the purchase and ownership by one state in the open market of the securities of another.

Union Branch R. Co. v. East Tennessee & G. R. Co. 14 Ga. 327; 2 Story, Const. §§ 1354, 1355, 1401, 2, 3.

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A promise to pay money is not an agreement of the character intended to be prohibited.

Morgan v. Insurance Co. of N. A. 4 Dall. 456, 1 L. ed. 907; *Murray v. Charleston*, 96 U. S. 445, 24 L. ed. 763; *Holmes v. Jennison*, 14 Pet. 572, 10 L. ed. 595; 2 Story, Const. §§ 1402, 1403.

Motive, even in a complainant, is immaterial. The only question is, Has the complainant a right? Whether acquired with good, bad, or indifferent motives is quite immaterial.

Morris v. Tuthill, 72 N. Y. 575; *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237, 31 N. E. 907; *Ramsey v. Gould*, 57 Barb. 398; 2 Morawetz, Corp. § 259; *Pender v. Lushington*, L. R. 6 Ch. Div. 75; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93.

The question is, Is it a real gift, the donor retaining no interest in the thing given? If it be, as in this case it unquestionably is, this court has repeatedly held that motive is not material.

McDonald v. Smalley, 1 Pet. 620, 624, 7 L. ed. 287, 289; *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825; *Smith v. Kernochan*, 7 How. 198, 12 L. ed. 666; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311; *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 177.

The first and second mortgage bondholders, upon the general principles of equity, being interested in the funds, must be made parties to this suit.

Story, Eq. Pl. 97, 112; *Florida v. Georgia*, 17 How. 510, 15 L. ed. 201; *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 754, 31 L. ed. 309, 312, 8 Sup. Ct. Rep. 337; *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 136; *Sutherland v. Lake Superior Ship Canal R. & Iron Co.* 1 Cent. L. J. 127; *McClure v. Adams*, 76 Fed. 899.

Messrs. **George Rountree and James E. Shepherd** argued the cause, and, with Messrs. **Robert D. Gilmer** and **James H. Merriam**, filed a brief for the state of North Carolina:

A sovereign cannot be sued in the courts without his consent.

Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; *The Siren*, 7 Wall. 152, 19 L. ed. 129; *Smith v. Weguelin*, L. R. 8 Eq. 198; *Briggs v. The Upper Cedar Point*, 11 Allen, 157.

This rule applies to suits brought in the Federal courts against either of the states of this Union.

Beers v. Arkansas, 20 How. 527, 529, 15 L. ed. 991, 992; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 451, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609; *Hans v. Louisiana*, 134 U.

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S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

There are many cases in which this court has decided against the jurisdiction, which seemed to come within the words of the Constitution.

Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 287, 32 L. ed. 239, 242, 8 Sup. Ct. Rep. 1370; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

The word "controversies" is not defined in the Constitution, but all controversies were not intended.

2 Baneroft, History of the Constitution, pp. 199, 200; *Rhode Island v. Massachusetts*, 12 Pet. 721, 9 L. ed. 1259.

The controversies intended by the framers of the Constitution were naturally akin to those with which they had become familiar from the experience of the colonies, such as those growing out of claims for soil, territory, jurisdiction, and boundary.

United States v. Texas, 143 U. S. 621, 639, 36 L. ed. 285, 291, 12 Sup. Ct. Rep. 488.

The genesis of the clause, as given in the opinion of the Chief Justice in *Louisiana v. Texas*, 176 U. S. 13, 44 L. ed. 351, 20 Sup. Ct. Rep. 251, would seem to show that it was intended to restrict the jurisdiction to disputes arising directly between states, and not to assumed quarrels.

States do not ordinarily maintain the quarrels of their citizens, certainly not the citizens of other states, for failure to pay debts,—much less go to war for them.

They generally refuse to interfere for the collection of debts, but do interfere for the redress of other kinds of grievances.

1 Halleck, International Law, 435, and note; W. E. Hall, International Law, 3d ed. 277; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; Wharton, International Law Digest, § 231; British Quarterly Review, Jan. 1876, p. 54.

The fact that the suit is brought in vindication of the property rights of the complaining state is not conclusive. This court, we believe, has never pronounced final judgment in such an action; and there are at least two cases in which it has declined to entertain such jurisdiction.

New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370.

Whether the subject-matter of a "contro-

versy between two or more states" is included within the grant of judicial power of this court must be determined, not only by the language of the Constitution, but also by the decisions of the court and historical considerations.

Missouri v. Illinois, 180 U. S. 219, 45 L. ed. 504, 21 Sup. Ct. Rep. 331.

The cognizance of suits and actions unknown to the law and forbidden by the law was not contemplated by the Constitution when establishing the judicial power of the United States.

Hans v. Louisiana, 134 U. S. 1, 15, 33 L. ed. 842, 847, 10 Sup. Ct. Rep. 504.

Suits for the collection of state debts were unknown at the time of the adoption of the Constitution, and were not contemplated by the framers of that instrument or the states which adopted it.

Bank of Washington v. Arkansas, 20 How. 530, 532, 15 L. ed. 993, 994; Webster, Oct. 16, 1839, Works, vol. 6, 537, 539; *Hans v. Louisiana*, 134 U. S. 1, 12, 17, 33 L. ed. 842, 846, 848, 10 Sup. Ct. Rep. 504; *Briscoe v. Bank of Commonwealth*, 11 Pet. 257, 321, 9 L. ed. 709, 734; *Crouch v. Credit Foncier* (1872-73) L. R. 8 Q. B. 374; Hamilton, Annals of Congress (1793-95), 3 Congress, p. 1635.

The view that what was not contemplated by the framers of the Constitution is not included in the grant of judicial power is also advanced by Campbell, J., in his dissenting opinion in *Florida v. Georgia*, 17 How. 513, 15 L. ed. 202, and apparently is adopted by Chief Justice Marshall as a test for the decision of the status of an Indian tribe, in *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25.

The separation and careful demarkation of the functions of government into executive, legislative, and judicial is the distinguishing characteristic of our Constitution, state and national, and neither department can transgress its proper bounds.

People ex rel. Broderick v. Morton, 156 N. Y. 136, 41 L. R. A. 231, 50 N. E. 791; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25; *United States ex rel. Goodrich v. Guthrie*, 17 How. 284, 303, 15 L. ed. 105, 106; *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364; *Raleigh & A. Air Line R. Co. v. Jenkins*, 68 N. C. 499; *Shaffer v. Jenkins*, 72 N. C. 275.

Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.

Miller, Const. p. 314.

In many of the cases in this court in which attempts have been made to collect debts from states, there have been strong intimations that, over and above the objec-

tion that states are exempt from suit by the 11th Amendment, courts had no process by which they could collect debts from states.

Marye v. Parsons, 114 U. S. 325, 328, 29 L. ed. 205, 206, 5 Sup. Ct. Rep. 932, 962; *Re Ayers*, 123 U. S. 443, 491, 31 L. ed. 216, 224, 8 Sup. Ct. Rep. 164; *Rees v. Watertown*, 19 Wall. 107, 110, 117, 22 L. ed. 72, 75. See also *Heine v. Levee Comrs.* 19 Wall. 655, 661, 22 L. ed. 223, 226; *Virginia Law Journal*, March, 1879, article by Hon. W. H. Burroughs, entitled "Can States be Compelled to Pay their Debts?"

The court should decline jurisdiction unless it has ample power to execute the decree.

Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L. R. A. 231, 50 N. E. 791.

No court sits to determine questions of law *in thesi*.

Marye v. Parsons, 114 U. S. 330, 29 L. ed. 206, 5 Sup. Ct. Rep. 932, 962.

The transferee must abide the title of his transferrer.

Barnard v. Norwich & W. R. Co. 4 Cliff. 351, Fed. Cas. No. 1,007.

When a state comes into court of her own accord, and invokes its aid, she is bound by all the rules established for the administration of justice between individuals.

Port Royal & A. R. Co. v. South Carolina, 60 Fed. 552; *The Siren*, 7 Wall. 152, 159, 19 L. ed. 129, 132; *Brent v. United States v. Bank of Washington*, 10 Pet. 596, 9 L. ed. 547; *United States v. Bank of Metropolis*, 15 Pet. 377, 10 L. ed. 774; *The Davis*, 10 Wall. 15, *sub nom. United States v. Douglas*, 19 L. ed. 875; *United States v. Ingate*, 48 Fed. 251; *United States v. Flint*, 4 Sawy. 42, Fed. Cas. No. 15,121; *United States v. Wilder*, 3 Sumn. 308, Fed. Cas. No. 16,694; *United States v. Union Nat. Bank*, 10 Ben. 408, Fed. Cas. No. 16,597; *United States v. Barker*, 4 Wash. C. C. 464, Fed. Cas. No. 14,520; *Prioleau v. United States*, L. R. 2 Eq. 662.

An assignee cannot acquire greater rights than his assignor.

Green v. Early, 39 Md. 223; *Hill v. McPherson*, 15 Mo. 204, 55 Am. Dec. 142; *Haun v. Trainer*, 190 Pa. 1, 42 Atl. 367; *Bullard v. Kinney*, 10 Cal. 63; *Brooks v. Record*, 47 Ill. 30.

The assignment of a claim to the government gives it no greater validity than it possessed in the hands of the assignor.

United States v. Buford, 3 Pet. 12, 7 L. ed. 585; *United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 125, 30 L. ed. 83, 192 U. S. U. S., Book 48.

6 Sup. Ct. Rep. 1006; 1 Cooley's Bl. Com. 247, note 6.

Whenever, by reason of change of business or change of parties, the result of an assignment would be to impose upon one of the contracting parties a greater liability than he ever intended to assume, the contract cannot be assigned.

Tolhurst v. Associated Portland Cement Mfrs. [1901] 2 K. B. 811; 18 Law Quarterly Rev. p. 10.

Under whatever law the assignment takes place, the liability of the debtor cannot be increased through the assignment of the creditor to another person of the claim against the debtor.

Diecy, Conf. L. p. 534.

Conferring the quality of suability on an agreement not originally suable is an increase of the burden.

Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440.

A court of chancery habitually condemns and repudiates all merchandising, huekstering, fomenting of litigations, though not within the prohibition of any enactment against champerty or maintenance.

New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; Pollock, Contr. p. 294.

At common law the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and, although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy.

Hager v. Swayne, 149 U. S. 242, 248, 37 L. ed. 719, 721, 13 Sup. Ct. Rep. 841; *Ball v. Halsey*, 161 U. S. 72, 80, 40 L. ed. 622, 624, 16 Sup. Ct. Rep. 554.

To prevent a state from being coerced in the payment of its debts was the primary cause of the 11th Amendment.

Cohen v. Virginia, 6 Wheat. 264, 406, 5 L. ed. 257, 291; Miller, Const. p. 382; Miller, Const. Davis's Note, pp. 652, 653; Judson, Constitutional History and Government of U. S. 255.

That there is no absolute necessity for such jurisdiction in this court is shown by the fact that we have lived for more than a century without its exercise; that it does not exist is made probable by the fact that it has not previously been invoked, although the circumstances which gave rise to it have existed from the beginning. The novelty of an action, under such circumstances, is strong evidence that it is groundless.

Mississippi v. Johnson, 4 Wall. 475, 500, 18 L. ed. 437, 441; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25; *Columbia Law Re-*

view, May, 1902. Randolph, "Notes on Suits Between States."

The circuit court will arrange the parties according to their real interest in the controversy, in order to ascertain whether it is one between citizens of different states, and, consequently, whether the court has jurisdiction of the cause.

Removal Cases, 100 U. S. 457, 25 L. ed. 593.

So, when the Constitution confers on this court jurisdiction to hear and determine "controversies between two or more states," and "between a state and citizens of another state," the court ought to look beyond the forms adopted by the pleader to the facts in order to ascertain between whom the controversy really exists.

In order to ascertain whether a suit is being prosecuted against a state,—to learn who is the real defendant,—the court will look beyond the record to see what will be the result of the suit.

Re Ayres, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

So, when the question is: Is the suit one by an individual against a state?—Who is the real plaintiff?—the court should look beyond the record to the result.

Indeed, that is the rule applied by this court in removal cases when the question is whether a state is the real plaintiff.

Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18.

The original jurisdiction of this court is limited, and manifestly intended to be sparingly exercised, and should not be expanded by construction.

California v. Southern P. Co. 157 U. S. 261, 39 L. ed. 695, 15 Sup. Ct. Rep. 591.

When a state consented to be sued by another state in a proper controversy, it clearly did not expressly consent to be sued by such state and an individual, either directly or indirectly, and to hold that it did, would seem to require a decidedly expansive construction.

Florida v. Georgia, 17 How. 478, 504, 15 L. ed. 181.

Again, in the circuit court, it is settled that the court has no jurisdiction unless each one of the plaintiffs, arranged according to their real interest, can maintain a suit against each one of the defendants, arranged according to their real interest in the controversy.

Removal Cases, 100 U. S. 457, 25 L. ed. 593; *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. ed. 435; *Smith v. Lyon*, 133 U. S. 319, 33 L. ed. 636, 10 Sup. Ct. Rep. 305; *Joseph Dry Goods Co. v. Hecht*, 57 C. C. A. 64, 120 Fed. 761; *Johnson v. Ford*, 109 Fed. 501.

If a single bondholder has any right at all to institute proceedings, he is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but to see that their rights are protected in the final decree.

New Orleans P. R. Co. v. Parker, 143 U. S. 58, 59, 36 L. ed. 71, 12 Sup. Ct. Rep. 364.

And it has been held that if a suit is instituted between competent persons, others having the requisite interest are entitled to intervene, and if they do intervene, and do not have the requisite diversity of citizenship, the jurisdiction of the court is ousted.

Mangels v. Donau Brewing Co. 53 Fed 515; *Cook, Stockholders*, 3d ed. § 827, note 2; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 625; *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Oberlin College v. Blair*, 70 Fed. 416.

If this be required merely because the judiciary act only confers jurisdiction on the circuit court of controversies between the citizens of different states, *a fortiori* ought it to be so held when the Constitution confers jurisdiction upon this court only of "controversies between two or more states?"—and, in addition to that, the 11th Amendment expressly prohibits suits by individuals against a state.

When an original cause is pending in this court to be disposed of here in the first instance, and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication, to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal.

California v. Southern P. Co. 157 U. S. 229, 257, 39 L. ed. 683, 693, 15 Sup. Ct. Rep. 591; *Minnesota v. Northern Securities Co.* 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308.

The general rule for the construction of a constitutional provision is so to construe it as to subserve its general purpose.

Legal Tender Cases, 12 Wall. 531, 20 L. ed. 305.

This court has applied that rule with liberality to the 11th Amendment.

Fitts v. McGhee, 172 U. S. 516, 528, 43 L. ed. 535, 541, 19 Sup. Ct. Rep. 269; *Virginia Coupon Cases*, 114 U. S. 332, 29 L. ed. 207, 5 Sup. Ct. Rep. 932; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504.

The Constitution prohibits things, not names.

Craig v. Missouri, 4 Pet. 410, 435, 7 L. ed. 903, 912.

A libel *in rem* could not be filed against an unarmed packet, the property of the King of the Belgians, although the sovereign was not personally made a defendant.

The Parliament Belge, L. R. 5 P. D. 197; *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; *Mighell v. Sulian of Johore* [1894] 1 Q. B. 149; *Jarrott v. Moberly*, 103 U. S. 580, 585, 26 L. ed. 492, 493.

An individual cannot invoke the original jurisdiction of this court in a suit against one state by using the name of another state.

New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176.

Jurisdiction is defeated where the motive of assignment was fraudulent.

Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 349, 40 L. ed. 452, 16 Sup. Ct. Rep. 307; *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Lake County v. Dudley*, 173 U. S. 253, 43 L. ed. 688, 19 Sup. Ct. Rep. 398.

The court will look into the whole matter and the unlawful purpose to be accomplished by the assignment.

Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; *Cross v. Allen*, 141 U. S. 532, 35 L. ed. 847, 12 Sup. Ct. Rep. 67.

A notable instance of a court declaring that the law is not to be evaded by apparently legal arrangement is *United States v. Northern Securities Co.* 120 Fed. 721.

Those who deal in the bonds and obligations of a sovereign state must rely altogether on the sense of justice and good faith of the state.

Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *Bank of Washington v. Arkansas*, 20 How. 530, 15 L. ed. 993; *Smith v. Reeves*, 178 U. S. 446, 44 L. ed. 1145, 20 Sup. Ct. Rep. 919.

Messrs. James H. Merrimon and Robert D. Gilmer also argued the cause, and, with **Messrs. George Rountree and James E. Shepherd**, filed a brief for the state of North Carolina:

The mere fact that the plaintiff held the ten bonds sued upon, and that the said bonds were past due and unpaid, did not constitute a controversy *per se*.

Louisiana v. Texas, 176 U. S. 18, 44 L. ed. 354, 20 Sup. Ct. Rep. 251; *Missouri v. Illinois*, 180 U. S. 208, 219, 45 L. ed. 497, 504, 21 Sup. Ct. Rep. 331.

The original jurisdiction of the Supreme Court of the United States depends solely on the character of the parties, and is con-

finied to the cases in which are those enumerated parties, and those only.

Louisiana v. Texas, 176 U. S. 1, 16, 44 L. ed. 347, 353, 20 Sup. Ct. Rep. 251.

The donation of the ten bonds sued upon was not to the state as a state, but to the state as a trustee for some charitable institution of the state to be selected by the state legislature. The precatory words with which the donation was accompanied was sufficient to raise an implied trust, and the declaration of the trust was sufficiently definite.

Miller v. Atkinson, 63 N. C. 537; 1 Perry, Tr. §§ 112 *et seq.*

This, it would seem, would bring the case within another rule laid down in *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251, that the suit must be one between states as states, and not between a state acting as trustee, as plaintiff, and another state.

The ten bonds sued upon were not donated to the plaintiff state, but constituted the consideration for a contract between it and the holders of the so-called second-mortgage bonds, whereby the plaintiff state engaged to institute a suit in the Supreme Court of the United States for the benefit of all the holders of said classes of bonds; and this brings the case within the rule of *New Hampshire v. Louisiana*, 108 U. S. 76, 85, 91, 27 L. ed. 656, 662, 2 Sup. Ct. Rep. 176.

It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor.

United States v. Bufort, 3 Pet. 12, 30, 7 L. ed. 585, 591; *United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 125, 30 L. ed. 83, 6 Sup. Ct. Rep. 1006.

The transaction between the plaintiff state and Schaffer, who represented the so-called second-mortgage bondholders, was against public policy, as being an attempt to control the regular administration of justice.

Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. ed. 868; *McMullen v. Hoffman*, 174 U. S. 648, 43 L. ed. 1121, 19 Sup. Ct. Rep. 839.

The conduct of the plaintiff state and its associates, who are in substance plaintiffs, but in form defendants, has been such as to justify this court in refusing to entertain jurisdiction or to grant any relief, upon the principles announced by this court in the case of *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 233-237, 36 L. ed. 414, 418, 419, 12 Sup. Ct. Rep. 632.

This court can look into all that was said

and done by the plaintiff and its associates in their negotiations to secure a standing in this court. If the letter written by Schaffer to Mr. Burke is to be regarded as containing the terms of the so-called gift to the plaintiff, still the court can look into all that was said and done, whether contained in this letter or not.

Ward v. United States, 14 Wall. 28, 20 L. ed. 792; *Merriam v. United States*, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; *United States v. Gibbons*, 109 U. S. 200, 27 L. ed. 906, 3 Sup. Ct. Rep. 117.

The transfer of the ten bonds to South Dakota was only a transfer at best of an interest in the mortgage, and the relation of South Dakota to the other holders of the bonds brings the case within the decision of this court in *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807.

If states are to be subjected to the same rule in respect of jurisdiction as individuals, this suit cannot be maintained.

Blacklock v. Small, 127 U. S. 96, 104, 32 L. ed. 70, 73, 8 Sup. Ct. Rep. 1096; *Pacific R. Co. v. Ketchum*, 101 U. S. 299, 25 L. ed. 936.

No one can be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition.

Black v. Baylees, 86 N. C. 534.

Information to an attorney is information to his client.

Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; *May v. Le Claire*, 11 Wall. 217, 20 L. ed. 50.

The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties.

Re Ayers, 123 U. S. 504, 31 L. ed. 229, 8 Sup. Ct. Rep. 164.

Those who deal in the bonds and obligations of a sovereign state are aware that they must rely altogether on the sense of justice and good faith of the state.

Bank of Washington v. Arkansas, 20 How. 530, 532, 15 L. ed. 993, 994; *Memphis & C. R. Co. v. Tennessee*, 101 U. S. 339, 25 L. ed. 961; *Hans v. Louisiana*, 134 U. S. 1, 13, 14, 33 L. ed. 842, 846, 847, 10 Sup. Ct. Rep. 504; *Smith v. Kceves*, 178 U. S. 446, 44 L. ed. 1145, 20 Sup. Ct. Rep. 919.

Now, if this was the law, it became a part of the contract between the defendant state and the holder of any of the bonds of the class sued upon, that the obligation of the defendant was only upon its conscience, and that the holder had nothing to rely upon except the obligation of good faith.

Edwards v. Kearzey, 96 U. S. 601, 24 L. ed. 796; *Walker v. Whitehead*, 16 Wall. 318, 21 L. ed. 358; *Louisiana ex rel. Nelson v. Police Jury*, 111 U. S. 720, 28 L. ed. 576, 4 Sup. Ct. Rep. 648; *Louisiana v. New Orleans*, 102 U. S. 206, 26 L. ed. 133.

Contracts between a nation and an individual are only binding on the conscience of the sovereign and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.

Wisconsin v. Pelican Ins. Co. 127 U. S. 288, 32 L. ed. 243, 8 Sup. Ct. Rep. 1370.

Mr. Daniel L. Russell argued the cause, and, with Messrs. Alfred Russell and Marion Builer, filed a brief for defendant Salter:

The first and second mortgage bondholders, upon the general principles of equity, being interested in the funds, must be made parties to the suit.

Story, Eq. Pl. 97, 112; *Florida v. Georgia*, 17 How. 510, 15 L. ed. 201; *Morton v. New Orleans & S. R. Co. & I. Assn.* 79 Ala. 590; *Knickerbocker Trust Co. v. Penacook Mfg. Co.* 100 Fed. 814; *Dickerman v. Northern Trust Co.* 25 C. C. A. 549, 53 U. S. App. 270, 80 Fed. 450.

No objection is perceived to joining the defendant state with two citizens of another state as defendants.

Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

Courts of equity do not require a mortgage holder of a fraction of a mortgage debt to call upon his associate mortgagees to unite with him in a suit for foreclosure. He may make them defendants.

Jones, Mortg. § 1369; *Wilkins v. Fry*, 1 Meriv. 244; *Hancock v. Hancock*, 22 N. Y. 568; *Carpenter v. O'Dougherty*, 58 N. Y. 681; *Rankin v. Major*, 9 Iowa. 297.

A second mortgage is *in solido*, and not a separate and independent mortgage of ten shares for each bond.

Row v. Dawson and Ryall v. Rowles, White & T. Lead. Cas. in Eq. 3d Am. ed. 1859, Wallace's notes; *English v. Carney*, 25 Mich. 178; *Kortlander v. Elston*, 52 Fed. 180.

The intention of the maker of the statute being as much within the statute as if it were within the letter, the court has to ascertain the meaning, which was to mortgage all the stock to secure all the bonds, each proportionally.

United States v. Babbit, 1 Black, 61, 17 L. ed. 96; *Wilson County v. Third Nat. Bank*, 103 U. S. 770, 26 L. ed. 488.

Where conveyances are made for the purpose of vesting title in the plaintiff to en-

able him to bring suit, the court, in deciding the question of jurisdiction, will not inquire into the motive for making the conveyance, where the transaction is real, and not colorable, and the plaintiff becomes the real, actual, and beneficial owner of the claim sued on.

M'Donald v. Smalley, 1 Pet. 620, 7 L. ed. 287; *Barney v. Baltimore City*, 6 Wall. 280, 18 L. ed. 825; *Smith v. Kernochen*, 7 How. 198, 12 L. ed. 666; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311.

It is no defense to a legal demand that the complainant is actuated by personal or improper motives.

Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 168.

Mr. Justice **Brewer** delivered the opinion of the court:

There can be no reasonable doubt of the validity of the bonds and mortgages in controversy. There is no challenge of the statutes by which they were authorized. By those statutes the treasurer was directed when it became necessary to borrow money for the payment of the subscription, to prepare coupon bonds and advertise in one or more newspapers for sealed proposals, and to accept the terms offered most advantageous to the state, provided that in no event should the bonds be sold for less than their par value. The advertisement was made, no bids were received, but the bonds were delivered to the railroad company as payment for the subscription, dollar for dollar. Upon each bond was placed the statutory pledge or mortgage. It is true no money was paid into the treasury and thence out of the treasury to the railroad company, yet, looking at the substance of the transaction (and equity has regard to substance rather than form), the transaction was the same as though the company had been the only bidder, had placed a thousand dollars in the treasury in payment of each bond, and received that thousand dollars back from the treasury in payment of the subscription for ten shares of stock. It is true also that there was no formal issue of certificates by the company to the state, but that was a matter of arrangement between the parties to the subscription. The state's right as a stockholder was not abridged by lack of the certificates, and in fact it has been receiving dividends on the stock exactly as though certificates had been issued. The statute also provided that with each several bond a deed of mortgage for an equal amount of stock, signed by the treasurer and countersigned by the comptroller, should constitute a part of the bond and be transferable in like manner with it, "and further, that such

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mortgage shall have all the force and effect, *in law and equity, of registered mortgages[310] without actual registry." While no certificate of stock was to be attached to or go with the bond, the statute evidently contemplated that the mortgage indorsed on the bond should have the same force and effect. Hence, when the indorsement was made and the bond issued by the state, it was tantamount to a separation and identification of the number of shares named therein. It cannot be that the state, having provided this means of giving to each bond the mortgage security of the corresponding shares of stock, can now prevent the attaching of the lien on the ground that no shares had been separated and no certificate transferred. It is unnecessary to refer to chap. 98 of the Laws of 1879, for that act was one in the nature of an offer to compromise, although it does contain a recognition of outstanding obligations.

Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the state as representative of individual owners, as in the case of *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176, for they were given outright and absolutely to the state. It is true that the gift may be considered a rare and unexpected one. Apparently the statute of South Dakota was passed in view of the expected gift, and probably the donor made the gift under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds. But the motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction. This has been often ruled. In *M'Donald v. Smalley*, 1 Pet. 620, 7 L. ed. 287, an objection to the jurisdiction on the ground that the title to the property in controversy had been conveyed to the plaintiff in the belief that it would be sustained by the Federal, when it would not be by the state, court, was overruled, with this observation by Chief Justice Marshall (p. 624, L. ed. p. 289):

"This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff which was binding on both parties. M'Donald could not have maintained *an action for his debt,[311] nor M'Arthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a

right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different states."

See also *Smith v. Kernochen*, 7 How. 198, 12 L. ed. 666; *Barney v. Baltimore City*, 6 Wall. 280, 18 L. ed. 825; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 190-192, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311. In this last case Mr. Justice Brown, speaking for the court, said:

"If the law concerned itself with the motives of parties, new complications would be introduced into suits, which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive. *Davis v. Flagg*, 35 N. J. Eq. 491; *Dering v. Winchelsea*, 1 Cox Ch. Cas. 318; *McMullen v. Ritchie*, 64 Fed. 253, 261; *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 168. . . . The reports of this court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a nonresident and enabling him to bring suit in a Federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance. *McDonald v. Smalley*, 1 Pet. 620, 7 L. ed. 287; *Smith v. Kernochen*, 7 How. 198, 12 L. ed. 666; *Barney v. Baltimore City*, 6 Wall. 280, 18 L. ed. 825; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759.

"The law is equally well settled that, if a person take up a bona fide residence in another state, he may sue in a Federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the state in which the court was held. *Cheever* [312] v. **Wilson*, 9 Wall. 108, 123, 19 L. ed. 604, 608; *Briggs v. French*, 2 Summ. 251, Fed. Cas. No. 1,871; *Cutlett v. Pacific Ins. Co.* 1 Paine, 594, Fed. Cas. No. 2,517; *Cooper v. Galbraith*, 3 Wash. 546, Fed. Cas. No. 3,193; *Johnson v. Monell*, Woolw. 390, Fed. Cas. No. 7,399."

The title of South Dakota is as perfect as though it had received these bonds directly from North Carolina. We have, therefore, before us the case of a state with an unquestionable title to bonds issued by another state, secured by a mortgage of railroad stock belonging to that state, coming into

this court and invoking its jurisdiction to compel payment of those bonds and a subjection of the mortgaged property to the satisfaction of the debt.

Has this court jurisdiction of such a controversy, and to what extent may it grant relief? Obviously, that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the Federal court of a state of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another state. The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy. Obviously, too, the subject-matter is one of judicial cognizance. If anything can be considered as justiciable it is a claim for money due on a written promise to pay; and if it be justiciable, does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual, and by him sold or donated to the former.

A preliminary question arises from the fact that representatives of the two classes of bonds are made defendants, and that a part of the relief asked is a sale of the 30,000 shares of stock of the North Carolina Railroad Company, belonging to the state of North Carolina, in satisfaction and discharge of all the mortgages upon such stock. It is insisted *that these individuals, owners [313] of the bonds, although named as defendants, are in fact occupying an adverse position to that of the state, and that the effect of their presence as parties is a practical nullification of the 11th Amendment, in that it is giving to individuals relief by judgment against the state. Apparently, one expectation of the donor to South Dakota was that in some way the bonds retained by himself would be placed in judgment, and relief obtained against North Carolina in the suit commenced by South Dakota. But we think that these individuals are not necessary parties-defendant, and that no relief should be given to them or to the classes of bondholders they represent. The statute under which the mortgage was executed provided that with each of the bonds a deed of mortgage for a like amount of stock should be executed by the state. There is, therefore, a separate mortgage of ten shares of stock on each one of these bonds, and that mort-

gage can be fully satisfied by a decree of foreclosure and sale of the ten shares of stock. No one would doubt that, if a certificate of stock was attached as a pledge to a note, the pledge could be satisfied by a sale of the stock without any determination of the rights of the purchaser as between himself and other stockholders. And such was the manifest purpose of this legislation. It contemplated that each bondholder should receive a stock security which he could realize on without the delay and expense of a suit to which all other stockholders and the corporation would be necessary parties. The purchaser at the sale to be authorized by this decree will become vested with the full title of the state to the number of shares of stock stated in the mortgage. He will occupy the same position in relation to the corporate property that other stockholders occupy, and have whatever rights they have. It is not necessary for a full satisfaction of the mortgage on one of these bonds that any other mortgage upon another bond be also foreclosed, or that a decree be entered determining what rights the purchaser will have by virtue of the stock which he obtains at the sale. So far, then, as these individual [314] defendants are concerned, the suit will be dismissed, with costs against South Dakota.

Coming now to the right of South Dakota to maintain this suit against North Carolina, we remark that it is a controversy between two states; that by § 2, art. III., of the Constitution, this court is given original jurisdiction of "controversies between two or more states." In *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, Mr. Justice Shiras, speaking for the court, reviewed at length the history of the incorporation of this provision into the Federal Constitution, and the decisions rendered by this court in respect to such jurisdiction, closing with these words (p. 240, L. ed. p. 512, Sup. Ct. Rep. p. 343):

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state."

The present case is one "directly affecting the property rights and interests of a state."

Although a repetition of this review is unnecessary, two or three matters are worthy of notice. The original draft of the Constitution reported to the convention gave to the Senate jurisdiction of all disputes and controversies "between two or more states, respecting jurisdiction or territory," and to the Supreme Court jurisdiction of "controversies between two or more states, except such as shall regard territory or jurisdiction." A claim for money due being a con-

troversy of a justiciable nature, and one of the most common of controversies, would seem to naturally fall within the scope of the jurisdiction thus intended to be conferred upon the Supreme Court. In the subsequent revision by the convention the power given to the Senate in respect to controversies between the states was stricken out, as well as the limitation upon the jurisdiction of this court, leaving to it, in the language now found in the Constitution, jurisdiction, without any limitation, of "controversies between two or more states."

The Constitution, as it originally stood, also gave to this *court jurisdiction of con-[315] troversies "between a state and citizens of another state." Under that clause *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440, was decided, in which it was held that a citizen of one state might maintain in this court an action of assumpsit against another state. In consequence of that decision the 11th Amendment was adopted, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." It will be perceived that this amendment only granted to a state immunity from suit by an individual, and did not affect the jurisdiction over controversies between two or more states. In respect to this it was said by Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 264, 406, 5 L. ed. 257, 291:

"It is a part of our history that, at the adoption of the Constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced

before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states."

In the same case, after referring to the two classes of cases, jurisdiction of which was vested in the courts of the Union, he said (p. 378, L. ed. p. 285):

"In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' 'and between a state and foreign states, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

In *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233, this court sustained its jurisdiction of a suit in equity brought by one state against another to determine a dispute as to boundary, and, in the course of the opinion by Mr. Justice Baldwin, said in respect to the immunity of a sovereign from suit by an individual (p. 720, L. ed. p. 1259):

"Those states, in their highest sovereign capacity, in the convention of the people thereof, . . . adopted the Constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the Constitution, it was ordained that this judicial power, in cases where a state was a party, should be exercised by this court as one of original jurisdiction. The states waived their exemption from judicial power (6 Wheat. 378, 380, 5 L. ed. 284, 285) as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified."

And, again, in reference to the extent of the jurisdiction of this court (p. 721, L. ed. p. 1259):

[317] "That it is a controversy between two states cannot be denied; and, though the Constitution does not, in terms, extend the judicial power to all controversies between

two or more states, yet it, in terms, excludes none, whatever may be their nature or subject."

In *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920, we took jurisdiction of an action brought by the United States against North Carolina to recover interest on bonds, and decided the case upon its merits. It is true there was nothing in the opinion in reference to the matter of jurisdiction, but as said in *United States v. Texas*, 143 U. S. 621, 642, 36 L. ed. 285, 292, 12 Sup. Ct. Rep. 488, 492:

"The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more states, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the states of the Union? This question is in effect answered by *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920. That was an action of debt brought in this court by the United States against the state of North Carolina upon certain bonds issued by that state. The state appeared, the case was determined here upon its merits, and judgment was rendered for the state. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a state."

See also *United States v. Michigan*, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742, decided at the last term, in which a bill in equity for an accounting and a recovery of money was sustained. Mr. Justice Peckham, delivering the unanimous opinion of the court, said (pp. 396, 406, L. ed. pp. 1109, 1113, Sup. Ct. Rep. pp. 747, 751):

"By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the state of Michigan. This court has jurisdiction of such a controversy, although it is not literally *between [318] two states, the United States being a party on the one side and a state on the other. This was decided in *United States v. Texas*, 143 U. S. 621, 642, 36 L. ed. 285, 292, 12 Sup. Ct. Rep. 488. . . . There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defense to the complainant's bill, we grant leave to the

defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting for the payment of the sum found due thereon."

We are not unmindful of the fact that in *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504, Mr. Justice Bradley, delivering the opinion of the court, expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in *Chisholm v. Georgia*, but such expression cannot be considered as a judgment of the court, for the point decided was that, construing the 11th Amendment according to its spirit rather than by its letter, a state was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign state. Without noticing in detail the other cases referred to by Mr. Justice Shiras in *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, it is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one state against another, to enforce a property right. *Chisholm v. Georgia* was an action of assumpsit; *United States v. North Carolina*, an action of debt; *United States v. Michigan*, a suit for an accounting; and that which was sought in each was a money judgment against the defendant state.

But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county, or state is exempt from seizure upon execution, because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes. (*Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. ed. 197, [319]204.) *As a rule, no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature.

In *Rees v. Watertown*, 19 Wall. 107, 116, 117, 22 L. ed. 72, 75, we said:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power
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that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a state in the exercise of this authority, at once so delicate and so important."

See also *Heine v. Levee Comrs.* 19 Wall. 655, 661, 22 L. ed. 223, 226; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

In this connection reference may be made to *United States ex rel. Goodrich v. Guthrie*, 17 How. 284, 15 L. ed. 102, in which an application was made for a mandamus against the Secretary of the Treasury to compel the payment of an official salary, and in which we said (p. 303, L. ed. p. 106):

"The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal government or by any known principle of law, there can be asserted a power in the circuit court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States. This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations,—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which *could be subjected to any [320] number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or rather, under such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests."

Further, in this connection may be noticed *Gordon v. United States*, 117 U. S. 697, in which this court declined to take jurisdiction of an appeal from the court of claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of Congress power to enforce its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney (pp. 702, 704):

"The award of execution is a part, and an essential part, of every judgment passed by
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a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. . . . Indeed, no principle of constitutional law has been more firmly established or constantly adhered to than the one above stated,—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.” See also *Re Sanborn*, 148 U. S. 222, 37 L. ed. 429, 13 Sup. Ct. Rep. 577, and *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 456, 44 L. ed. 223, 235, 20 Sup. Ct. Rep. 168.

[321] We have, then, on the one hand the general language of the Constitution, vesting jurisdiction in this court over “controversies between two or more states,” the history of that jurisdictional clause in the convention, the cases of *Chisholm v. Georgia*, *United States v. North Carolina*, and *United States v. Michigan* (in which this court sustained jurisdiction over actions *to recover money from a state), the manifest trend of other decisions, the necessity of some way of ending controversies between states, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a state by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question, it is directly presented, and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.

There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff’s claim. If that should be the result, there would be no necessity for a personal judgment against the state. That the state is a necessary party to the foreclosure of the mortgage was settled by *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260. Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency to be determined when, if ever, it arises. And surely if, as we have often held, this court has jurisdiction of an action by one state against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of

one to enforce the delivery of personal property.

A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars (\$27,400), (no interest being recoverable [*United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920]), and that the same are secured by 100 shares of the stock of the North Carolina Railroad Company, belonging to the state of North Carolina, shall order that the said state of North Carolina pay said amount with costs of suit to the state of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the marshal of this court, directing him to sell *at public auction all the interest [322] of the state of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington.

And either of the parties to this suit may apply to the court upon the foot of this decree, as occasion may require.

Mr. Justice **White**, with whom concurred Mr. Chief Justice **Fuller**, Mr. Justice **McKenna**, and Mr. Justice **Day**, dissenting:

The decision in this cause seems to me to disregard an express and absolute prohibition of the Constitution. The facts are stated in the opinion of the court. As, however, there are some facts deemed by me to be material, which are not referred to, it is proposed to make a summary of the case, and then express the reasons which control me.

In the years 1847 and 1855 the negotiable bonds of the state of North Carolina were issued to aid in the construction of the railway of the North Carolina Railroad Company, and were exchanged for the stock of that company. The bonds went into the hands of individuals and the exchanged stock passed into the possession of the state, and was declared to be pledged in the hands of the state to secure the payment of the bonds in question.

In 1855 and 1866 similar aid was given to another railway,—the Western North Carolina. Bonds, each for the par value of \$1,000, aggregating nearly two and a half millions of dollars, were issued by the state. All the bonds which were issued after the passage, in 1866, of an act of the legislature,

were declared to be secured, as stated in the act, by a mortgage of the stock of the North Carolina Railroad held by the state, and already, in its entirety, pledged for the security of all the bonds which had been previously issued *in aid of the North Carolina Railroad. The stock, however, remained in possession of the state, but each of the bonds thereafter issued contained an indorsement that ten shares of stock of the North Carolina Railroad Company, in the hands of the state, were mortgaged as security for the payment of each of the bonds.

Presumably, as a result of the disastrous consequences of the Civil War and the events which followed, the financial affairs of the state of North Carolina in 1879 were profoundly embarrassed. The state had not paid the interest as it accrued on the bonds issued in aid of the North Carolina Railroad. It had, in effect, paid no interest whatever on the bonds issued in favor of the Western North Carolina Railroad, and, indeed, had defaulted generally in the payment of the interest on its public debt. Statutes were passed by the state providing for an adjustment of its financial affairs so as to rehabilitate its credit, in order that when the state debt was readjusted the state might, for the benefit of all its people and its creditors, be able to pay the interest on, and provide for the principal of, the public debt. The adjustment made was accepted by those holding the bonds issued in aid of the North Carolina Railroad, and they waived a very large sum of unpaid interest, and received new bonds, accompanied with a reiteration of the pledge of all the stock of the North Carolina Railroad owned by the state, which had always been held by the state as security for the payment of all the bonds of that issue. It is to be inferred from the record that the adjustment proposed was generally accepted by the other creditors of the state, and that, as a consequence, its fiscal affairs were placed upon a sound basis. Be this as it may, certain is it that the adjustment was accepted by the holders of a vast majority of the bonds issued in aid of the Western North Carolina Railroad, and that such holders surrendered their old bonds and took new bonds of the state for 25 per cent of the face value of their bonds, these new bonds not purporting to be secured by any mortgage of the stock of the North Carolina Railroad.

In 1901,—twenty-two years after the passage of the acts referred *to, and their acceptance as above stated,—Simon Schafer and his brother, composing the firm of Schafer & Brothers, bankers and brokers in the city of New York, addressed a petition to the legislature of North Carolina. Therein it was recited that the parties named

were the holders, in their own right and as trustees, of nearly two hundred and fifty thousand dollars of the bonds issued in aid of the Western North Carolina Railroad Company, attached to which were unpaid interest coupons for more than thirty years. The petitioners declared that these bonds were substantially all the bonds of the series then outstanding, because the holders thereof had not accepted the arrangement of 1879. It was stated that such arrangements had been accepted by the vast majority of others who held such bonds, by reason of the financial stress of the state at the time, and because those creditors knew that the stock of the North Carolina Railroad, mortgaged to secure the bonds, was of no avail for such purpose, since its value at the time of the adjustment was not adequate to pay the bonds issued in aid of the North Carolina Railroad, in favor of which it was first pledged. It was recited that the petitioners had not availed of the adjustment because they preferred waiting a restoration of the credit of the state, and trusted that the stock of the North Carolina Railroad might ultimately prove adequate to pay the bonds as reduced, issued in favor of the North Carolina Railroad, and the small amount of bonds which remained outstanding, as a result of the adjustment. It was declared that this had been accomplished; that in consequence of the reduced amount of the North Carolina Railroad bonds brought about by the adjustment, and the retirement thereby effected of all the bonds of the Western North Carolina Railroad except the small amount held or represented by the petitioners, the stock of the North Carolina Railroad held by the state, if sold, would be adequate to pay both series and leave a balance in favor of the state. Reciting that the petitioners and those they represented were aware that their claims against the state could not be judicially enforced either in the state or Federal courts, the prayer was that an appropriation might be made to pay their bonds in principal *and accumu- [325] lated interest; or that, in default, an act be passed authorizing suit in the courts to enforce the mortgage lien asserted to exist on the stock of the North Carolina Railroad. The prayer of this petition was not granted.

Shortly following the failure to act favorably upon the petition just referred to, the act of the legislature of South Dakota, set out in the opinion of the court, was passed. It will be observed that, among other things, it empowered the governor to accept gifts made to the state of bonds or choses in action, and authorized the attorney general of the state, when such gifts were accepted, to bring suit in the name of the state to enforce payment of the same, and for that

purpose "to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the state, and shall be entitled to reasonable compensation (italics mine) *out of the recoveries and collections in such suits and actions.*" Thereupon Simon Schafer addressed the letter to the Hon. Charles H. Burke, a member of Congress from South Dakota, which is reproduced in full in the opinion of the court. It suffices to say that by that letter ten of the bonds were given to the state of South Dakota, and it was specially mentioned that the gift was made because Schafer was aware that he could not sue the state of North Carolina, whilst the state of South Dakota could do so. The letter also contained the suggestion, presumably as an inducement to an acceptance by the state, that if the ten bonds were enforced by the state of South Dakota, other gifts of similar bonds might be made. The bonds were accepted by the governor of South Dakota, and the attorney general of that state thereupon filed the present bill. The parties-defendant were the state of North Carolina, a person sued as representing all the holders of bonds issued in aid of the North Carolina Railroad, and a person sued as representative of the holders of the outstanding bonds issued in aid of the Western North Carolina Railroad. The prayer of the bill was, in substance, for a decree against the state of North Carolina for the amount of the principal of the bonds, and for more than thirty years' accrued interest; for an enforcement of the mortgage asserted to exist on

[326] the stock of *the North Carolina Railroad Company held by the state; for a decree declaring that the holders of the bonds issued in favor of the North Carolina Railroad Company had lost their prior lien upon the whole stock by reason of their acceptance of the compromise under the act of 1879, and the taking of new bonds by them in pursuance thereof. It was, however, prayed that in the event it should be found that the lien of such bondholders on the stock had not been waived, the stock be ordered sold, free from all encumbrances, to satisfy the claims of the respective lienholders thereon, and that distribution be made of the proceeds of the stock among them according to priority.

The state answered, challenging the jurisdiction of this court to entertain the bill, and also urging various defenses on the merits.

The person joined as representing the bonds issued in aid of the North Carolina Railroad made no appearance. Charles Salter, who was made defendant as representative of the holders of the bonds issued in aid of the Western North Carolina Railroad,

answered, substantially admitting all the allegations of the bill, but praying "that plaintiff's bill be dismissed with costs, unless the court shall decree that all the stock subject to the second mortgage be sold for the benefit of all the holders of said second mortgage bonds."

The court now decides that it has jurisdiction, because of the delegation in the 2d section of the 3d article of the Constitution, of judicial power to the United States over "controversies between two or more states," and because of the grant to this court of original jurisdiction over cases in which a state shall be a party. Whilst conceding that, if the holders of the bonds issued in aid of the North Carolina Railroad are necessary parties, the jurisdiction would be ousted, it is held that such bondholders are not necessary parties, since there may be a sale to enforce complainant's rights of a portion of the stock held by the state of North Carolina, subject to the prior rights therein of the holders of such bonds. The decree which will be entered will, therefore, adjudge the state of North Carolina to be indebted to South Dakota in the *amount of the principal of the ten bonds, [327] with more than thirty years' accrued interest. The decree will direct the sale of the stock in the North Carolina Railroad Company held by the state, subject to the prior pledge in favor of the holders of the bonds of the North Carolina Railroad. The question of a deficiency decree is reserved, in case, as a result of the sale, the debt decreed against the state should not be extinguished.

With this summary of the pleadings, the facts, and the decision of the court in mind, I shall now state the reasons which compel me to dissent, all of which may be embraced in the two following general propositions which I shall examine under separate headings: (A) The absolute want of power in the court to render a decree between the two states on the cause of action sued on; and (B) The want of power to render the decree which is now directed to be entered, because of the absence of essential parties whose presence would oust jurisdiction, and the impotency to grant any relief whatever in the absence of such parties.

(A)

The absolute want of power in the court to render a decree between the two states on the cause of action sued on.

First. The power of this court to award a decree against the state of North Carolina is based on the provision in the 2d section of the 3d article of the Constitution, extending the judicial power of the United States over "controversies between two or more states," and to the delegation to this court of original jurisdiction over such con-

troversies. If the provisions in question were the only ones on the subject it might be more difficult to deny that the Federal judicial power embraced this controversy. Those provisions, however, do not stand alone, since they must be considered in connection with the 11th Amendment to the Constitution, providing that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." [328] *The question which the case involves is not what, in a generic sense, may be considered a controversy between states, but whether the particular claim here asserted by the state of South Dakota is, in any view, such a controversy. It is also to be observed that the question is not whether a controversy between states may not arise from a debt originating as the result of a direct transaction between states, but is whether one state can acquire a claim asserted against another state by a citizen of that or of another state or an alien, and as a result sue upon it, and thereby create a controversy between states in a constitutional sense. Indeed, the question is narrower than this, since in this case the alleged debtor state had, years before the transfer of the claim in question, while it was yet owned by individuals, declined to recognize the debt, and had refused payment thereof, as the result of a controversy between itself and its alleged creditors.

I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean, not to give effect to the Constitution, but to destroy a portion thereof. My mind cannot escape the conclusion that if, wherever an individual has a claim, whether in contract or tort, against a state, he may, by transferring it to another state, bring into play the judicial power of the United States to enforce such claim, then the prohibition contained in the 11th Amendment is a mere letter, without spirit and without force. This is said because no escape is seen from the conclusion if the application of the prohibition is to depend solely upon the willingness

of the creditor of a state, whether citizen or alien, to transfer, and the docility or cupidity of another state in accepting such transfer, that the *provision will have no efficacy whatever. And this becomes doubly cogent when the history of the 11th Amendment is considered, and the purpose of its adoption is borne in mind.

It is familiar that the amendment was adopted because of the decision of this court in 1793, in *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440, holding that the grant of judicial power to the United States to determine controversies between a state and a citizen of another state vested authority to determine a controversy wherein a citizen of a state asserted a claim against another state. That the purpose of the amendment was to remove the possibility of the assertion of such a claim is aptly shown by the passage from the opinion of Mr. Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, as quoted in the opinion of the court in this case, saying (p. 406, L. ed. 291):

"It is a part of our history that, at the adoption of the Constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures."

As the purpose of the amendment was to prohibit the enforcement of individual claims against the several states by means of the judicial power of the United States, and as the amendment was subsequent to the grant of judicial power made by the Constitution, the amendment qualified the whole grant of judicial power to the extent necessary to render it impossible, by indirection, to escape the operation of the avowed purpose which the people of the United States expressed in adopting the amendment. How, as declared by Chief Justice Marshall, could the adoption of the amendment have quieted the apprehensions concerning the right to enforce private claims against the states, if the power was left open, after the amendment, to do so if only they were transferred to another state? It is also to be observed that the construction now given causes the judicial power of the United States to embrace *claims not within even the reach [330] of the ruling in *Chisholm v. Georgia*, for that case only decided that under the grant of power a citizen of one state might sue another state. But under the rule of construction now announced, not only claims

held by citizens of other states and aliens, but those held by a citizen of the state, become capable of enforcement, if only the holders of such claims, after the state has refused to pay them, choose to sell or make gift thereof to another state, found willing to become a party to a plan to evade a constitutional provision inserted for the protection of all the states.

Let me, *arguendo*, grant that a case may be conceived of where one provision of the Constitution can be so construed as to render nugatory another and applicable provision. Even such an impossible doctrine can have no relation to the case in hand. The decisions of this court, rendered since the 11th Amendment, have consistently held that that amendment embodied a principle of national public policy whose enforcement may not be avoided by indirection or subterfuge. Ought this rule of public policy to be disregarded by endowing every state with the power of speculating upon state and unenforceable claims of individuals against other states, thus not only doing injustice, but also overthrowing the fiscal independence of every state, and destroying that harmony between them which it was the declared purpose of the Constitution to establish and cement? Such a departure from the provisions of the 11th Amendment, and the rule of national public policy which it embodies, may not be sustained by the assumption that it would be unduly curtailing the independence of the several states to deny them the right of enforcing, by the aid of the Federal judicial power, claims against other states, acquired from private individuals. For this assumption would amount to this,—that any and all of the states only enjoy the essential privilege of being free from coercion as to the claims of individuals, and have the power to manage their financial affairs at the mere pleasure of any of the other states. This is to say, that for the purpose of preserving the rights of the states, those rights must be destroyed.

It is true that the greater number of cases [331] decided by this *court concerning the right to enforce a private claim against a state concerned controversies where suit was brought by citizens of other states or aliens, who were therefore persons expressly within the terms of the 11th Amendment. An analysis of those cases, however, will show that they were decided, not upon the mere ground that the person who sued was within the 11th Amendment, but upon the broad proposition that, by the effect of that amendment, claims of private individuals could not be enforced against a state, and that in upholding this constitutional limitation the court would look at the real nature of the controversy, irrespective of the

parties on the record. If it were found by doing so that, in effect, the consequence of the granting of the relief would be to enforce, by the Federal judicial power, the claim of a private individual against a state, such relief would be denied. I content myself with the reference in the margin to the leading cases of this character,† and come at once to consider the adjudications of this court rendered in two cases which directly related to the operation of the prohibitions of the 11th Amendment on the grant of judicial power to the United States over controversies between states, and to two other cases which directly concerned the effect of the prohibitions of the 11th Amendment in suits brought by persons who were within the grant of the judicial power, but were not embraced within the category of persons specifically referred to in the 11th Amendment. The first two cases referred to are *New Hampshire v. Louisiana* and *New York v. Louisiana*. The opinion *of the court in both [332] was delivered by Mr. Chief Justice Waite, and is reported (1883) in 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176. The suits were originally brought in this court. The complainants were, in the one case, the state of New Hampshire, and in the other the state of New York; the principal defendant in both cases being the state of Louisiana. The complainant states asserted the right to enforce certain pecuniary claims against the state of Louisiana, as the holders of the naked legal title to certain coupons and bonds of the state of Louisiana, which, pursuant

†*Hollingsworth v. Virginia* (1798) 3 Dall. 378, 1 L. ed. 644; *Osborn v. Bank of United States* (1824) 9 Wheat. 739, 849, 6 L. ed. 204, 230; *Briscoe v. Bank of the Commonwealth* (1837) 11 Pet. 321, 9 L. ed. 734; *Louisiana v. Jumel* (1883) 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Polindexter v. Greenhow* (1884) 114 U. S. 270, 286, 29 L. ed. 185, 191, 5 Sup. Ct. Rep. 903, 962; *Marye v. Parsons* Rep. 932, 962; *Hagood v. Southern* (1886) 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Re Ayers* (1887) 123 U. S. 443, 504, 31 L. ed. 216, 229, 8 Sup. Ct. Rep. 164; *Christian v. Atlantic & N. C. R. Co.* (1890) 133 U. S. 233, 243, 33 L. ed. 589, 593, 10 Sup. Ct. Rep. 260; *Louisiana ex rel. New York Guaranty & Indemnity Co. v. Steele* (1890) 134 U. S. 230, 33 L. ed. (1884) 114 U. S. 325, 29 L. ed. 205, 5 Sup. Ct. 891, 10 Sup. Ct. Rep. 511; *Pennoy v. McCannoughy* (1891) 140 U. S. 11, 35 L. ed. 365, 11 Sup. Ct. Rep. 699; *Re Tyler* (1893) 149 U. S. 164, 190, 37 L. ed. 689, 697, 13 Sup. Ct. Rep. 785; *Reagan v. Farmers' Loan & T. Co.* (1894) 154 U. S. 362, 388, 38 L. ed. 1014, 1020, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Scott v. Donald* (1897) 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Tindal v. Wesley* (1897) 167 U. S. 204, 219, 42 L. ed. 137, 142, 17 Sup. Ct. Rep. 770; *Smyth v. Ames* (1898) 169 U. S. 466, 518, 42 L. ed. 819, 839, 18 Sup. Ct. Rep. 418; *Fitts v. McGhee* (1899) 172 U. S. 516, 524, 43 L. ed. 535, 539, 17 Sup. Ct. Rep. 269.

to legislative authority, by assignment, had been acquired from citizens of the respective states, for the purpose of collection for the benefit of such citizens. The defendant state challenged the jurisdiction of this court over the controversy. To sustain such jurisdiction it was pressed by the complainant that the bonds and coupons were negotiable instruments, of which the assignee states became the legal owners, and that as such they, as a matter of law, were the real parties in interest, whether the transfer was a complete sale or merely made for the purpose of collection for the benefit of the assignors. The court first considered the grant of judicial power to the United States prior to the adoption of the 11th Amendment, and held that as such power, when originally conferred, as interpreted in *Chisholm v. Georgia*, embraced the right of a citizen of one state to enforce his claims by suit directly against another state, a state could not, as the holder of the legal title, champion for its citizens a right for the prosecution of which a particular remedy had been provided by the Constitution. Coming to generally consider the effect of the 11th Amendment as elucidated by the history connected with its adoption, it was decided that as that amendment had expressly taken away the right of a citizen of one state to sue another state, a state could not enforce a right the assertion of which in the courts was prohibited to the citizen himself. Noticing the contention that the grant of judicial power over controversies between states was but a substitute for the surrender to the national government, which each state had made, of the power of prosecuting against another state, by force, if necessary, as a sovereign trustee for its citizens, the [333] claims of such citizens, the *proposition was held not to be sustainable, under the Constitution of the United States. It was decided that the special remedy originally granted to the citizen himself "must be deemed to have been the only remedy the citizen of one state could have under the Constitution against another state for the redress of his grievances, except such as the delinquent state saw fit itself to grant." Having announced this doctrine, it was then, as an inevitable deduction from it, decided that, as the 11th Amendment had taken away the special remedy originally provided by the Constitution, there was no other remedy whatever left. The opinion of the court concluded as follows (p. 91, L. ed. p. 562, Sup. Ct. Rep. p. 184):

"The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states, or aliens, without the consent of the state to be sued, 192 U. S.

and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other state to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

To me it seems that this adjudication is conclusive of the question now here. It, in the broadest way, determined that the prohibitions of the 11th Amendment controlled the grant of judicial power as to controversies between the states so as to exclude the possibility of that grant vesting a state with authority in any form, directly or indirectly, to set at naught the 11th Amendment. The case was decided, not upon the particular nature of the title of the bonds and coupons asserted by the states of New Hampshire and New York, since it was conceded that, but for the Constitution, a title such as that propounded would have given rise to an adequate cause of action. The ruling of the court was that, as suits against a state upon the claims of private individuals was absolutely prohibited by the 11th Amendment, such character of claim could not be converted into a controversy between *states, and thus be made justiciable, since [334] to do so would destroy the prohibition which the 11th Amendment embodied. I do not perceive, if one state may not engender a controversy between states, in the constitutional sense, in respect to claims arising out of dealings between a state and individuals, how it was competent for the state of South Dakota to create such a controversy by the acquisition of a claim of the class whose enforcement it was the purpose of the 11th Amendment to effectually prohibit. It is to be observed that in the cases referred to the court did not deny that a sovereign state, in virtue of its existence as such, would not have possessed the inherent power to prosecute against another state the claims of its citizens, and that such a prosecution by it would have constituted a controversy between states in the international significance of those words. But the court held that controversies between states, in the constitutional sense, did not embrace rights of that character, because of the prohibitions of the 11th Amendment, which operated upon the whole grant of judicial power, including, of course, such grant as to controversies between states.

The two other cases to which I have referred are *Hans v. Louisiana* (1890) 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504, and *Smith v. Reeves* (1900) 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919. In the first,

the opinion of the court was delivered by Mr. Justice Bradley; in the second, by Mr. Justice Harlan. In *Hans v. Louisiana*, a suit was brought in the circuit court of the United States against the state of Louisiana by a citizen of that state, under the claim that the rights asserted arose under the Constitution and laws of the United States, and therefore were not within the 11th Amendment, since that amendment only prohibited suits against a state by a citizen of another state or by aliens. The argument was pressed that as the guaranties of the Constitution were all-abiding, that it would be against public policy to deprive a citizen of the protection of the Constitution of the United States by bringing him within the spirit when he was not within the letter of the 11th Amendment. The court answered the contention in the broadest possible way. It held that the effect of the 11th Amendment was to qualify, *to the extent of its prohibitions, the whole grant of judicial power, and, therefore, although a suit by a citizen of a state against a state, to enforce assumed constitutional rights, was not within the letter of the amendment, it was within its spirit, and there was no jurisdiction in the Federal courts over such controversy. In summing up its general conclusions the court said (p. 21, L. ed. p. 849, Sup. Ct. Rep. p. 504):

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a state represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause."

Smith v. Reeves was an action brought in the circuit court of the United States by a corporation created under an act of Congress, against the treasurer of the state of California, to obtain redress concerning certain taxes. The defendant challenged the jurisdiction upon the ground that in effect the action was one against a state. This court, concluding that the state of Califor-

nia was the real party in interest, was led to consider whether a Federal court was thereby deprived of jurisdiction. The contention on the part of the plaintiff was that, as a Federal corporation had a right to invoke, in virtue of the law of its creation, the jurisdiction of the Federal courts, the case was not controlled by the prohibitions of the 11th Amendment forbidding suits against a state by citizens of other states or aliens. The court, speaking through Mr. Justice *Harlan, again adversely disposed of the contention, saying (p. 446, L. ed. p. 1145, Sup. Ct. Rep. p. 923):

"If the Constitution be so interpreted it would follow that any corporation created by Congress may sue a state in a circuit court of the United States upon any cause of action, whatever its nature, if the value of the matter in dispute is sufficient to give jurisdiction. We cannot approve this interpretation."

After referring to the views expressed by Hamilton, Madison, and Marshall, which were commented upon in *Hans v. Louisiana*, the court quoted approvingly the following passage from the opinion in *Hans v. Louisiana*:

"It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they applied equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the 11th Amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the Federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the 11th Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face."

The opinion concluded as follows (p. 449, L. ed. p. 1146, Sup. Ct. Rep. p. 924):

"It could never have been intended to exclude from Federal judicial power suits arising under the Constitution or laws of the United States when brought against a state by private individuals or state corporations, and at the same time extend such power to suits of like character brought by Federal

corporations against a state without its consent."

[337] *Here again I am unable to perceive any ground for taking the case in hand out of the rulings made in the cases just reviewed. The letter of the 11th Amendment was just as inapplicable to a suit by a citizen of a state against a state to enforce his constitutional rights and to a suit by a Federal corporation, suing in the Federal court by virtue of its creation, as it was to the grant of judicial power over controversies between states. But the prohibition of the 11th Amendment was held to apply, because that amendment was again construed as prohibiting the enforcement of claims by private individuals against states through the judicial power of the United States, without reference to the character of the person by whom the claim was asserted. In other words, the decision was that the operation of the 11th Amendment was to be determined, not by the formal party complainant on the record, but by the essential character and nature of the claim or right which was asserted. This being the decision, how, consistently, can the state of South Dakota be held to have power to give effect to a character of claim as to which the 11th Amendment declares the judicial power of the United States shall not extend?

Will not the accuracy of what I have just stated, as applied to this case, be demonstrated by putting the question which this court put in *Hans v. Louisiana* and approvingly reiterated in *Smith v. Reeves*, and giving it the answer which the court gave in those cases, changing, of course, the form of the question to meet the case now here? For this purpose, I repeat the question, placing, however, in brackets the changed mode of expression necessitated by the difference in the character of the parties complainant. "Suppose that Congress, when proposing the 11th Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued" [upon private claims due to its own citizens or to aliens or citizens of other states, if only such claims were sold or otherwise disposed of long after the debtor state had refused to pay them, so as to thus secure their judicial enforcement], "can we imagine that the 11th Amendment would have been adopted by the states? The supposition that it would is almost an absurdity on its face."

[338] *Nor do I think the previous decisions of this court, which are relied upon as establishing that the state of South Dakota may maintain this suit, have any such tendency. Of course, it is not by me denied that a dispute as to boundaries between two states is judicially cognizable as a controversy between states, and that such may also be the

case where one state asserts property rights against another, provided, always, that the assertion of the particular right does not violate the prohibitions of the 11th Amendment. So, also, in my opinion, *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920, and *United States v. Texas*, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488, instead of sustaining the view that the cause of action here asserted can be treated, despite the provisions of the 11th Amendment, as a controversy between states, establish the contrary. In *United States v. North Carolina*, the United States sued the state of North Carolina concerning the interest on certain bonds. No objection was taken by North Carolina to the jurisdiction of the court, since that state voluntarily assented to a judicial determination of the issue involved. There was, and could have been, therefore, no question of jurisdiction, so far as the state of North Carolina was concerned. The only question of jurisdiction which could have arisen was whether a suit by the United States against a state was within the constitutional grant of judicial power. Although the court, in its opinion in *United States v. North Carolina*, did not refer to the subject of jurisdiction, it must be assumed that it was considered. This is shown by a remark concerning *United States v. North Carolina*, made by the court in the course of its opinion in *United States v. Texas*, to the following effect:

"It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against the state."

Those two cases, therefore, so far as jurisdiction is concerned, simply determined that the grant of judicial power concerning controversies between states, whilst not in letter embracing *a suit brought by the United [339] States against a state, in spirit and purpose did give jurisdiction of a suit of that character. The effect of these rulings, then, was but to cause a suit by the United States against a state to be within the meaning of controversies between states. In other words, in ascertaining the import of the grant of judicial power as to controversies between states, the court gave force to the spirit and purpose of the Constitution in order to include a suit by the United States against a state within the category of controversies between states. This was simply applying the same rule of construction to the grant of judicial power for the purpose

of including the United States, which had been previously applied in *Hans v. Louisiana*, in *Smith v. Reeves*, and in all the other cases to which I have referred, in order to exclude jurisdiction over controversies, to entertain which would have been a violation of the spirit and purpose of the 11th Amendment. When *United States v. North Carolina* and *United States v. Texas* are considered, it seems to me clear that the decision now made not only is destructive of the inherent rights of the states as protected by the 11th Amendment, but also strips the government of the United States of its rights as a sovereign, belonging to it under the Constitution. As, under the decisions referred to, a suit between the United States and a state is within the grant of judicial power over controversies between states, it must follow that a suit by a state against the United States is also of that character. Now, as the ruling is that such a controversy may include the claim of a private individual, if only such claim be transferred to a state, it follows that a suit by a state against the United States on a claim of that character is within the grant of judicial power. Thus it has come to pass that any and every claim against the United States, whatever be its character, is enforceable against the United States if only a state chooses to acquire and prosecute its enforcement. It is no answer to suggest that such claims of private individuals are not justiciable unless the law of the United States has caused them to be so, for if the constitutional grant of judicial power embraces such controversies, *as [340] is now necessarily held, any restriction by Congress would be repugnant to the Constitution.

My reason does not perceive how the principles which have been stated and the rulings of this court enforcing them are rendered inapplicable by the suggestion that, as the court may not inquire into the motives actuating a particular transfer of right, therefore it is without power to refuse to enforce in behalf of South Dakota the alleged gift. This proceeds upon the assumption that the want of jurisdiction to enforce a private claim against a state depends upon motive. But the absence of such jurisdiction rests upon the constitutional prohibition, which addresses itself to the very nature of the cause of action, and imposes upon the court the duty to inquire into it. The power of the court when such is the case, even in a case brought in this court by one of the states of the Union to enforce an alleged pecuniary right, is aptly illustrated by *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. There the state of Wisconsin, having obtained a judgment against the defendant cor-

poration in the courts of Wisconsin, availed of the original jurisdiction of this court to sue the defendant corporation to enforce the judgment. It was held that, as the judgment was for a penalty imposed by the laws of Wisconsin, and as penalties had no extraterritorial operation, the court would look at the origin of the rights upon which the judgment was based, and, doing so, declined to enforce the judgment. See also *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237. If, as the result of merely a general rule of law against the extraterritorial operation of statutory penalties, this court looked beyond the judgment sued on by a state to the cause of action merged in the judgment, and refused relief, the court now must have the power to look into the present cause of action and the origin of the rights asserted by the state of South Dakota. To do otherwise seems to me is but to declare that a general principle of law restricting the extraterritorial enforcement of penal statutes must be held to have more sanctity than the declared will of the people of the United States, expressed in the 11th Amendment. Indeed, the existence of power in this court to inquire into purpose and motive in suits brought by one *state [341] against another state was directly upheld in *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176. It was not denied in those cases that the bonds sued upon were negotiable, and that if the rules of law controlling in controversies between private individuals were to be applied, the title of each plaintiff state to the bonds it sought recovery upon could not be gainsaid, but should be regarded as absolute. Coming, however, to enforce the provisions of the 11th Amendment, the court held that it was its duty to depart from the rule ordinarily applied, and to examine into the nature of the asserted rights, and if to give effect thereto would be inconsistent with constitutional provisions, to refuse to lend its aid to the enforcement of the claims.

Second. But putting out of view what seem to be the controlling principles previously stated, let me now look at the controversy from a narrower point of view and consider the rights of the parties by those considerations which would apply to the enforcement of private rights. It is unquestioned on the record that the bonds given to the state of South Dakota and upon which its action is based were past due at the time of the gift, and that for more than twenty years prior to the gift the state of North Carolina had, by her legislation, held herself not bound to pay the same. That these facts were known to the state of South Dakota when it accepted the gift is shown. The

makers of the gift could not transfer to the state of South Dakota rights which they had not. In other words, if, when the gift was made, that which was parted with was not susceptible, and had never been susceptible, of legal enforcement because not embodying a justiciable obligation against the state of North Carolina, the state of South Dakota could not, by the acceptance of the gift, acquire greater rights than were possessed by the transferor. I take it to be the elementary rule of public law that, whilst the contracts of a sovereign may engender natural or moral obligations, and are, in one sense, property, they are yet obligations resting on the promise of the sovereign, and possessing no other sanction than the good faith and honor of the sovereign itself. These principles, as applied to the states of *this Union, are the necessary resultant of the adoption of the 11th Amendment. It is not necessary to refer to opinions of publicists on the general subject, since this court—as to the states of the Union—has declared the doctrine so fully as to leave it no longer an open question in this forum.

The concluding passages already quoted from the opinion in *Hans v. Louisiana*, 33 L. ed. 842, 10 Sup. Ct. Rep. 504, approvingly referred to in *Smith v. Reeves*, state the subject in the clearest possible way. Prior to the cases just mentioned, however, this court in numerous decisions had announced the same doctrine. A few of the more important of those cases will now be briefly noticed. In *Re Ayers* (1887) 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164, the court, speaking through Mr. Justice Matthews, said (p. 504, L. ed. p. 229, Sup. Ct. Rep. p. 182):

"It cannot be doubted that the 11th Amendment to the Constitution operates to create an important distinction between contracts of a state with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132. That obligation, by virtue of the provision of article I., § 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a state. In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the state, the contract is substantially without sanction, except that which arises out of the honor and good faith

of the state itself, and these are not subject to coercion. Although the state may, at the inception of the contract, have consented, as one of its conditions, to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. *Beers v. Arkansas*, 20 How. 527, 15 L. ed. 991; *Memphis & C. R. Co. v. Tennessee*, 101 U. S. 337, 25 L. ed. 960. The very *object [343] and purpose of the 11th Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to, and controlled by, the mandates of judicial tribunals, without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

There is another and allied reason which seems to me equally decisive against this claim. As will be observed from the passage already quoted from the opinion of this court in *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164, it was there affirmatively declared that as the obligation of a state rested but on its conceptions of moral duty, the state itself, under the great responsibilities which attach to it as a sovereign, was the ultimate tribunal to whom the creditor agreed, at the very inception of the contract, to submit his rights. And that where a sovereign state, in the discharge of the public duty thus resting upon it, declared against the payment of an obligation, such conclusion by the sovereign was a determination by the tribunal which had been impliedly agreed on, and was binding upon the creditor, and, as a result of the 11th Amendment, not susceptible of review or change by the courts of the United States. Applying this doctrine to this case it is apparent that years before the transfer of the bonds to the state of South Dakota, the state of North Carolina had, through its duly constituted authorities, determined that the holder of the bonds in question had not the right now asserted by the state of South Dakota under the transfer from such

[344]*creditor. This, after all, only serves additionally to demonstrate the fallacy underlying the assumption that the state of South Dakota, because it is a state and may avail of the grant of judicial power over controversies between states, can, in doing so, escape the prohibition of the 11th Amendment, created for the very purpose of protecting the states and preserving their independent control over their own affairs. It seems to me the gross inequality which must arise from disregarding the judgment of the tribunal selected by the creditor is well illustrated by this case. When the facts which I have at the outset stated are recalled, it will be observed that there were about two and a half millions of dollars of outstanding bonds of the same series as those now owned by the state of South Dakota, and that that amount was reduced to about \$250,000 of principal, as a consequence of the conclusion of the state of North Carolina concerning the exigencies of its financial situation. It is also certain, when the facts stated in the petition presented to the legislature of North Carolina by the assignor of the state of South Dakota are recalled, that but for this vast reduction of the debt produced by the determination of the state of North Carolina, the alleged security now sought to be realized upon by the state of South Dakota would be of no value. The moral attitude shown by the record, then, is this: that the state of South Dakota, as the mere beneficiary of the bounty of an individual, seeks to derive all the benefit resulting from the judgment of the state of North Carolina as to its public debt, and, at the same time, desires to repudiate that judgment, and to obtain rights which never would have been within its reach if the judgment of the state of North Carolina had not been exercised. Under these circumstances it to me seems, even if a court of equity was vested with power to disregard the final judgment of the tribunal selected at the time the bonds were issued, such court should not exercise that power in favor of one standing on the record in the position which the state of South Dakota here occupies.

Looking at the question from a yet narrower point of view, the same conclusion seems [345] to me to be impelled. In *United States v. Buford* (1830) 3 Pet. 12, 7 L. ed. 585, the question was considered whether a claim acquired by the government of the United States from an individual, which was barred by limitation at the time of its acquisition by the United States, was yet enforceable in the hands of the government. The court decided that, as against the United States, under such circumstances, despite the general exemption of the government from the operation of such statute, the bar of the

statute was operative. The court said (p. 30, L. ed. p. 591):

"It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."

And this principle was applied by the court of exchequer in *King v. Morrell*, 6 Price, 24, cited approvingly in *United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 125, 30 L. ed. 83, 6 Sup. Ct. Rep. 1006. The facts of the case were, in brief, as follows: On a scire facias it was sought by the Crown to recover from a creditor of a debtor to the Crown the amount of a certain bill of exchange. On demurrer to a plea of the statute of limitations it was contended that the right of the Crown was not barred by the statute,—by a plea which, in point of fact, admitted the debt. The court held otherwise. Lord Chief Baron Richards observed (p. 28):

"The Crown is only entitled to its debtor's right, and cannot create or revive any right in the person of its debtor if none ever existed, or it has become extinct. In this case, nothing could have been recovered by the debtor of the Crown against this defendant if the statute had been pleaded; I therefore consider that it is also a good bar to the suit of the Crown, who stands precisely in the same situation as its debtor, and that this is an honest plea, which, therefore, the law allows. If the Crown could thus put its debtor in a better situation than he was in before, by such a proceeding as this, the consequences would be monstrous before the passing of the late statute, and the mischief would have been incalculable."

Wood, Baron, said (p. 29):

"In this case, the claim of the Crown is only a derivative right, and it must, therefore, stand in the same situation as its principal."

*Garrow, Baron, remarked (p. 31): [346]

"By a process, said, by a fiction, to be for the benefit of the Crown, it is attempted to revive the debt, and place the creditor in a better situation than the law permits. This is too gross an absurdity; . . ."

These authorities additionally demonstrate that a claim which, when acquired by the state of South Dakota, was without legal sanction, did not, by the mere fact of such acquisition, become a justiciable, enforceable right. It may be said that there was no statute of limitations in the state of North Carolina barring the claim. But this begs the whole question. It assumes that the state of North Carolina should have indulged in the idle ceremony of passing a special statute of limitations extinguishing, after the lapse of a certain time, a cause of ac-

tion which had never existed. The proposition is but a further illustration of the misconception which results from holding that the claim of an individual against a state, which is not enforceable, can be made such by the voluntary act of transferring. The very attribute of sovereignty renders it unnecessary for the sovereign to legislate for its own behalf in the passage of statutes of limitations, insolvent and other like laws, as his will, controlled alone by the duty and sense of responsibility which sovereignty must be presumed to engender, determines the question of liability.

But let me analyze the proposition in order to see what it leads to. What is a statute of limitations? It is but the action of the state in determining that, after the lapse of a specified time, a claim shall not be legally enforceable. In this case, from the very inception of the alleged obligation to the time of the transfer to the state of South Dakota, there was no legal cause of action for the enforcement of the claim under the laws of North Carolina, and by the obligation of the 11th Amendment no cause of action on the subject could be asserted to exist in any court of the United States. To hold that there is a right to recover in this case which would not exist if there had been a statute of limitations barring the cause of action, although none had ever arisen, is but to say that the right of the parties is to be determined by words having no significance whatever. The fact that the state of North Carolina, in her own courts, was not subject to be coerced as to the claim in question, was, in effect, a state statute of limitations, since the act of the state in forbidding the arising of a cause of action is certainly in reason the equivalent of an act of that state barring a cause of action in a case where one could exist. It is the nonexistence of the cause of action at the time of the transfer, upon which rests the rule preventing a sovereign from recovering on a claim which was barred at the time he acquired it. This is true also of the 11th Amendment. As that amendment from the date of the inception of the alleged contract prohibited the assertion of any cause of action concerning the same in the courts of the United States, the amendment was substantially a national statute of limitations. Thus operating, it furnishes an effectual barrier, preventing the state of South Dakota from asserting in the courts of the United States that it had acquired from its transferor a cause of action which the Constitution of the United States prevented from ever existing so far as the judicial power of the United States was concerned.

Nor does the fact that the state of South Dakota alleges there was a pledge or mort-

gage of certain stock in the North Carolina Railroad serve at all to take the case out of the control of the provisions of the 11th Amendment. It is not pretended that any delivery of stock alleged to have been pledged was ever made to the bondholders; on the contrary, it is conceded that the stock in question has always been in the possession of the state of North Carolina. The right to enforce the alleged pledge must therefore rest upon the power to enforce a private claim against the state of North Carolina, and to take from its possession property of which it has ever had the absolute dominion and control. And this view is, to my mind, concluded by the previous rulings of this court, one of which I shall now particularly notice.

Christian v. Atlantic & N. C. R. Co. (1890) 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260, was a bill in equity to reach dividends on the stock of the railroad company, and apply such dividends to the payment of bonds issued by the state of North Carolina, *and for a sale of stock owned and held by the state. It was contended by the defendants that the proceeding was in substance against the state, and therefore within the prohibitions of the 11th Amendment. The correctness of this contention was denied, on the ground that there was a valid contract in favor of the complainant; that by that contract there was a pledge in its favor; and that the object of the suit was not to hold the state of North Carolina or to sue it, but to proceed *in rem* against the stock to enforce the right in and to it resulting from the contract. The court—not at all disputing that, if the premise was correct, the legal conclusion based on it was well founded—proceeded to test the accuracy of the premise. It found that the stock in question had never been actually delivered to the alleged pledgee, but had always remained in the possession of the agents of the state. Reaching this conclusion, it was held that there was no pledge unless such contract resulted from the declaration of the state that the stock held by it was pledged. Coming to consider that question, the court, speaking through Mr. Justice Bradley, said (p. 242, L. ed. p. 592, Sup. Ct. Rep. p. 263):

"It was no more of a pledge than is made by a farmer when he pledges his growing crop or his stock of cattle for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular, sense. His language may amount to a parol mortgage, if such a mortgage can be created; but that is all. So, in this case, the pledge given by the state in a statute may have amounted to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in

possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt. But how is that right to be asserted? If the mortgagor be a private person, the mortgagee may cite him into court and have a decree for the foreclosure and sale of the property. The mortgagor, or his assignee, would be a necessary party in such a proceeding. Even when absent, beyond the reach of process, he must still be made a party and at least constructively cited, by publication or otherwise. This is established by the authorities before *referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign state, no such proceeding can be maintained. The mortgagee's right against the state may be just as good and valid, in a moral point of view, as if it were against an individual. But the state cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a state might be sued in it by a citizen of another state, or of a foreign state; but it was declared by the 11th Amendment that the judicial power of the United States shall not be construed to extend to such suits. *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Marye v. Parsons*, 114 U. S. 325, 29 L. ed. 205, 5 Sup. Ct. Rep. 932, 962; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164."

Applying the ruling made in the case just cited to the case in hand, it to me clearly results that as possession of the alleged pledged or mortgaged stock was never parted with by the state of North Carolina, the right asserted by the state of South Dakota to enforce the alleged pledge comes directly within the prohibition of the 11th Amendment, since in its essence it depends upon the existence in this court of the power to enforce against the state of North Carolina in favor of the state of South Dakota, a mere promise made by North Carolina to a private individual, as to which the state of South Dakota acquired no greater right than was possessed by the individual who made the transfer to it of the bonds in question.

Third. Finally, putting out of view the various considerations which I have previously stated, in my opinion this record discloses a condition of things which ought to prevent a court of equity from exerting its powers to enforce, for the benefit of the state

of South Dakota, the claim which it asserts against the state of North Carolina. From the facts which I have at the outset related, it is undeniable that at the time the gift was made to the state of South Dakota of the bonds in question, *they were past due, [350] and payment thereof had; more than twenty years prior to the gift, been refused by the state of North Carolina. The letter evidencing the gift demonstrates that the purpose of the gift to the state of South Dakota was to enable that state to assert a cause of action against the state of North Carolina which did not exist in favor of the transferrer. It also appears, by the act of the legislature of South Dakota, under which this suit was brought, that the state of South Dakota deemed that it might acquire a mere right to litigate, since the act itself in advance provided that the attorney general of the state should prosecute actions in the name of the state to recover on bonds or choses in action which might be transferred to the state, and that it contemplated litigation without cost to itself, since the act empowered the attorney general to employ counsel to prosecute suits, the compensation to be paid out of the proceeds which might be realized. This condition of things, in my opinion, although it may not be champertous in the strict sense of that word, is in its nature equivalent to a champertous engagement, whose enforcement is contrary to public policy, and one which a court therefore ought not to lend its aid to carry into effect. It has been sometimes said that the doctrine of maintenance and champerty has no application to the sovereign. But this can alone be justified by taking into view the high attributes which pertain to sovereignty. Now, if the state of South Dakota may avail of the delegation of judicial power over controversies between states—a power conferred in view of the sovereign dignity of all the states—for the purpose of destroying the sovereignty of another state by subjecting such state to judicial coercion concerning a claim of a private individual, then it seems to me the state of South Dakota should be treated as any other private individual seeking to enforce a private claim, and should have applied to it by a court of equity the principles of morality and justice which control such courts in refusing aid to persons who acquire merely litigious and speculative claims. As said by this court, in the course of its opinion in *Randolph v. Quidnick Co.* (1890) 135 U. S. 457, 34 L. ed. 200, 10 Sup. Ct. Rep. 655: "It is a case where equity, true to its ideas of substantial *justice, refuses to be bound by [351] the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of

honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken." How aptly these observations apply to the case in hand is shown when it is considered that the holders of more than two million dollars of bonds of the same class as that held by the state of South Dakota, more than twenty years before the transfer to that state, accepted, on the faith of the operation of the 11th Amendment, and the circumstances surrounding the state of North Carolina at the time, the adjustment proposed by the act of 1879; and therefore that the claim of South Dakota now urged, in effect, as I have previously stated, seeks to avail of the result brought about by the operation of the 11th Amendment, and yet at the same time to deny its efficacy as regards the rights which it claims. It is additionally shown by the inference arising from the record that the whole fiscal system of the state of North Carolina is existence since the adjustment of 1879 has rested upon the action taken by the creditors of the state consequent upon their reliance upon the possession by the state of the attributes of sovereignty which it was the purpose of the 11th Amendment to consecrate.

But eliminating all the previous reasoning, and considering the case upon the hypothesis that the controversy is one between states, nevertheless I am of opinion that the court is without jurisdiction. And the statement of the reasons which impel me to this conclusion involves an examination of the second proposition which was by me at the outset stated, that is,—

(B)

The want of power to render the decree which is now directed to be entered, because of the absence of essential parties, whose presence would oust jurisdiction, and the impotency to grant any relief whatever in the absence of such parties.

Even under the view that the general conclusions of the *court as to its authority over the controversy as one between states is well founded, I cannot agree that the holders of the bonds issued in aid of the North Carolina Railroad are not essential parties to this controversy, since the nature of the relief specifically prayed necessitates their presence, and since, without such presence, in my opinion, no decree giving substantial relief to the complainant or doing justice to the principal defendant can be rendered. If they are such essential parties, it is not questioned that the court is without jurisdiction. *California v. Southern P. Co.* 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591.

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Under the assumption that there was a valid mortgage in favor of the complainant and other holders of the same class of bonds, the bill proceeds upon the theory that it is essential that it be determined what claim or right the holders of the bonds issued in aid of the North Carolina Railroad have upon or in the stock in question. To that end the bill challenged the existence of any right of pledge in favor of such bondholders, upon the theory that, as against the holders of bonds issued in aid of the Western North Carolina Railroad, they had lost their right by accepting the compromise of 1879. It is, however, further asserted in the bill that, even if the holders of the bonds issued in aid of the North Carolina Railroad had not, by accepting the compromise of 1879, lost their rights as to the complainant and those similarly situated, yet, as the pledge was past due when the adjustment of 1879 was entered into, it was essential, to afford the complainant relief as a junior secured creditor on the stock, that the entire stock be sold, free from all encumbrances. And this was also the position taken by the answer filed on behalf of the representative of the outstanding bonds issued in aid of the Western North Carolina Railroad. The bill, then, having been framed upon the theory of the necessity of the specific relief referred to, which could not be afforded without the presence of the other lienholders, the cause, it seems to me, ought not now to be decided upon a wholly different theory, and relief inconsistent with that specifically prayed for be awarded to the complainant upon that changed basis.

*But, leaving out of view the considera-[353] tions just stated, it seems to me the decree which it is proposed to enter cannot afford any specific relief to the complainant without destroying, or materially impairing, the rights of the prior lienholders, although they are now held not to be essential parties to the controversy. The pledge in favor of the holders of the bonds issued in aid of the North Carolina Railroad was of all the stock, and for the benefit of all the bonds. It was therefore indivisible. It cannot be divided without impairing the obligations of the contract in favor of those creditors. Now, whilst each of the ten mortgages which it is in effect held the complainant possesses purported to be of ten shares of stock securing each bond, no particular ten shares were delivered, segregated, or identified. As a result no division of the stock held by the state had in fact ever been made, and, therefore, each and every one of the ten shares assumed to be mortgaged to secure each of the bonds were subject to the prior lien on

all the stock in favor of all the holders of bonds issued in aid of the North Carolina Railroad. When the attempt is made to enforce the decree in this case, what shares will be sold? If any particular shares, then, unless the rights of the prior lienholders are to be rendered divisible, although they are indivisible, the shares sold must continue to be subject to the entire pledge in favor of all the bonds issued in aid of the North Carolina Railroad. To state this situation, it seems to me, is to demonstrate that the decree will afford no substantial relief whatever. The best that can be said, under such circumstances, is that the effect of a sale so made will be merely to foment a law suit. A court of equity, when its aid is invoked to give particular relief, if it finds that it is unable to do it, ought not, whilst denying such relief, to enter a decree which confers no substantial relief, but, on the contrary, can only serve as a fruitful source of future litigation, injurious to the rights of the very party or class of persons in whose favor the decree is rendered. But this is not all, for whilst the decree will, in substance, deprive the complainant of any real benefit from his assumed security, a sale under the decree must also result injuriously to the state of North Carolina. Its rights, as well as those of the complainant, are entitled to consideration. The possibility of a deficiency decree is now taken into account in the opinion, and rights on that subject are reserved. But if the sale which is to be ordered is one which must lead to a prejudicial result, then the effect of the decree is simply to order a sale which can produce at best no more than a nominal sum, and will lay a foundation for a deficiency decree for an amount wholly out of proportion to the actual value of the mortgaged property. It is to my mind no answer to point out that whilst there was no segregation and delivery of the ten shares of stock mortgaged to secure each bond, as such division was provided for, a court of equity will treat that as being done which should have been done. The fallacy of this lies in failing to consider the rights of the prior lienholders, and overlooking the fact that their lien was indivisible, and that the segregation provided for in the act of 1866 could not be made without being subordinate to the entire sum of the prior and indivisible right of pledge. When this is borne in mind it results that the rights of those prior lienholders are necessarily clouded or impaired by decreeing that a court of equity will treat that as having been done which ought to have been done, when the very question is, Could it have been done efficaciously, consistently

with the rights of the prior lienholders? They are, therefore, I submit, essential parties, if it is proposed to give any real relief by the decree of sale which is ordered. If it is not proposed to give that character of relief, then such a decree ought not to be entered, especially when it does not accord with, and in reality is inconsistent with, the specific relief asked for.

I am authorized to say that the **Chief Justice**, Mr. Justice **McKenna**, and Mr. Justice **Day** concur in this dissent.

*UNITED STATES, *Appt.*,
v.

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CALIFORNIA & OREGON LAND COMPANY. (No. 4)

CALIFORNIA & OREGON LAND COMPANY, *Appt.*,
v.

UNITED STATES. (No. 5)

(See S. C. Reporter's ed. 355-362.)

Judgment — estoppel by former decree—dismissal of cross bill.

1. A decree dismissing, because of the bona fides of defendant's purchase, a bill filed by the United States under the act of Congress of March 2, 1889 (25 Stat. at L. 850, chap. 377), to avoid, by way of forfeiture, certain patents of land issued by the United States in pursuance of the wagon-road grant made by the act of Congress of July 2, 1864 (13 Stat. at L. 355, chap. 213), is a bar to a subsequent suit by the United States against the same defendant to avoid the patents on the ground that the lands were within an Indian reservation, and therefore excepted from the operation of the grant.
2. The dismissal because of estoppel by former decree of a bill filed by the United States to avoid certain patents of land issued by the United States in pursuance of the wagon-road grant made by the act of Congress of July 2, 1864 (13 Stat. at L. 355, chap. 213), on the ground that the lands were within an Indian reservation, and therefore excepted from the operation of the grant, requires the dismissal of the cross bill which seeks to enjoin the allotments of such lands and the issue of patents therefor to the Indians.

[Nos. 4, 5.]

NOTE.—On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank*, 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* 7 L. R. A. 577; *Morrill v. Morrill*, 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street Rail Co. v. Wharton*, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

Argued March 14, 17, 1902. Ordered for reargument April 21, 1902. Reargued December 9, 10, 1902. Ordered resubmitted to full bench March 16, 1903. Resubmitted March 23, 1903. Ordered for reargument October 26, 1903. Reargued January 5, 6, 7, 1904. Decided February 1, 1904.

CROSS APPEALS from the Circuit Court of the United States for the District of Oregon to review a decree declaring void certain patents of land issued by the United States. Reversed and remanded with instructions to dismiss the bill and cross bill.

See same case below, 103 Fed. 549.

The facts are stated in the opinion.

Mr. **Charles W. Russell** argued the cause and filed a brief for the United States:

The United States is suing in a new capacity as guardian of Indians.

United States v. Boyd, 68 Fed. 577, 27 C. A. 592, 42 U. S. App. 637, 83 Fed. 547; *United States v. Winans*, 73 Fed. 72; *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 599; *Sonnenberg v. Steinbach*, 9 S. D. 518, 70 N. W. 655; *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024; *Morton v. Packwood*, 3 La. Ann. 167; *Rathbone v. Hooney*, 58 N. Y. 463.

In a different second controversy between the same parties in the same capacity only the point actually litigated and decided is concluded.

Cassels v. Vernon, 5 Mason, 332, Fed. Cas. No. 2,503; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024; *Duchess of Kingston's Case*, 20 How. St. Tr. 538; *Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729.

For the rule as to matters that might have been brought into former suit but were not, see—

Eastman v. Porter, 14 Wis. 48; *Williams v. Clouse*, 91 N. C. 327; *Russell v. Placee*, 94 U. S. 606, 24 L. ed. 214; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

Messrs. **John F. Dillon** and **Aldis B. Browne** argued the cause, and, with Mr. *Alexander Britton*, filed a brief for the California & Oregon Land Company:

The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption and stand on the same footing with private individuals.

United States v. Flint, 4 Sawy. 42, Fed. Cas. No. 15,121.

As between private individuals it stands beyond question that controversy over the title to land finally determines, not only

that which was actually litigated between the parties, but all which might have thus been litigated. It is not permitted in the interest of public justice that the individual should bring successive actions upon different grounds and yet involving the same subject-matter.

Freeman, Judgm. 3d ed. § 253, p. 453; *Dowell v. Applegate*, 152 U. S. 327, 343, 38 L. ed. 463, 469, 14 Sup. Ct. Rep. 611; *The Santa Maria*, 10 Wheat. 431, 444, 6 L. ed. 359, 362; *Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.* 5 C. C. A. 249, 12 U. S. App. 320, 55 Fed. 690; *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 1 Am. Dec. 121; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Rogers v. Higgins*, 57 Ill. 244; *Kelly v. Donlin*, 70 Ill. 385; *Bailey v. Bailey*, 115 Ill. 551, 4 N. E. 394; *Kurtz v. Carr*, 105 Ind. 574, 5 N. E. 692; *Martin v. Roney*, 41 Ohio St. 141; *Jordan v. Van Epps*, 85 N. Y. 427; *Thompson v. Lester*, 75 Tex. 521, 14 S. W. 20; *Barksdale v. Greene*, 29 Ga. 418; *Griffin v. Long Island R. Co.* 102 N. Y. 452, 55 Am. Rep. 824, 7 N. E. 735; *Murrell v. Smith*, 51 Ala. 301; *McDonald v. Mobile L. Ins. Co.* 65 Ala. 358; *Kelly v. Hurt*, 74 Mo. 568; *Davis v. Durgin*, 64 N. H. 51, 5 Atl. 908; *Christy v. Spring Valley Waterworks*, 84 Cal. 541, 24 Pac. 307; *Bigelow, Estoppel*, p. 46.

Except in special cases, the plea of *res judicata* applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.

Henderson v. Henderson, 3 Hare, 100; Taylor, Ev. § 1513.

The finality which attends the judgment of a court of law has like application to the decrees of a court of equity.

Hopkins v. Lee, 6 Wheat. 109, 113, 5 L. ed. 218, 219.

Where a fact has been put in issue and determined by final judgment, it becomes as between the same parties and their privies *res judicata*, and is not open to further contestation in a second suit which may involve even a different cause of action.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195.

Where a right, title, or demand is thus put in issue, the final judgment or decree therein binds the parties both as to all matters actually litigated, and as to those which might have been so litigated therein.

Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *Southern P.*

R. Co. v. United States, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154.

The power of the Attorney General, independently of the act of March 2, 1889, to institute suit in the name of the government against us, based upon the objections to our title, made the basis of the pending suit, is and was at all times complete.

United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850.

Mr. Justice **Holmes** delivered the opinion of the court:

These are cross appeals from a decree of the United States circuit court. The bill was brought for the purpose of having certain patents of land issued by the United States declared void. These patents were issued on April 2, 1873, to the Oregon Central Military Road Company, under an act of Congress of July 2, 1864 (13 Stat. at L. 355, chap. 213), granting lands to the state of Oregon to aid in the construction of a wagon [356] road, and in pursuance of "a grant of the same lands by the state to the road company on October 24, 1864. The California & Oregon Land Company claims through mesne conveyances from the patentee. The ground of the bill, so far as the argument before us is concerned, is that the lands in controversy were within the Klamath Indian Reservation, and therefore were "lands heretofore reserved to the United States" within the proviso reserving such lands in the grant of July 2, 1864. As our decision is upon grounds independent of this question, it is unnecessary to state the legislation and facts upon which that controversy turns.

One of the pleas of the land company is that on August 30, 1889, the United States filed an earlier bill in the United States circuit court in respect of these same lands, praying, like the present one, that the patents be declared void; that the land company pleaded matters showing that the patents were valid, and also that it was a purchaser for valuable consideration, without notice; and that on March 29, 1893, a final decree was entered, finding the facts to be as alleged by the land company, including the allegation that the land company was a bona fide purchaser for value, and dismissing the bill on that ground. The land company also filed a cross bill in the present suit to enjoin the allotments of said lands and the issue of patents for the same to the Indians. The cross bill was demurred to.

The circuit court sustained the demurrer, adjudged the plea to be bad, and entered a decree declaring the patents void. We have to deal only with the before-mentioned plea.

The former bill was brought in pursuance of the act of Congress of March 2, 1889 (25 Stat. at L. 850, chap. 377). This act recited

that the Oregon legislature had memorialized Congress, and had alleged that certain of the wagon roads in the state were not completed within the time required by the grants of the United States, and therefore enacted that suits should be brought in the United States circuit court against all claimants of any interest under the grant of 1864, and certain others, "to determine the questions of the seasonable and proper completion of said roads in accordance with the terms of the granting *acts, . . . the [357] legal effect of the several certificates of the governors of the state of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States." The court was authorized to render judgment of forfeiture "saving and preserving the rights of all bona fide purchasers of either of said grants or of any portion of said grants for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried." The act of March 2, 1896 (29 Stat. at L. 42, chap. 39), also confirmed the title of bona fide purchasers.

By § 2, "the state of Oregon, and any person or corporation claiming any interest under or through the grants aforesaid in the lands to be affected by said suit or suits, and whether made a party thereto or not, may intervene therein by sworn petition to defend his interest therein, as against the United States, or against each other, and affecting the said question of forfeiture, and may, upon such petition for intervention, also put in issue and have adjudicated and determined any other question, whether of law or of fact, which may be in dispute between said intervener and the United States, and affecting the right or title to any part of the lands claimed to have been embraced within the grants. . . . Should the lands embraced within said grants or either of them, or any portion thereof, be declared forfeited by the final determination of said suit or suits, the same shall be immediately restored to the public domain, and become subject to disposal under the general land laws; and should the final determination of said suit or suits maintain the right of the aforesaid wagon-road grantees or their assigns to the lands embraced in said grants, the Secretary of the Interior shall forthwith adjust said grants in accordance with such determination, and shall cause patents to be issued for the lands inuring to said grantees under said wagon-road grants and which have been heretofore unpatented."

On the general principles of our law it is tolerably plain that the decree in the suit under the foregoing statute would *be a bar. [358]

The parties, the subject-matter, and the relief sought all were the same. It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself,—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. It would be true of a suit by an executor as compared with a suit by the same person on his own behalf. But that is because in theory of law the executor continues the *persona* of the testator, and therefore is a different person from the natural man who fills the office. This is recognized in *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 599, 606, cited for the United States. Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. See *Werlein v. New Orleans*, 177 U. S. 390, 400, 401, 44 L. ed. 817, 822, 20 Sup. Ct. Rep. 682. The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means,—that is to say, by evidence that the lands originally were excepted from the grant. But in this as in the former suit, it seeks to establish its own title to the fee.

It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi*. *Phosphate Sewage Co. v. Molleson*, 5 Ct. Sess. Cas. 4th Series, 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. *S. C. L. R.* 4 App. Cas. 801, 820. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim (*Fetter v. Beale*, 1 Salk. 11; *Trask v. Hartford & N. H. R. Co.* 2 Allen, 331; *Freeman*, Judgm. 4th ed. §§ 238, 241); and, *a fortiori*, he cannot divide the grounds of recovery. Unless the statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and when the bill was dismissed, was barred as to all by the decree. *Werlein v. New Orleans*, 177 U. S. 390, 44 L. [359] ed. 817, 20 Sup. Ct. Rep. 682; **Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 216, 217, 46 L. ed. 1132, 1134, 22 Sup. Ct. Rep. 820; *Hoscason v. Keegen*, 178 Mass. 247, 59 N. E. 627; *Wildman v. Wildman*, 70 Conn. 700, 710, 41 Atl. 1; *Sayers v. Auditor General*, 124 Mich. 259, 82 N. W. 1045; *Foster v. Hinson*, 76 Iowa, 714, 720, 39 N. W. 682; 192 U. S.

State v. Brown, 64 Md. 199, 1 Atl. 54, 6 Atl. 172; *Boyd v. Boyd*, 53 App. Div. 152, 159, 65 N. Y. Supp. 859; *Shaffer v. Scuddy*, 14 La. Ann. 576; *Henderson v. Henderson*, 3 Hare, 100, 115.

The question, then, is narrowed to whether the statute established a special and peculiar rule of procedure for the cases to be brought under it. No doubt it is true that the ground of recovery that was prominent in the mind of Congress was an alleged forfeiture of the grant, and therefore not unnaturally, in § 2, the result of a forfeiture is stated. But a forfeiture was not the only ground on which the United States might have prevailed. All claimants of any interest were at liberty to intervene and to have any other question affecting the title settled, and if any such other question had been raised and resolved in favor of the United States, of course the same result would have followed. But it cannot be supposed that the United States was not at liberty to raise the same issues which defendants and interveners were given the right to raise. There is no reason for such a discrimination, and its right was admitted at the argument. But if the United States was at liberty to state all its grounds for claiming the land, it was bound to do so on "the same principles and rules of jurisprudence as other suits in equity are therein tried," by which principles and rules, as has been shown, it was expressly enacted that the case should be tried. So far from establishing a special rule, the act shows an intent to settle the title once for all. It was dealing with several grants which might present different cases. It stated in terms that the suits should be brought to determine, not merely the question of forfeiture, but "the right of resumption of such granted lands by the United States," § 1, and it provided that, if the suits should maintain the right of the wagon-road grantees or their assigns to the lands embraced in said grants, the Secretary of the Interior should adjust the grants in accordance with the determination, and issue patents for the lands to which the grantees *were entitled and which [360] had not been patented. See also the language of the act of March 2, 1896, § 1 (29 Stat. at L. 42, chap. 39). It would not be consistent with the good faith of the United States to attribute to it the intent to keep a concealed weapon in reserve in case these suits should fail. On the face of the act it seems to us apparent that these suits were intended to quiet or to end the title of the wagon-road grantees.

As the bill must be dismissed there seems to be no reason why the cross bill should not be dismissed, according to the general rule in such cases. *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65. It is true that the cross bill

is not merely in aid of the defense, and that relief has been given upon a cross bill in such a case, notwithstanding the dismissal of the bill. *Holgate v. Eaton*, 116 U. S. 33, 42, 29 L. ed. 538, 540, 6 Sup. Ct. Rep. 224; *Blythe v. Hinckley*, 84 Fed. 228, 236, 237. But apart from any other questions it may be presumed that after this decision no action will be attempted based on a denial of the land company's title to the fee.

Decree reversed and case remanded to the Circuit Court with instructions to enter a decree dismissing the bill and cross bill.

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan** and Mr. Justice **Brown**, dissenting:

It will be assumed that the lands in controversy had been reserved for the Indians prior to the taking effect of the grant, "except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted."

The act of 1866 made provision for supplying deficiencies "occasioned by any lands sold or reserved, or to which the rights of pre-emption or homestead have attached, or which for any reason were not subject to said grant." [14 Stat. at L. 374, chap. 5.]

March 2, 1889, Congress directed the Attorney General to cause a suit or suits to be brought against all persons, firms, and corporations claiming interests in lands granted to the state of Oregon, by three enumerated acts of Congress, including that under consideration: "To determine the [361] questions of the seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the state of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States, all of such lands as are co-terminous with the part or parts of either of said wagon roads which were not constructed in accordance with requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all bona fide purchasers of either of said grants or of any portion of said grants for a valuable consideration, if any such there be." . . .

By the second section of the act it was provided that the state or any person or corporation claiming under the grant might intervene and defend his interest therein, and might "also put in issue and have adjudicated and determined any other question, whether

of law or of fact, which may be in dispute between said intervenor and the United States, and affecting the right or title to any part of the lands claimed to have been embraced within the grants of lands by the United States to or for either of said wagon roads. Should the lands embraced within said grants or either of them or any portion thereof be declared forfeited by the final determination of said suit or suits, the same shall be immediately restored to the public domain, and become subject to disposal under the general land laws; and should the final determination of said suit or suits maintain the right of the aforesaid wagon-road grantees or their assigns to the lands embraced in said grants, the Secretary of the Interior shall forthwith adjust said grants in accordance with such determination," etc.

The act related to three wagon-road grants, only one of which was involved in this case. This bill sought a forfeiture of the entire grant for reasons stated, and no other matter was put in issue. The bill covered the lands in the reservation and many thousands of acres besides. It seems to me *clear that Congress did not intend that the [362] United States should ask a forfeiture and at the same time litigate exceptions from the grant. The second section is wholly inconsistent with such a theory. The issue was a single issue, and defendants did not seek to have it expanded. The suit was decided in favor of defendants (148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458), and the present bill having been filed in respect of the lands of the Indian reservation, it is now contended that the former decree is a bar to its prosecution.

I do not think so. The former case sought a forfeiture of the entire grant. This bill, accepting the conclusion that there could be no forfeiture, simply sought relief as to particular lands which had not been embraced in the grant and did not pass thereby, but which had been patented in error. Conceding that Congress may pass title subject to Indian occupancy, it did not do so; but these lands were reserved from the grant, while in terms the right of way through the reservation was granted. Had the decree in the prior case been for the government, this right of way would have been declared forfeited with other lands included in the grant, but as the case turned out the right of way passed while the reservation remained unaffected. The cause of action in this suit is entirely different and governed by entirely different considerations from the cause of action in the prior suit. And I think the decree in the former suit operates as an es-

toppel only as to the point or question actually litigated and determined.

There is no hardship involved in this view, as, while the United States were shut up to the question of forfeitures, defendants were permitted to raise any questions they chose, and did not see fit to bring any other into the case.

My brothers **Harlan** and **Brown** concur in this dissent.

[363] *GEORGE C. THOMAS, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 363-371.)

Constitutional law—stamp tax on memorandum of sale of stock not a direct tax.

The stamp tax on a memorandum or contract of sale of a certificate of stock, imposed by the act of Congress of June 13, 1898 (30 Stat. at L. 448, chap. 448), is not unconstitutional as a direct tax on property, which, under U. S. Const. art. 1, § 2, cl. 3, must be apportioned according to the census, but falls within the class of duties, imposts, and excises which, by § 8, cl. 1, of that article, are required to be uniform throughout the United States.

[No. 43.]

Argued December 4, 1903. Decided February 23, 1904.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a conviction for selling a certificate of stock without attaching the requisite revenue stamps to the memorandum of sale. *Affirmed.*

See same case below, 115 Fed. 207.

Statement by Mr. Chief Justice **Fuller**:

George C. Thomas was indicted for violation of the internal revenue laws of the United States in that, being a broker in the city of New York, he sold certain shares of Atchison preferred stock and omitted the required revenue stamps from the memorandum of sale. He demurred to the indictment on the ground that the act of June 13, 1898 (30 Stat. at L. 448, chap. 448), which required the stamps to be affixed, was unconstitutional. The demurrer was overruled, the court, Thomas, J., delivering an opinion. 115 Fed. 207.

Trial was had, defendant found guilty, and judgment rendered, sentencing him to pay a fine of \$500.

NOTE.—As to what are direct taxes—see note to *Scholey v. Rew*, 23 L. ed. U. S. 99. 192 U. S.

The case was then brought here on writ of error.

Mr. **Frank D. Pavey** argued the cause, and, with Messrs. **Walter J. Moore** and **Charles C. Pavey**, filed a brief for plaintiff in error:

A tax upon property is a direct tax within the meaning of the Constitution, and must be apportioned among the states in proportion to the census.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 583, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 513, 158 U. S. 601, 637, 39 L. ed. 1108, 1126, 15 Sup. Ct. Rep. 912.

Shares and certificates of stock are property.

Jellenik v. Huron Copper Min. Co. 82 Fed. 778; *Allen v. Pegram*, 16 Iowa, 163; *Mattingly v. Roach*, 84 Cal. 207, 23 Pac. 1117; *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306; *Weaver v. Barden*, 49 N. Y. 286; 23 Am. & Eng. Enc. Law, p. 590; 1 Cook, Corp. 4th ed. p. 41.

The right of sale and transfer is an inherent attribute of property.

1 Bl. Com. 138; 2 Kent, Com. 317, 320, 326; Bouvier, Law Dict. *Property*; Rutherford, Inst. of Natural Law, p. 20; Puffendorf, Law of Nature, p. 220; *Wynelhamer v. People*, 13 N. Y. 396; *Sherman v. Elder*, 24 N. Y. 381; *Bank of Toledo v. Toledo*, 1 Ohio St. 662; *Exchange Bank v. Hines*, 3 Ohio St. 8; *Tod v. Wick Bros.* 36 Ohio St. 385; *Kuhn v. Detroit*, 70 Mich. 537, 38 N. W. 470; *Arapahoe County v. Rocky Mountain News Printing Co.* 15 Colo. App. 196, 61 Pac. 494; *Com. v. Maury*, 82 Va. 883, 1 S. E. 185; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 534, 58 L. R. A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *Re Marshall*, 102 Fed. 324.

A tax upon the sale of articles is in substance a tax upon the articles themselves, and is invalid if a tax laid in the same manner upon the articles themselves is invalid.

Brown v. Maryland, 12 Wheat. 419, 444, 6 L. ed. 678, 687; *Welton v. Missouri*, 91 U. S. 275, 279, 23 L. ed. 347, 349; *Cook v. Pennsylvania*, 97 U. S. 566, 573, 24 L. ed. 1015, 1018; *Almy v. California*, 24 How. 174, 16 L. ed. 646; *Nicol v. Ames*, 173 U. S. 509, 521, 43 L. ed. 786, 794, 19 Sup. Ct. Rep. 522; *Fairbank v. United States*, 181 U. S. 293, 45 L. ed. 867, 21 Sup. Ct. Rep. 648.

Assistant Attorney General **Purdy** argued the cause and filed a brief for defendant in error:

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

Sinking Fund Cases, 99 U. S. 700, 718, 481

25 L. ed. 496, 501; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Fletcher v. Peck*, 6 Cr. Mch. 87, 128, 3 L. ed. 162, 175; *Dartmouth College v. Woodward*, 4 Wheat. 518, 625, 4 L. ed. 629, 656; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Nicol v. Ames*, 173 U. S. 514, 43 L. ed. 791, 19 Sup. Ct. Rep. 522.

Congress has power to do whatever is necessary, or seems to it necessary, to carry into effect an express power.

M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605.

The selection of the means rests with Congress. Unless these means are forbidden by the Constitution, the courts will not interfere.

M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605; *Fong Yue Ting v. United States*, 149 U. S. 698, 712, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 472, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Within the limitations fixed by the Constitution, the mode of exercising the taxing power is within the discretion of Congress.

License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 501; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, 21 L. ed. 179, 187; *Knowlton v. Moore*, 178 U. S. 41, 59, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747.

In exercising the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in distributing equitably the burdens of government.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Nicol v. Ames*, 173 U. S. 509, 521, 43 L. ed. 786, 794, 19 Sup. Ct. Rep. 522; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 234, 33 L. ed. 892, 894, 10 Sup. Ct. Rep. 533; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Missouri v. Lewis*, 161 U. S.

22, 30, 25 L. ed. 989, 992; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 468, 12 Sup. Ct. Rep. 468; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Walston v. Nevins*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Chicago & N. W. R. Co. v. McLaughlin*, 119 U. S. 566, 30 L. ed. 477, 7 Sup. Ct. Rep. 1366; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.

The constitutionality of a law making an exaction for purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497.

The following are the only direct taxes, within the meaning of the Constitution, which have been decided to be such by the opinions of this court: (1) A capitation or poll tax; (2) a tax on lands (that is, a direct tax on lands such as is ordinarily imposed).

Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *Merchants' Nat. Bank v. United States*, 101 U. S. 1, 25 L. ed. 979; *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99; *Michigan C. R. Co. v. Collector*, 100 U. S. 595, 25 L. ed. 647; *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253.

A tax upon all one's personal estate by reason of one's general ownership thereof.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

A tax on the income of real property.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 513.

A tax upon the income of personal property.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The tax here imposed is an indirect tax within every definition of that term contained in the many decisions of this court, and the writings of leading authors on the subject of political economy.

Knowlton v. Moore, 178 U. S. 47, 44 L. ed. 972, 20 Sup. Ct. Rep. 747; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 558, 39 L.

ed. 811, 15 Sup. Ct. Rep. 513; *Veazie Bank v. Fenno*, 8 Wall. 546, 19 L. ed. 487; Wells, Theory & Pr. of Taxn. p. 341; Cooley, Const. Lim. 595, 5th ed. *480; Miller, Const. 237; Pom. Const. L. § 281; 1 Hare, American Const. L. pp. 249, 250; Burroughs, Taxn. p. 502; Black, Const. Law, p. 162; *Springer v. United States*, 102 U. S. 602, 26 L. ed. 259; Bastable, Public Finance, p. 249.

The tax here imposed is not a direct tax within the meaning of the Constitution, for the reason that it is impossible to apportion it among the several states according to population.

The tax here imposed may be sustained on the theory that it is a tax in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing.

Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; *Lieense Cases*, 5 How. 504, 18 L. ed. 497; *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 993; *Dobbins v. Erie County*, 16 Pet. 435, 10 L. ed. 1022; *Veazie Bank v. Fenno*, 8 Wall. 533, 544, 19 L. ed. 482, 486; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 513; *Michigan C. R. Co. v. Collector*, 100 U. S. 595, 598, 25 L. ed. 647, 648.

The law may also be defended on the theory that the tax imposed is in the nature of a duty or excise upon the contract of sale itself, referring only to the fact that the subject-matter of the sale must be a certificate of stock as the basis or ground for classification.

Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; *Knowlton v. Moore*, 178 U. S. 41, 59, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747; *Treat v. White*, 181 U. S. 264, 268, 45 L. ed. 853, 855, 21 Sup. Ct. Rep. 611.

The tax here imposed may be sustained on the ground of its close analogy to the tax involved in the case of *Hyllton v. United States*, 3 Dall. 171, 1 L. ed. 556.

The tax here imposed may be sustained upon the theory that it is laid upon the privilege or facility afforded the owner of the stock, under and by virtue of the laws of the state authorizing the formation of the corporation, to sell and dispose of his property in the form of a certificate of stock.

Nicol v. Ames, 173 U. S. 521, 43 L. ed. 794, 19 Sup. Ct. Rep. 522.

A tax similar to the tax here under discussion has been uniformly regarded by the legislative and executive departments of the government since its foundation as an indirect tax within the meaning of the Constitution.

If any doubt arises as to the exact nature

of this tax, resort may be had to the practical construction of similar laws by the legislative and executive departments of the government.

Fairbank v. United States, 181 U. S. 283, 311, 45 L. ed. 862, 874, 21 Sup. Ct. Rep. 648.

And, finally, it is contended that an act of Congress imposing a tax directly upon all shares or certificates of stock in all corporations and associations would be constitutional. *A fortiori*, is a law constitutional which merely taxes the sale of, or agreement to sell, such property.

Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; *Veazie Bank v. Fenno*, 8 Wall. 533, 544, 546, 19 L. ed. 482, 486, 487; *Merchants' Nat. Bank v. United States*, 101 U. S. 1, 25 L. ed. 979; *Scholey v. Rew*, 23 Wall. 333, 23 L. ed. 99; *Michigan C. R. Co. v. Collector*, 100 U. S. 595, 25 L. ed. 647; *Springer v. United States*, 102 U. S. 586, 602, 26 L. ed. 253, 259; *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the first clause of § 8 of article 1, of the Constitution, Congress is empowered "to lay and collect taxes, duties, imposts, and excises," "but all duties, imposts, and excises shall be uniform throughout the United States."

This division of taxation into two classes is recognized throughout the Constitution.

By clause 3 of § 2, representatives and direct taxes are required to be apportioned according to the enumeration prescribed, and by clause 4 of § 9, no capitation or other direct tax can be laid except according to that enumeration.

By clause 1 of § 9, the migration or importation of persons by the states was not to be prohibited prior to 1808, but a tax or duty could be imposed on such importation, not exceeding \$10 for each person.

By clause 5 it is provided: "No tax or duty shall be laid on any articles exported from any state."

By clause 2 of § 10, no state can, "without the *consent of the Congress, lay any imposts[370] or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." By clause 3 the states are forbidden, without the consent of Congress, to "lay any duty of tonnage."

And these two classes, taxes so called, and "duties, imposts, and excises," apparently embrace all forms of taxation contemplated by the Constitution. As was observed in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 557, 39 L. ed. 759, 810, 15 Sup. Ct.

Rep. 673, 680: "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts, and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

The present case involves a stamp tax on a memorandum or contract of sale of a certificate of stock, which plaintiff in error claims was unlawfully exacted because not falling within the class of duties, imposts, and excises, and being, on the contrary, a direct tax on property.

There is no occasion to attempt to confine the words "duties, imposts, and excises" to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.

Taxes of this sort have been repeatedly sustained by this court, and distinguished from direct taxes under the Constitution. As in *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556, on the use of carriages; in *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, on sales at exchanges or boards of trade; in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, on the transmission of property from the dead to the living; in *Treat v. White*, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611, on agreements to sell shares of stock denominated "calls" by New York stockbrokers; [371] in *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493, on tobacco manufactured for consumption.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678, and *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, are not in point. In the one the clause of the Constitution was considered which forbids any state, without the consent of Congress, to "lay any imposts or duties on imports or exports," and in the other, that "no tax or duty shall be laid on articles exported from any state." The distinction between direct and indirect taxes was not involved in either case.

The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as

stamp taxes ordinarily do, within the second class of the forms of taxation.

Judgment affirmed.

BANKERS' MUTUAL CASUALTY COMPANY, *Plff. in Err.*,

v.

MINNEAPOLIS, ST. PAUL, & SAULT SAINTE MARIE RAILWAY COMPANY.

(See S. C. Reporter's ed. 371-386.)

Appeal—finality of judgment of circuit court of appeals.

A suit against a railway company engaged in carrying the United States mails under the Federal laws and postal regulations, to recover the value of a registered package alleged to have been lost through its negligence, does not arise under the Federal Constitution and laws so as to deprive the judgment of the circuit court of appeals therein of the finality which exists when the jurisdiction of the circuit court depends entirely on diverse citizenship, where plaintiff relied on principles of general law, and nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States.

[No. 141.]

Argued January 22, 25, 1904. Decided February 23, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Minnesota sustaining a demurrer to a complaint to recover from a railway company engaged in carrying the United States mails the value of a registered package alleged to have been lost by its negligence. *Dismissed* for want of jurisdiction.

See same case below, 54 C. C. A. 608, 117 Fed. 434.

Statement by Mr. Chief Justice **Fuller**:

This action was originally brought in the circuit court of the United States for the district of Minnesota by the German State Bank of Harvey, North Dakota, for which the Bankers' Mutual Casualty Company of Iowa was subsequently substituted as plaintiff, against the Minneapolis, St. Paul, & Sault Sainte Marie Railway Company of Minnesota. The averments gave jurisdiction on the ground of diversity of citizenship. A demurrer to the original complaint was sustained for reasons stated by Lochren, J. (113 Fed. 417.) Thereupon "an amended and substituted complaint" was filed, and on demurrer judgment was rendered in favor of defendant, and affirmed on error by the circuit court of appeals for the eighth circuit. (54 C. C. A. 608, 117 Fed. 434.) This writ of error was then allowed.

The amended complaint was as follows:

"That the Bankers' Mutual Casualty Com-

pany, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the state of Iowa, and a citizen of said state, with its principal place of business at Des Moines, in said state, engaged in the business of insuring banks against loss from robbery and burglary, including the insurance against loss of packages of money while in the course of transmission from place to place, while regularly carried in the United States registered mails.

[373] "That defendant, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the state of Minnesota and a citizen of said state, with its principal place of business at Minneapolis, in *said state, engaged in operating a line of railroad situated in the states of Minnesota and North Dakota.

"That the German State Bank, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the state of North Dakota, and a citizen of said state, with its principal place of business at the town of Harvey, in said state, engaged in a general banking business at said town.

"That during the whole year A. D. 1900, and up to the present time, defendant is and was engaged in carrying the United States mails between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the statutes and laws of the United States, and the regulations established by the Postoffice Department of the United States government, and in pursuance of a fixing of the compensation to be paid to defendant by the United States government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails and upon notice in writing, in the usual form, from the Second Assistant Postmaster General of the United States, requiring defendant to carry said mails and the person in charge thereof.

"That said depot, at or near the town of Harvey, was an intermediate station on that part of defendant's said line of railroad within the state of North Dakota, which extends from the station at Hankinson to the station at Portal, and the railroad line between said stations at Hankinson and Portal is designated by and known to the Postoffice Department of the United States as railroad route No. 161,018, being a distance of 344.58 miles, and the compensation fixed by the United States Postoffice Department, to be paid annually by the United States to defendant during all of the period herein referred to for the carriage of said mails, and the person in charge thereof, is and was the

sum of sixty-four thousand eight hundred and fifteen and 49/100 dollars (\$64,815.49), at the rate of \$188.10 per mile.

*"That this substituted plaintiff is not in [374] possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice or a true copy thereof.

"That during all of the period hereinbefore referred to there was no contract of any kind between defendant and the United States government, concerning or providing for the carriage, by defendant, of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof.

"That on or about the 10th day of November, A. D. 1900, the Metropolitan Bank, a corporation organized under the laws of the state of Minnesota, was engaged in transacting a general banking business in the city of Minneapolis, in said state, and on or about said date, said bank deposited in the United States mails, at Minneapolis, in said state, a package containing lawful money of the United States, commonly known and called currency, of the actual cash value of three thousand dollars (\$3,000.00), in an envelope properly addressed to the German State Bank at Harvey, North Dakota, and prepaid thereon the postage and registration fee, and said package was thereupon duly registered by the postmaster of said postoffice. That from and after the time of depositing said package in said postoffice at Minneapolis, said package and its contents was the property of said German State Bank.

"That said registered package was covered by insurance and indemnity against loss while in transit through the United States mails from Minneapolis to said Harvey, under a policy of insurance issued by said Bankers' Mutual Casualty Company, the substituted plaintiff, said insurance being for the use and benefit of said German State Bank. That a true copy of said policy is hereto attached as part hereof, and marked Exhibit 'A.'

"That on or about November 10th, A. D. 1900, and while said package was in good safety and prior to the departure of the train carrying said registered package, said Metropolitan Bank deposited in the United States mails, at the postoffice *in said city of [375] Minneapolis, a letter of advice, properly addressed to said Bankers' Mutual Casualty Company at Des Moines, Iowa, with postage thereon prepaid; that said letter of advice notified said Bankers' Mutual Casualty Company of the shipment by said Metropolitan Bank of said sum of \$3,000 to said German State Bank of Harvey, and upon said mailing of said letter of advice, the contract of

insurance and indemnity of said registered package of currency immediately attached thereto and became a valid and complete contract of insurance and indemnity by the said Bankers' Mutual Casualty Company, in favor of said German State Bank.

"That in the regular course of transmission of the United States mails between the said city of Minneapolis and the said town of Harvey, said registered package was duly delivered by the postoffice officials of said city of Minneapolis to the railway mail clerk or other proper postal official, and placed in a railway mail car or other proper car, the property of defendant, then standing upon defendant's said line of railway, and was transported by defendant railway company to defendant's railway depot or station, situated in or near said town of Harvey, North Dakota.

"That prior to the arrival of said registered package at said town of Harvey, the same, together with other registered mail packages and other mail matter, was, by said railway mail clerk in charge of said mails, duly enclosed in a regular United States mail sack or mail pouch, which said mail sack or mail pouch was securely locked or fastened by the official government strap and lock.

"That from and after the time of the depositing of the mail sack containing said currency in defendant's mail car at Minneapolis, Minnesota, for the purpose of transit and transportation for delivery at Harvey, North Dakota, the same was under the exclusive care, custody, and control of the postal clerks, regularly employed by the United States government and in charge of the mail in said car; that the mail sacks [376] containing said registered package, from and after the time of its delivery in said postal car to the proper postal clerks therein, up to and including the delivery of said mail sack at Harvey, North Dakota, was in the exclusive care, custody, and control of the said postal clerks or authorities.

"That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained, to one James Magson, the night station agent, or night operator of defendant at said town of Harvey; that said night station agent, or night operator, was not sworn as an official or employee of the Postoffice Department of the United States government, as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of

railway, at said town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of, and deposit said mail sack or mail pouch.

"That defendant was not sworn as an official or employee of the Postoffice Department of the United States government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States mails, or the performance of defendant's duties as such carrier of the mails.

"That § 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered package, is in words and figures as follows, to wit: 'The railroad company will also be required to take the mails from, and deliver them into, all intermediate postoffices and postal stations located not more than eighty rods from the nearest railroad station at which the company has an agent or other representative employed.'

"That said postoffice at Harvey was an intermediate postoffice, and was located not [377] more than 80 rods from defendant's railroad station, or depot, at or near said town of Harvey.

"That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody, also to safely care for and guard said mail sack and its contents during the night, also to safely deliver the same to the postmaster or postmistress at the postoffice in said town of Harvey, North Dakota.

"But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack, and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the postoffice to the postmaster in said town of Harvey. That by reason of defendant's said negligence, some person, to this plaintiff unknown, in some manner not known to this plaintiff, obtained access to said mail sack and opened the same, and abstracted or took therefrom said registered package, whereby the same was wholly lost to said German State Bank.

"That one George A. Soule was then the road master or foreman employed by said defendant at said town of Harvey, or one of defendant's employees or servants, but was not sworn in as an official or employee

of the Postoffice Department, as required by law, and was not authorized or employed by defendant to take charge of said mail sack or to perform any duty in relation thereto, and had no right of access to said mail sack, or to the mail therein contained, by virtue of his said employment by defendant.

[378] "That said Soule had previously unlawfully obtained and caused to be made a key to the United States government mail sacks or mail pouches, and personally, or with the aid and assistance of some person or persons, to this plaintiff unknown, did enter one of the rooms contained in the said depot building, where said mail sack or mail pouch had been placed by *defendant's operator or night agent, on the floor or wall of said room, and not in any separate room, closet, or other safe receptacle, capable of being securely fastened against any intruder or unauthorized person, by lock and key or otherwise. That said room was not designed for, or capable of, safely keeping valuable articles of property.

"That said Soule, or other person, had no right of access to said room, or to said mail sack or mail pouch, but through the negligence of defendant and its said night operator or night agent, as set forth in this complaint, did gain entrance to said room and obtain access to said mail sack or mail pouch, and the mail matter therein contained, and did find said mail sack or mail pouch situated or placed as above set forth, so that the same was readily accessible to any person gaining entrance to said room, and did find said mail sack or mail pouch wholly unprotected and unguarded by said night operator or otherwise.

"That said Soule, or other person, by reason of the aforesaid negligence of said defendant and its said night agent or night operator, did obtain access to said mail sack or mail pouch and did unlock the same and abstract and take therefrom the aforesaid registered package, containing said three thousand dollars (\$3,000) in currency, and did unlawfully convert the same to his use and benefit, and the same has never been delivered or returned to said German State Bank or to said Metropolitan Bank of Minneapolis, or to this plaintiff, the Bankers' Mutual Casualty Company, or to any one for the benefit of any of them."

[Then followed averments of payment to the German State Bank by the casualty company under its policy of insurance; of demand on defendant for repayment, and refusal; of subrogation and assignment; and prayer for judgment.]

Messrs. A. U. Quint and George W. Bowen argued the cause, and, with **Messrs. Horatio F. Dale and William Connor**, filed a brief for plaintiff in error:

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The question of the duty of the postmaster, under the Federal statutes, and his liability for violation of such duty, was considered by this court on writ of error to the New York court of appeals in *Teal v. Felton*, 12 How. 284, 13 L. ed. 990. This is clearly a precedent for the jurisdiction of this court in the case at bar, as the question to be determined is identical with ~~the~~ *Teal Case*.

This case comes within the exception contained in § 6 of the judiciary (circuit court of appeals) act of 1891.

Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; *Robinson v. Bell*, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16; *McFaddin v. Evans-Snyder-Buel Co.* 185 U. S. 505, 46 L. ed. 1012, 22 Sup. Ct. Rep. 758; *Studebaker v. Perry*, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463; *Marande v. Texas & P. R. Co.* 184 U. S. 173, 46 L. ed. 487, 22 Sup. Ct. Rep. 340; *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 49; *Bolles v. Outing Co.* 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94; *Brady v. Daly*, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62; *Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628; *Sonnenheil v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 493, 19 Sup. Ct. Rep. 233; *Union P. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 343; *Northern P. R. Co. v. Amato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740.

Certiorari should be allowed if necessary or proper.

Security Trust Co. v. Dent, 187 U. S. 237, 47 L. ed. 158, 23 Sup. Ct. Rep. 61.

Mr. Alfred H. Bright argued the cause and filed a brief for defendant in error:

It makes no difference how many Federal questions may have come into this case after the circuit court acquired jurisdiction, because if the jurisdiction was in fact acquired solely upon the ground of diverse citizenship the decision of the circuit court of appeals is final.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Huguley Mfg. Co. v. Galtton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

The sufficiency of this complaint to sustain the claim of jurisdiction on the ground that it shows a suit "arising under the Constitution or laws of the United States" must be tested by rules firmly settled by the decisions of this court.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 202, 24 L. ed. 656, 658; *American Sugar Ref. Co. v. New Orleans*,

181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 143, 17 L. ed. 571, 576; *Starin v. New York*, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 243, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867.

No "title, right, privilege, or immunity under the Constitution of the United States" is claimed in the amended complaint; nor considering it in view of the general demurrer is it possible to deduce any issue whatever in respect to any such right from the complaint. This cannot be a case, then, arising under the Constitution.

Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656.

Claims made in argument, of whatever value they may be, cannot be considered by the court on this question because the circuit court did not acquire jurisdiction on any such claims or grounds.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Huguley Mfg. Co. v. Galtion Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

The consideration of the question must be confined to the complaint because upon that the circuit court acquired jurisdiction, and the record cannot be enlarged by argument for the purpose of making out a Federal question which does not otherwise clearly appear.

St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 44 L. ed. 315, 17 Sup. Ct. Rep. 925; *Hanford v. Davies*, 163 U. S. 273, 279, 41 L. ed. 157, 159, 16 Sup. Ct. Rep. 1051.

Not every suit which springs out of facts related to the authority of the United States or to the Constitution or laws thereof, regardless of the nature of that relation, may be said to be a suit arising under the Constitution or laws of the United States.

Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *New Orleans Mail Co. v. Flanders*, 12 Wall. 130, 20 L. ed. 249; *Albright v. Teas*, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171; *Bausman v. Dixon*, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; *Price v. Pennsylvania R. Co.* 113 U. S. 218, 28 L. ed. 980, 5 Sup. Ct. Rep. 427.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

If the jurisdiction of the circuit court depended entirely on diversity of citizenship, the judgment of the circuit court of appeals was made final by the act of March 3, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550], and this writ of error must be dismissed. But it is contended that jurisdiction also rested on the ground that the case arose under "the Constitution or [381] laws of the United States, and that must be tested by the settled rule that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends, and which appears on the record by plaintiff's own statement of his case in legal and logical form, such as is required in good pleading. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Arbuckle v. Blackburn*, 191 U. S. 405, ante, 239, 24 Sup. Ct. Rep. 148; *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28.

The amended complaint alleged that defendant was engaged in carrying the mails by virtue of the laws and postal regulations of the United States; that a registered pack-

age of currency was deposited in the mails, delivered to the mail clerk on the proper mail car belonging to defendant, duly enclosed with other mail matter in a securely locked mail sack, and transported by defendant to its station at Harvey; that the mail clerk, between eleven and twelve o'clock at night, delivered the mail sack, duly locked and containing the registered package of currency, to the night station agent of defendant at the town of Harvey, who was duly authorized by defendant to receive and take charge of all mail matter received there on defendant's railway, neither defendant nor the station agent having taken the oath as officials or employees of the Postoffice Department; and it was then averred:

"That § 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered package, is in words and figures as follows, to wit: 'The railroad company will also be required to take the mails from, and deliver them into, all intermediate postoffices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'

[382] "That said postoffice at Harvey was an intermediate postoffice, and was located not more than 80 rods from defendant's railroad station, or depot, at or near said town of Harvey.

"That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody; also to safely care for and guard said mail sack and its contents during the night; also to safely deliver the same to the postmaster or postmistress at the postoffice in said town of Harvey, North Dakota.

"But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack, and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the postoffice to the postmaster in said town of Harvey."

And further, that defendant's road master entered the depot, unlocked the mail bag with a key he had unlawfully caused to be made, abstracted the package of currency, and converted its contents; that the room where the mail bag was placed was "not designed or capable of safely keeping valuable articles or property," and that it was through the negligence of defendant and its

station agent that the man gained entrance to the room and obtained access to the mail bag.

It will be perceived that plaintiff relied on principles of general law applicable to negligence, and to the liability of defendant if there were negligence, and nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States. The complaint did indeed deny that there was any contract between defendant and the government, but that was merely a conclusion of law, inconsistent with the statutes and with the facts alleged. And whether the duty counted on was imposed by law, or arose from contract, the question remained whether defendant was a public agent of the United States and the consequences of that relation, and the construction of no provision of the Constitution or of any law of the United States on which the recovery depended was put in controversy.

In other words, no definite issue in respect of a right claimed under the Constitution or any law of the United States was deducible from plaintiff's statement of its case, and if the postal regulations could, under circumstances, be regarded as laws of the United States creating a right which might be denied or secured according to one construction or another, it did not appear that the construction of the extract from § 713 of those regulations was in any way in dispute, or could have been. And the averments of the complaint cannot be helped out by resort to the other pleadings or to judicial knowledge. *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47.

The Constitution empowers Congress to establish postoffices and post roads, and Congress has passed laws accordingly, pursuant to which defendant was carrying the mails. But the alleged cause of action was not referable to those laws or put on the ground that defendant was an officer or public agent of the United States. That was matter of defense and could not be and was not resorted to by plaintiff to obtain jurisdiction. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

A writ of error to the judgment of a state court stands on different ground. Such was *Teal v. Felton*, 12 How. 284, 13 L. ed. 390, in which the postmaster relied on an act of Congress in defense, and the writ was properly granted under the 25th section of the judiciary act.

Cases against United States officers as such, or on bonds given under acts of Congress, or involving interference with Federal process, or the due faith and credit to be accorded judgments, are not in point; nor does the case fall within the ruling that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation it may [384] have except as specially restricted. The doctrine of *Pennsylvania Railroad Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113, cannot be extended so as to embrace cases like the present. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 509, 44 L. ed. 864, 866, 20 Sup. Ct. Rep. 726. On the other hand, such cases as *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Colorado Cent. Consol. Min. Co. v. Turek*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 259, 42 L. ed. 460, 18 Sup. Ct. Rep. 62; *Western U. Telg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171, show that suits, though involving the Constitution or laws of the United States, are not suits arising under the Constitution or laws where they do not turn on a controversy between the parties in regard to the operation of the Constitution or laws on the facts.

In *Price v. Pennsylvania R. Co.* 113 U. S. 218, 28 L. ed. 980, 5 Sup. Ct. Rep. 427, which was a writ of error to the supreme court of Pennsylvania, the question arose whether a railway mail clerk was a passenger within a certain statute of Pennsylvania, and Mr. Justice Miller, delivering the opinion, said:

"The plaintiff argues here, and insisted throughout the progress of the case in the state courts, that by reason of certain laws of the United States as applied to the facts found in the verdict of the jury, the decedent was a passenger, and the supreme court erred in holding otherwise. These laws are thus cited in the brief of plaintiff's counsel:

"Act of March 3, 1865, § 8, 13 Stat. at L. 506, chap. 89, provides that "for the purpose of assorting and distributing letters and other matter in railway postoffices, the Postmaster General may, from time to time, appoint clerks, who shall be paid out of the appropriation for mail transportation."

"Section 4000, Rev. Stat. (U. S. Comp. Stat. 1901, p. 2719), requires that "every

railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.' "

*"We do not think these provisions either [385] aid or govern the construction of the proviso in the Pennsylvania statute.

"The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge; nor does the fact that he is in the employment of the United States, and that defendant is bound, by contract with the government, to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any right as against the railroad company which would not belong to any other person in a similar employment by others than the United States. We are, therefore, of opinion that no question of Federal authority was involved in the judgment of the supreme court of Pennsylvania, and the writ of error is accordingly dismissed."

Although that case was a writ of error to a state court, it was held, in effect, that it was too obvious for controversy that the acts of Congress referred to did not give the mail clerk any particular right as against the railroad company in respect of negligence, and therefore this court declined to entertain the writ.

We repeat that the rule is settled that a case does not arise under the Constitution or laws of the United States unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege, or immunity on which recovery depends will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction. *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; **Starin v. New* [386] *York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 192 U. S.

222; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

Tested by this rule, the jurisdiction of the circuit court depended entirely on diversity of citizenship, and not in any degree on grounds making the case one arising under the Constitution, laws, or treaties of the United States.

Writ of error dismissed.

Mr. Justice **White** dissented.

BRUNSWICK TERMINAL COMPANY
et al.
v.

NATIONAL BANK OF BALTIMORE.

(See S. C. Reporter's ed. 386-397.)

Corporations — stockholder's liability — pledgee as stockholder—effect of transfer of stock.

A transfer of bank stock on the books of the bank in favor of a pledgee which held it as collateral security does not render such pledgee liable as a stockholder for the bank's indebtedness created after the stock has been retransferred on the books of the pledgee upon payment of the loan, notwithstanding the pledgee's failure to give notice of the retransfer, which, under Ga. Code 1882, § 1496, is requisite to exempt from an existing individual liability as a stockholder under a corporate charter, where the stockholder's individual liability under the charter of the bank in question is limited to the par value of his stock "at the time the debt was created."

[No. 88.]

Argued December 9, 10, 1903. Decided February 23, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit bringing up for consideration a cause pending in that court on an appeal from a decree of the Circuit Court for the District of Maryland dismissing a bill to enforce the individual liability of stockholders in a state bank. Decree of the Circuit Court *affirmed*.

See same case below in circuit court, 112 Fed. 812.

Statement by Mr. Chief Justice **Fuller**:

This was a bill filed January 14, 1898, in

NOTE.—On the rights and liabilities of pledgees and distributees of corporate stock—see note to *Frater v. Old Nat. Bank*, 42 C. C. A. 135.

On the liability of a pledgee of stock as a shareholder—see note to *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 139.

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the circuit court of the United States for the district of Maryland by the Brunswick Terminal Company and others, creditors of the Brunswick State Bank, chartered by the state of Georgia, which failed and was declared insolvent in May, 1893, to enforce, in behalf of its creditors, against the National Bank of Baltimore, a statutory liability equal to the par value of certain shares of stock in the state bank at one time standing in the name of the Baltimore bank.

The case was first heard on demurrer to a plea of the Maryland statute of limitations. The demurrer was overruled, the defense sustained, and the bill dismissed. 88 Fed. 607. On appeal to the circuit court of appeals for the fourth circuit, the decree was reversed and the cause remanded for further proceedings. 48 L. R. A. 625, 40 C. C. A. 22, 99 Fed. 635.

The cause was then heard on the pleadings, and an agreed statement of facts, the parties reserving the right to refer to any pertinent laws or statutes of Georgia, as follows:

"That the Brunswick State Bank was a corporation chartered, organized, and existing under the laws of the state of Georgia, and was engaged in the general banking business in that state; that on or about the 30th day of May, 1893, William M. Wiggins and others, alleging themselves to be creditors of said Brunswick State Bank, filed their petition in the superior court of Glynn county, Georgia, against said bank, alleging that it was insolvent, and praying for the appointment of a receiver to take possession of its assets, and administer them, and on the 29th day of June following the court decreed that the bank was insolvent and appointed a permanent receiver for the purposes stated; that the state of Georgia and Glynn county were, under the laws of Georgia, preferred creditors, and the assets obtained by the receiver as the assets of the bank were exhausted in the payment of these preferred claims *and [388] the costs of litigation, and nothing was left for the payment of other creditors of the bank; that the following persons are creditors of the said Brunswick State Bank in the amounts stated in connection with their names, and were originally parties plaintiff in said cause, or having become such subsequently, that is to say: [Here follow lists of creditors.]

"That the defendant is a national bank, chartered, organized, and conducting a business of a bank at the city of Baltimore, in the state of Maryland, under the provisions of the statutes of the United States in relation to national banks and their operation.

"That in the month of August, 1890, the defendant discounted for one Lloyd a promissory note drawn by him and F. E. Cunningham for the sum of ten thousand dollars

(\$10,000.00), indorsed by the copartnership firm of Lloyd & Adams, and by W. A. Cunningham, and received, together with the note, as the collateral security for its payment, one hundred and ten (110) shares of the capital stock of said Brunswick State Bank of the par value of one hundred dollars (\$100.00) per share; that, in order to protect itself as pledgee, the defendant caused this stock to be transferred into its own name on the books of the Brunswick State Bank, on or about the 25th day of August, 1890; that the said note was paid to the defendant at the time of its maturity, and the defendant being under obligation to return the stock, the pledge being at an end and the pledgeor entitled to its return, retransferred the stock on the books of said Brunswick State Bank by direction of the pledgeor, and the said transfer was fully completed on the books of the said bank on or before the 20th day of October, 1890, but no notice by publication of the fact of said retransfer was given by the defendant; that the defendant never had or claimed any interest in said stock, save under the pledge aforesaid, but never notified the Brunswick State Bank, its stockholders or creditors, that it held said stock otherwise than as the absolute owner thereof.

[389] "That the indebtedness of said Brunswick State Bank to *all of the plaintiffs in this cause accrued after the said 20th day of October, 1890, from transactions with said bank commenced after that date, and the plaintiffs had no knowledge in fact that the name of the defendant had appeared upon the books of said Brunswick State Bank as a stockholder.

"It is agreed that the court may draw inferences from any of the foregoing facts to the same extent as if the facts had been proven by means of witnesses."

The circuit court rendered a decree dismissing the bill. 112 Fed. 812.

An appeal to the circuit court of appeals was taken and that court certified to this court certain questions concerning which it desired instructions for the proper decision of the case. After full argument on the merits this court required the whole record and cause to be sent up for consideration.

Messrs. Henry W. Williams and **C. P. Goodyear** argued the cause, and, with **Messrs. W. E. Kay, H. Winslow Williams,** and **William S. Thomas,** filed a brief for the Brunswick Terminal Co.:

A stockholder cannot relieve himself from liability by a mere transfer of his stock, or cease to be a stockholder by the mere transfer of his stock, but remains liable, not only to creditors whose claims were created prior to such transfer, but to all creditors of the

corporation until he has given the notice required by law of such transfer. This is the settled law of Georgia.

Lane v. Morris, 8 Ga. 468; *Thornton v. Lane*, 11 Ga. 459; *Force Bros. v. Dahlonga Tanning & Leather Mfg. Co.* 22 Ga. 86; *Mason v. Force*, 30 Ga. 99; *Brobston v. Chatham Bank*, 95 Ga. 505, 22 S. E. 277; *Chatham Bank v. Brobston*, 99 Ga. 801, 27 S. E. 790.

It has been held by this court that it will not be bound by the decision of a state court determining a right under a statute, if that very right is at that time before the Federal courts for determination.

Burgess v. Seligman, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Sanford v. Poc*, 60 L. R. A. 641, 16 C. C. A. 308, 37 U. S. App. 378, 69 Fed. 546. Affirmed in 165 U. S. 195, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Stanly County v. Coler*, 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811.

But this is the limit to which the court will go in this direction.

Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52; *Manley v. Park*, 187 U. S. 547, 47 L. ed. 296, 23 Sup. Ct. Rep. 208.

Messrs. Frank Gosnell and **William L. Marbury** argued the cause, and, with **Mr. Allan McLane**, filed a brief for the Baltimore National Bank:

The question of the liability of the appellee as a stockholder of the "Bank" is one of commercial law and general jurisprudence, and consequently the circuit court of appeals is not bound to follow the decisions of the supreme court of Georgia thereon.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Stanly County v. Coler*, 190 U. S. 435, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811.

When the shares of stock in question were transferred on the books of the "Bank" from the pledgeor to the appellee, as security for the payment of the debt, and when the same were retransferred by the appellee to the pledgeor upon the payment of that debt, the law of Georgia as to the status of a person holding shares of stock in a corporation as collateral security was well defined. He was declared not to be a stockholder.

National Exch. Bank v. Sibley, 71 Ga. 726.

Persons dealing with a corporation have in view the financial standing and responsibility of its stockholders.

Williams v. Hanna, 40 Ind. 544; *Thompson. Liability of Stockholders*, § 95; 1 Cook, *Stockholders*, § 259; *Matthews v. Albert*, 24 Md. 527.

Statutes imposing double liability upon stockholders are strictly construed.

Cook, Stockholders, ¶ 214.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Baltimore bank was a national bank, and was not authorized to permanently invest any portion of its capital in the stock of other corporations, nor did it attempt to do so in this instance. The shares of stock of the Brunswick bank were merely accepted as collateral to a note discounted by the Baltimore bank. They stood, it is true, for a few weeks in the name of the Baltimore bank on the registry of the Brunswick bank, but they were then retransferred to the pledgee as appeared on the registry, the note having been paid. Complainants became creditors long after the transaction, and were chargeable with notice so far as the Baltimore bank was concerned.

[390] But notwithstanding the latter bank only held the shares as collateral, and had returned the pledge in due course on the payment of the loan, the contention is that the bank is under a statutory liability to these subsequent creditors, to the full amount of the shares it had temporarily held as security.

This additional liability of a stockholder depends on the terms of the statute creating it, and as it is in derogation of the common law, the statute cannot be extended beyond the words used.

As to stockholders of the Brunswick bank, such a liability was imposed by the 9th section of the charter, granted in 1889, which provided "that said corporation shall be responsible to its creditors to the extent of its property and assets, and the stockholders, in addition thereto, shall be individually liable equally and ratably, and not one for another, as sureties to the creditors of such corporation for all contracts and debts of said corporation, to the extent of the amount of their stock therein, at the par value thereof, respectively, at the time the debt was created, in addition to the amount invested in such shares."

Tested by the language of this section, the Baltimore bank was never under liability to these creditors. For if this national bank could have been regarded as the owner of these shares from August 25 to October 20, 1890, notwithstanding the actual facts and the limitations on its powers, it was not such stockholder, in fact or in appearance, at the time complainants' debts were created. It acquired the stock as pledgee, August 25, 1890, and the note to which it was collateral, having been paid, retransferred it October 20, 1890, the retransfer being regularly entered on the books of the bank. It was after

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this that the transactions commenced from which the indebtedness to complainants arose, and no element of estoppel was involved.

Nevertheless complainants contend that the Baltimore bank remained liable as a stockholder because it did not give notice of the retransfer under § 1496 of the Georgia Code of 1882, reading as follows:

"When a stockholder in any bank or other [391] corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability unless he receives a written notice from a creditor within six months after such transfer, of his intention to hold him liable; *provided*, he shall give notice once a month, for six months, of such transfer, immediately thereafter, in two newspapers in or nearest the place where such institution shall keep its principal office."

This section was obviously not intended to impose a liability, but to exempt from an existing liability. If any debt had been created from August 25 to October 20, and perhaps as to any debt outstanding on August 25, the Baltimore bank, treating it as a stockholder from August 25 to October 20, might have been held liable because it did not give the statutory notice, but no such case is presented. On the face of this record it is immaterial whether there were any creditors during the six months after the retransfer to give or to receive notice or whether there was any indebtedness incurred prior to August 25, or during the period from August 25 to October 20, 1890.

We concur in the views of the circuit court, as thus expressed by Morris, J.:

"As by the charter of the Brunswick State Bank a stockholder was only liable as surety to creditors to the extent of his stock in the bank at the time the debt was created, and as the defendant, at the time the debts of the plaintiffs were created, had no stock in the bank, and was therefore under no liability, it does not appear that § 1496 of the Georgia Code could have any application to this defendant. This section is applicable to a stockholder who, being individually liable to a creditor or creditors, shall then transfer his stock. The stockholders in the Brunswick State Bank were only liable for debts created while they held their stock, and, as applied to them, this section means that a stockholder who has become individually liable to a creditor by holding stock at the time the creditor's debts were created shall be exempt *from such liability, pro-[392] vided he publishes a notice that he has transferred his stock, unless, within six months after the transfer, the creditor gives him notice that he intends to hold him liable. This

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would seem to be the plain meaning and intention of the statute.

"As § 1496 enables a stockholder who, by the charter, is already under liability to a creditor, to escape that liability by transferring his stock, unless the creditor gives him notice within six months after the transfer, it is sensible and understandable why notice of the transfer should be given; but, as to persons who as yet had no dealing with the bank out of which debts could be created, to require notice to them would not be sensible, and would be a mere arbitrary penalty, without reason,—a thing which is not to be imputed to the legislature if the section is capable of a more reasonable interpretation. If no notice of transfer by advertisement is given by the stockholder, then no notice within six months need be given by the creditor, and both stand upon the rights given by the charter, unaffected by § 1496 of the Code."

But it is said that the highest judicial tribunal of Georgia has decided otherwise, and that the circuit court and this court are bound to accept its interpretation of these statutory provisions. Without discussing the exceptions to that rule the inquiry in the first instance is as to what has been actually decided by the supreme court of Georgia in respect of the construction and application of those provisions in circumstances such as exist in this case. We are referred to the cases of *Brobston v. Downing*, 95 Ga. 505, 22 S. E. 277, decided May Term, 1894; and *Chatham Bank v. Brobston*, 99 Ga. 801, 27 S. E. 790, decided December Term, 1895, which involved the charter of the Brunswick State Bank.

The court delivered no opinion in *Brobston v. Downing*, but the first headnote by Bleckley, Ch. J., was in these words: "With or without a clause in the charter restricting the personal statutory liability of stockholders to the *amount of stock at its par value at the time the debt in question was created, the liability exists and continues for any debt incurred by the corporation at any time until the stockholder who claims to be exempt by reason of having sold and transferred his stock before the debt was created has given notice of such sale, conformably to § 1496 of the Code. Lumpkin, J., concurring *dubitante*."

This does not in terms refer to stock which has been held as collateral, and retransferred on payment of the loan.

In the second case there was no opinion of the court, but the following headnotes appear:

"1. The decisions of this court in the cases of *Brobston v. Downing*, and *vice versa*, and *Brobston v. Chatham Bank*, 95 Ga. 505, 22 S. E. 277, upon a review thereof, are affirmed.

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"2. Where the charter of a bank imposes on all of its stockholders personal liability to its creditors, such liability attaches as well to those who acquire a complete legal title to stock of the bank by having the same transferred to them as collateral security for debts due by the transferrers, as to those who purchase such stock outright.

"3. Under the charter of the Brunswick State Bank, and the general rules of law applicable thereto, a stockholder is individually liable for his *pro rata* part of the corporation debts created before he acquired his shares of stock by transfer, as well as for a like part of those created during his ownership of the shares.

"4. A stockholder in that bank is also liable to the same extent upon debts of the corporation created after he transferred his shares, unless he gave notice of the transfer, as prescribed in § 1496 of the Code."

These were followed by four other headnotes, which need not be set forth.

Of the three members of the court, Mr. Justice Lumpkin and Gober, J., filed an explanatory opinion, in which, after giving the 9th section of the Brunswick bank charter, and § 1496 of the Code of 1882, they stated:

"*In the case of *Brobston v. Downing*, 95 Ga. 505, 22 S. E. 277, this court in effect decided that a stockholder in this bank was individually liable for his *pro rata* part of the debts of the corporation created before he became a stockholder, as well as for a like proportion of the indebtedness incurred by it while he held his stock. This decision controls the present cases. Upon a review of it, duly allowed, Chief Justice Simmons and Justice Lumpkin are of the opinion that it should be affirmed; and Judge Gober, being thus bound by it, of necessity concurs in the judgments now rendered. He is nevertheless of the opinion that in dealing with the cases reported in 95 Ga. *supra*, the court, in so far as it held that a stockholder of this bank could be made liable for any debt created by it before he actually became a stockholder, misconstrued that portion of the bank's charter which is quoted above. If free to do so, he would hold that, under the language just referred to, the individual liability of a stockholder of this corporation is limited to such debts only as were contracted during the time he was an owner of stock and up to the date when, relatively to such liability, he legally severed his connection with the corporation. We all agree that any such owner, although he may have transferred his stock, would still be bound, under the above-cited section of the Code, for whatever liability the charter fixed upon him, unless he gave the notice provided for by that section.

"In 1894 an act was passed by the general assembly which materially modifies the law

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bearing upon this subject, in that it dispenses with any necessity for a stockholder, upon transferring his stock, to publish notice of the fact in order to be discharged from liability. That act declares that 'when-ever a stockholder in any bank or other corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability by such transfer, unless such bank or other corporation shall fail within six months from the date of such transfer.' Acts of 1894, p. 76; Civil

[395]Code, § 1888.† *In view of the radical change thus made in the law, the difference of opinion which exists between the majority and the minority of the court as constituted for the hearing of the cases now in hand is, apparently, of but little practical importance, save as affecting the result of the present litigation. If another case should arise the decision of which would depend upon the question as to which we disagree, the whole matter would still be open to review by a bench of six justices. Accordingly, we have agreed among ourselves to let the present decision stand upon the headnotes as announced, with the foregoing explanation of our reasons for not entering upon a discussion as to what should be the proper construction of the bank charter now under consideration."

As the reference was to the increase of the number of justices from three to six, which followed soon after, we think this explanation indicated that it was contemplated that "the whole matter would be open for review," before the new bench, if another case arose. The power to re-examine would exist, and these remarks were evidently intended to suggest that in the circumstances it might be properly exercised. And this, although the point of disagreement was confined to the question whether liability attached in

[396]respect of indebtedness created *before the particular stockholders sought to be charged became such.

We conclude, therefore, that the questions before us have not been so definitively determined by the state court as to entitle such determination to be adopted and applied in this case. And this conclusion is confirmed

by other considerations. The foregoing decisions were rendered in 1894 and 1895, and the Baltimore bank was not a party to the litigation and was never within the jurisdiction of the Georgia courts. The transaction with this bank occurred in 1890, and fully terminated October 20 of that year.

When it took the collateral shares in its own name, it seems to us that it had the right to assume that it ran no risk of incurring liability by virtue of the terms of the charter of the Brunswick bank for indebtedness created after, in the ordinary course of business, it ceased to hold the stock, and that it could not reasonably have supposed that § 1496 of the Code of Georgia was intended arbitrarily to make all who might have held the stock of the Brunswick bank from time to time liable for every transaction during twenty years (the period of limitations), after they had ceased to be stockholders.

There had been no such ruling in respect of the statutory liability imposed by the charter of the Brunswick bank on its stockholders when the loan was made and paid, and the cases cited from Georgia reports prior to 1894, all of which we have carefully examined, dealt with different provisions, and involved different considerations.

The charter of the Brunswick bank was granted in 1889, at which time § 1496 had been in force for many years, and its application could only extend to the liability imposed by the charter,—namely, liability for indebtedness created while the relation of stockholder existed. The words "at the time the debt was created" must be held to have been providently inserted as words of limitation, and cannot be rejected nor rendered inefficacious by the prior law, which only applied to the actual situation, and did not control it nor purport to do so.

*The question is not whether all stockhold-[397]ers remained such if notice were not published, but whether the liability as stockholders, as to subsequent transactions, continued in spite of the termination of that relation, and that question is answered by the explicit terms of the 9th section of the charter.

Decree affirmed.

†Sections 1, 2, and 6 of the act of 1894 are as follows:

Sec. I. *Be it enacted by the general assembly of the state of Georgia, etc.,* That from and after the passage of this act, whenever a stockholder in any bank or other corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability by such transfer, unless such bank or other corporation shall fail within six months from the date of such transfer.

Sec. II. *Be it further enacted,* That the stockholders in whose name the capital stock stands

upon the books of such bank or other corporation at the date of its failure shall be primarily liable to respond upon such individual liability; but upon proof made that any of said shareholders at the date of the failure are insolvent, recourse may be had against the person or persons from whom such insolvent shareholder received his stock, if within a period of six months prior to the date of the failure of such bank or other corporation.

Sec. VI. *Be it further enacted,* That all laws and parts of laws in conflict with this law be, and the same are, hereby repealed.

SPRECKELS SUGAR REFINING COMPANY, *Plff. in Err.*,

v.

PENROSE A. McCLAIN, Collector of Internal Revenue for the First District of Pennsylvania.

(See S. C. Reporter's ed. 397-418.)

Appeal — finality of judgment of circuit court of appeals—suit arising under revenue laws—constitutional law—tax on sugar refining not a direct tax—computation of gross annual receipts — wharfage receipts — interest on bank deposits — dividends on stock.

1. A suit to recover the amount of a tax exacted under the war revenue act of June 13, 1898 (30 Stat. at L. 448, 464, chap. 448, U. S. Comp. Stat. 1901, p. 2297), and paid under protest, in which not only is the construction of that statute involved, but the rights of the parties depend, on the plaintiff's own showing, upon the constitutionality of such statute and the construction or application of the Federal Constitution, is not one arising under the revenue laws within the meaning of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550), § 6, which makes the judgment of the circuit court of appeals in such cases final; and such judgment may, therefore, be brought to the Federal Supreme Court for review as of right.
2. The "special excise tax" imposed on sugar refining by the war revenue act of June 13, 1898 (30 Stat. at L. 448, 464, chap. 448, U. S. Comp. Stat. 1901, p. 2297), § 27, to be measured by gross annual receipts in excess of a named sum, is not a direct tax, which, under the Federal Constitution, must be apportioned among the several states according to population, but is an excise imposed by Congress under its power to lay and collect excises which shall be uniform throughout the United States.
3. Receipts of a sugar refining company from wharves owned by it and almost exclusively used for the unloading of sugar consigned to it are properly included in the gross annual receipts upon which the amount of the tax imposed upon sugar refining by the war revenue act of June 13, 1898 (30 Stat. at L. 448, 464, chap. 448, U. S. Comp. Stat. 1901, p. 2297), § 27, is to be computed.
4. Interest on bank deposits and dividends on shares of stock owned by a sugar refining company are not properly included in the gross annual receipts upon which the amount of the tax imposed on sugar refining by the war revenue act of June 13, 1898 (30 Stat. at L. 448, 464, chap. 448, U. S. Comp. Stat. 1901, p. 2297), § 27, is to be computed.

[No. 103.]

Argued December 3, 1903. Decided February 23, 1904.

NOTE.—As to what are direct taxes—see note to *Scholey v. Rew*, 23 L. ed. U. S. 99.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the Circuit Court for the Eastern District of Pennsylvania granting to plaintiff a portion of the relief sought by an action to recover the amount of a tax exacted under the war revenue act and paid under protest. *Reversed* and remanded for further proceedings.

See same case below, 51 C. C. A. 201, 113 Fed. 244.

The facts are stated in the opinion.

Mr. **John G. Johnson** argued the cause and filed a brief for plaintiff in error:

To such extent as the refining company received dividends upon shares of stock held by it in other sugar refining companies, these dividends were paid to it by the companies out of the profits of sugar refining done by them, in pursuance of a license tax which had been determined by reference to their receipts from such refining. In no sense were receipts of such dividends by the refining company receipts from its business of refining sugar.

People ex rel. Chicago Junction R. & Union Stockyards Co. v. Roberts, 154 N. Y. 1, 47 N. E. 974; *People v. Albany Ins. Co.* 92 N. Y. 458; *Bailey v. New York C. & H. R. R. Co.* 106 U. S. 109, 27 L. ed. 81, 1 Sup. Ct. Rep. 62.

To hold that the dividends collected by the refining company upon shares of stock in other sugar refining companies by it owned were liable to be returned as part of its receipts works double taxation, inasmuch as these dividends are part of a fund arising from receipts in the hands of the subsidiary sugar refining companies from their business of sugar refining, upon which they had been compelled to pay a tax.

While double taxation is possible, it is never presumed in a case like this.

Cooley, Taxn. 2d ed. 1886, chap. VI. p. 225; *Bailey v. New York C. & H. R. R. Co.* 106 U. S. 109, 27 L. ed. 81, 1 Sup. Ct. Rep. 62; *Merchants' Ins. Co. v. McCartney*, 1 Low. Dec. 447, Fed. Cas. No. 9,443.

So far as the court below permitted a tax to be assessed, measured by receipts of wharfage, interest, and dividends, it sustained a clearly unconstitutional tax, i. e., one upon wharves, moneys, and shares.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015.

If the jurisdiction of the circuit court attached, not solely because of diverse citizenship, but also because of a constitutional

question, the judgment of the circuit court of appeals was not final.

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

The decision of the circuit court of appeals is made final in cases arising under the revenue laws; but it is not made thus final in cases arising under the Constitution of the United States.

Huguley Mfg. Co. v. Galetton Cotton Mills, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

A question arising under the Constitution of the United States can hardly be held to be one arising under the revenue laws.

United States v. American Bell Teleph. Co. 159 U. S. 548, 553, 40 L. ed. 255, 257, 16 Sup. Ct. Rep. 69.

Solicitor General **Hoyt** argued the cause and filed a brief for defendant in error:

This court is without jurisdiction of the writ of error.

Carter v. Roberts, 177 U. S. 496, 500, 44 L. ed. 861, 863, 20 Sup. Ct. Rep. 713; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 282, 45 L. ed. 859, 862, 21 Sup. Ct. Rep. 646; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.

The intention of Congress was to relieve the burden of this court, and to make decisions of the circuit court of appeals in the classes of cases mentioned in the act of March 3, 1891, § 6, final in that court, no matter what questions, constitutional or otherwise, might be involved therein, subject, however, to the right on the part of that court to certify (see *United States v. Lee Yen Tai*, 51 C. C. A. 299, 113 Fed. 465; *United States v. Lee Yen Tai*, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. Rep. 629), and by this court to review by certiorari.

Owensboro v. Owensboro Waterworks Co. 53 C. C. A. 146, 115 Fed. 318; *Loeb v. Columbia Twp.* 179 U. S. 478, 479, 45 L. ed. 285, 21 Sup. Ct. Rep. 174; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 295, 46 L. ed. 546, 548, 22 Sup. Ct. Rep. 452; *United States v. Jahn*, 155 U. S. 109, 112, 39 L. ed. 87, 89, 15 Sup. Ct. Rep. 39.

Even if a party might be entitled to come directly to this court from a Federal circuit court, yet if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court.

Cary Mfg. Co. v. Aeme Flexible Clasp Co. 187 U. S. 428, 47 L. ed. 245, 23 Sup. Ct. Rep. 211.

No valid objection can be urged against this tax on the ground that it is double. Certainly, so far as it may be thus considered, that effect is merely indirect, remote, and consequential.

Cooley, Taxn. pp. 222, 223; *Delaware* 192 U. S.

Railroad Tax, 18 Wall. 206, 21 L. ed. 888; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198; *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; 1 Desty, Taxn. p. 203.

The tax is an excise, and plainly indirect.

Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99; *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253; *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; *Atty. Gen. v. Reed*, L. R. 10 App. Cas. 141.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, who was the plaintiff below, is a sugar refining company, incorporated under the statutes of Pennsylvania for the purpose "of refining sugar, which will involve the buying of the raw material therefor, and selling the manufactured products, and of doing whatever else should be incidental to the said business of refining."

The defendant is the collector of internal revenue for the first district of that commonwealth.

The plaintiff seeks by two separate actions to recover certain sums paid by it under protest to the defendant as collector, and which it is alleged were unlawfully exacted by that officer under the 27th section of the act of June 13th, 1898, entitled "An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes;" by which act a tax was imposed upon the gross annual receipts, in excess of a named sum, of every person, firm, corporation, or company carrying on or doing the business of refining sugar,—the amount of the tax to be determined by the returns of business required by the statute. 30 Stat. at L. 448, 464, chap. 448, U. S. Comp. Stat. 1901, p. 2297.

By agreement of the parties, the issues in the two causes were consolidated and tried as one cause.

It is conceded that before bringing the actions the plaintiff did all that was required in order to maintain a suit against the collector, and that the payments made by it to that officer were not voluntary.

The record contains a summary of the re-

turns made by the plaintiff, covering its entire gross receipts from June 14th, 1898, to August 1st, 1900, under these heads: Period Covered by Return; Indebtedness Due before June 14th, 1898; Amounts Received from Interest, Rent, and Wharfage, and Stevedoring; Sugar Sold since June 14th, 1898; Gross Receipts; Amount of Tax Paid; and Dates of Payment."

[399] The plaintiff contended that for the purposes of the tax in *question certain things were included, as being part of its gross annual receipts arising from business, which could not properly have been so included, and that no tax could legally have been exacted on account of them. The government insisted that no taxes had been exacted which the law did not require to be paid.

In its statement of demand the plaintiff alleges that no part of its receipts from other sources than the business of refining sugar was taxable under the provisions of the act; that no tax upon receipts was payable or collectible before the end of the year from the date of the passage of the act; that the administration of the act makes arbitrary, unjust, and illegal discrimination founded on a pretended difference between the business of manufacturing and of refining sugar, between the plaintiff and other persons, firms, corporations, and companies carrying on and doing the business of refining sugar; and that all the provisions of the act subjecting the plaintiff to pay the tax in question were in violation of the Constitution of the United States, and void.

That statement also shows that upon appeal to the commissioner of internal revenue, it urged the following reasons why the sums it had paid should be refunded: That the act, so far as it assumed to subject corporations or companies carrying on or doing business of refining sugar to pay a special excise tax, was unconstitutional and void; that the tax was a direct tax, which had not been apportioned among the several states as required by the Constitution, was not uniform throughout the United States, and was invalid; that the plaintiff was, and at all times had been, engaged in the business of manufacturing, and not in that of refining, sugar; that it refines sugar only incidentally in the process of manufacture, and is, therefore, not liable for the payment of the tax; that by the provisions of the act the tax was payable annually at the end of each year; and the collection thereof monthly or for periods less than a year and prior to the expiration of the year was illegal, unauthorized, and void; and that the tax was [400] assessed upon, and *collected from, gross receipts that included receipts outside of those coming from the business of refining sugar; that such gross receipts included receipts

from sales of sugar made prior to the passage of the act, from interest on loans and indebtedness, from dividends upon stock owned by the plaintiff in other sugar refining companies, from wharfage collected by it upon wharves owned by it, and from receipts from other sources.

One of the contentions of the plaintiff was that, apart from its constitutionality, the act of 1898, properly construed, did not embrace the claims here in dispute, and therefore did not authorize the defendant to demand and collect the taxes here in question.

The cause was determined in the circuit court upon an agreed special verdict of a jury. Some of the positions taken by the plaintiff were sustained while others were overruled. Judgment was rendered in favor of the plaintiff for \$1,056.82, the aggregate of the sums paid (with interest thereon) by way of tax upon receipts on business done before the passage of the act, and for stevedoring. 109 Fed. 76. The plaintiff prosecuted a writ of error to the circuit court of appeals, which sustained the judgment, except in one particular, namely, in requiring the plaintiff to pay the tax in question otherwise than annually. 51 C. C. A. 201. 113 Fed. 244. And the case is here upon writ of error sued out by the plaintiff.

It may be stated that both courts below formally sustained the constitutionality of the act of 1898, remitting that question to this court for full consideration and determination.

We are met at the threshold of this case with a question of jurisdiction raised by the government, which contends that under the existing statutes the judgment of the circuit court of appeals cannot be reviewed by this court, at the instance of the plaintiff, as of right.

By the 5th section of the judiciary act of March 3d, 1891, appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to this court in certain specified cases, among which is "any case that involves the construction or application of the Constitution of the United States," and, "any case in which the constitutionality of any law of the United States . . . is drawn in question." § 5.

By the 6th section of the same act it is provided that the circuit courts of appeals "shall exercise appellate jurisdiction to review, by appeal or by writ of error, [the] final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees *of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent [406]

entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also, in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that in every subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any question or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal, and excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." 26 Stat. at L. 826, chap. 517 (U. S. Comp. Stat. 1901, pp. 549, 550).

This suit was cognizable by the circuit court under the judiciary act of 1887-88, as one arising under both the Constitution and the laws of the United States. 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508. It arose under the Constitution, because the plaintiff's cause of action, as disclosed in its statement of demand, has its sanction in that instrument, if it be true, as [407] alleged, that *the act of 1898, under which the defendant proceeded when collecting the taxes in question, is repugnant to the Constitution. And it arose under the laws of the United States because it arose under a statute providing for internal revenue. By § 629, subdivision 4, of the Revised Statutes (U. S. Comp. Stat. 1901, p. 503), the circuit courts, without regard to the citizenship of the parties, may take original cognizance of suits arising under a law of that character. That provision has not been superseded by the judiciary act of 1887-88. See also Rev. Stat. §§ 3220, 3226 (U. S. Comp. Stat. 1901, pp. 2086, 2088).

Was the judgment of the circuit court sub-

ject to review only by this court, or was it permissible for the plaintiff to take it to the circuit court of appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the circuit court. *Huguley Mfg. Co. v. Galton Cotton Mills*, 184 U. S. 291, 295, 46 L. ed. 546, 549, 22 Sup. Ct. Rep. 452. But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the circuit court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the 5th section of the act of 1891, and, consequently, could not have come here directly from the circuit court. As, then, the case made by the plaintiff involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the circuit court of appeals had jurisdiction to review the judgment of the circuit court, although, if the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the circuit court, or, at its election, to go to the circuit court of appeals for a review of the whole case. Of course, *the plaintiff, having elected to go to [408] the circuit court of appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the circuit court to this court. *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Ayres v. Polsdorfer*, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196.

It remains to inquire whether the judgment of the circuit court of appeals was so far final, within the meaning of the 6th section of the act of 1891, that it could not be reviewed here as of right upon writ of error. Can the judgment of that court in this case be re-examined here in any way except upon writ of certiorari granted by this court? The government insists that it cannot, because the case—to use the words of the 6th section of the act of 1891—is one "arising . . . under the revenue laws." So far as we now remember, this precise point has not heretofore arisen for our determination. Looking at the purpose and scope of

the act of 1891, we are of opinion that the position of the government on this point cannot be sustained. It rests upon an interpretation of the act that is too technical and narrow. The meaning of the words "arising . . . under the revenue laws," in the 6th section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the 5th section of that act. We do not think that the words quoted necessarily embrace a case carried to the circuit court of appeals, which, although arising under the revenue laws, and involving a construction of those laws, depends, for a full determination of the rights of the parties, upon the construction or application of the Constitution, or upon the constitutionality of an act of Congress. We lean to that interpretation of the act which enables the defeated party in such a case in the circuit court of appeals to have, as of right, upon writ of error to that court, a re-examination here of the judgment (the requisite amount being involved) if the correctness of the judgment [409] depends in whole or in part upon *the application or construction of the Constitution, or upon the constitutionality of any act of Congress drawn in question.

What we have said is in harmony with our former decisions, although the precise point here was not involved in any of them. In *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 280, 281, 45 L. ed. 859, 861, 21 Sup. Ct. Rep. 646, 647, it was said: "It was held in *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174, where the jurisdiction of the circuit court rested on diverse citizenship, but the state statute involved was claimed in defense to be in contravention of the Constitution of the United States, that a writ of error could be taken directly from this court to revise the judgment of the circuit court, although it was also ruled that the plaintiff might have carried the case to the circuit court of appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the circuit court. . . . If plaintiff, by proper pleading, places the jurisdiction of the circuit court on diverse citizenship, and also on grounds independent of that,—a question expressly reserved in *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35,—and the case is taken to the court of appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment (and the power to certify

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assumes the power to decide), an appeal or writ of error would lie under the last clause of § 6, because the jurisdiction would not depend solely on diverse citizenship. *Union P. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843." In *Huguley Mfg. Co. v. Galtton Cotton Mills*, 184 U. S. 290, 295, 46 L. ed. 546, 549, 22 Sup. Ct. Rep. 452, 454, it was said: "If after the jurisdiction of the circuit court attaches on the ground of diversity of citizenship, issues are raised the decision of which brings the case within either of the classes set forth in § 5, then the case may be brought directly to this court; although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought here as of right. *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174. *If the jurisdiction of the [410] circuit court rests solely on the ground that the suit arises under the Constitution, laws, or treaties of the United States, then the jurisdiction of this court is exclusive; but if it is placed on diverse citizenship, and also on grounds independent of that, then, if carried to the court of appeals, the decision of that court would not be made final, and appeal or writ of error would lie. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646. . . . The ground on which the jurisdiction of the circuit court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals cannot be regarded otherwise than as made final by the statute."

Now, as the judgment of the circuit court of appeals may be brought to this court, as of right, where the jurisdiction of the circuit court rested upon the diversity of citizenship, and also upon grounds that would bring the case within § 5 of the act of 1891, it must be held that the judgment of the circuit court of appeals is not final, within the meaning of the 6th section, in a case which, although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving, from the outset, from the plaintiff's showing, the construction or application of the Constitution or the constitutionality of an act of Congress.

For the reasons stated we hold that the plaintiff was entitled, of right, to a writ of error for the review by this court of the judgment of the circuit court of appeals.

Coming now to the merits of the case, we first notice the contention of the plaintiff that the 27th section of the act of 1898 imposes a direct tax, in violation of the constitutional provision relating to the appor-

tionment of taxes of that kind among the several states.

The above section of the act of 1898 is as follows: "Sec. 27. That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any [411] pipe line for transporting oil or *other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars. And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation, or company may be located, or in which such person has his place of business. Such return shall be verified under oath by the person making the same, or, in case of corporations, by the president or chief officer thereof. Any person or officer failing or refusing to make return as aforesaid, or who shall make a false or fraudulent return, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars for each failure or refusal to make return as aforesaid and for each and every false or fraudulent return."

The contention of the government is that the tax is not a direct tax, but only an excise imposed by Congress under its power to lay and collect excises which shall be uniform throughout the United States. Art. 1, § 8. Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts. The tax is defined in the act as "a special excise tax," and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of laying and collecting excises.

This general question has been considered in so many cases heretofore decided that we do not deem it necessary to consider it anew upon principle. It was held in *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95, that [412] the income tax imposed by the *internal revenue act of June 30th, 1864, amended July 13th, 1866 (13 Stat. at L. 276, chap. 173, 14 Stat. at L. 98, chap. 184), on the amounts

insured, renewed, and continued by insurance companies, on the gross amount of premiums received, on dividends, undistributed sums and income, was not a direct tax, but an excise duty or tax within the meaning of the Constitution; in *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482, that the statute then before the court, which required national banking associations, state banks, or state banking associations, to pay a tax of 10 per centum on the amount of state bank notes paid out by them, after a named date, did not, in the sense of the Constitution, impose a direct tax, but was to be classed under the head of duties which were to be sustained upon the principles announced in *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95; in *Scholey v. Rev.*, 23 Wall. 331, 23 L. ed. 99, that the tax imposed on every devolution of title to real estate was not a direct tax, but an impost or excise, and was, therefore, constitutional; in *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, that the tax imposed (30 Stat. at L. 448, chap. 448, U. S. Comp. Stat. 1901, p. 2297) upon each sale or agreement to sell any products or merchandise at an exchange, or board of trade, or other similar place, either for present or future delivery, was not, in the constitutional sense, a direct tax upon the business itself, but in effect "a duty or excise law upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act," which was "separate and apart from the business itself;" in *Knowlton v. Moore*, 178 U. S. 41, 81, 44 L. ed. 969, 986, 20 Sup. Ct. Rep. 747, that an inheritance or succession tax was not a direct tax on property, as ordinarily understood, but an excise levied on the transmission or receipt of property occasioned by death; and in *Patton v. Brady*, 184 U. S. 609, 46 L. ed. 713, 22 Sup. Ct. Rep. 493, that the tax imposed by the act of June 13th, 1898, upon tobacco, however prepared, manufactured, and sold, for consumption or sale, was not a direct tax, but an excise tax which Congress could impose; that it was not "a tax upon property as such, but upon certain kinds of property, having reference to their origin and intended use."

In view of these and other decided cases, we cannot hold that *the tax imposed on the [413] plaintiff expressly with reference to its "carrying on or doing the business of . . . refining sugar," and which was to be measured by its gross annual receipts in excess of a named sum, is other than is described in the act of Congress,—a special excise tax, and not a direct one, to be apportioned among the states according to their respective numbers. This conclusion is inevitable from the judgments in prior cases, in

which the court has dealt with the distinctions, often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or re-examined. It would subserve no useful purpose to do so. It must suffice now to say that they clearly negative the idea that the tax here involved is a direct one, to be apportioned among the states according to numbers.

It is said that if regard be had to the decision in the *Income Tax Cases*, a different conclusion from that just stated must be reached. On the contrary, the precise question here was not intended to be decided in those cases. For, in the opinion on the rehearing of the *Income Tax Cases*, the Chief Justice said: "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such." 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The question of the constitutionality of the act having been disposed of, we turn our attention to the questions involving its construction merely.

As already stated, the judgment of the circuit court determined certain questions for the plaintiff. But as the government did not prosecute a writ of error to the circuit court of appeals those questions cannot be examined here, and we can only consider such points, on the merits of the case, as are raised by the plaintiff's assignments of error.

[414] *It was in proof that the plaintiff owned three wharves on the Delaware river, at which vessels landed, and for the use of which those vessels paid wharfage according to the rates prescribed by a general tariff. A large part, nearly all, of the sugar refined by the plaintiff was brought into the port of Philadelphia by vessels which come to those wharves, and such vessels paid wharfage according to that tariff. Many vessels brought raw sugar which the refining company had purchased abroad. The wharves were built by the plaintiff for the purpose of transacting any business that it might have or for which it saw fit to use them. And nearly all the business done at that time at the wharves was the unloading of sugar consigned to the plaintiff. The exceptions were too few to be regarded as material. Upon its receipts from such wharf-

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age the plaintiff had been compelled to pay a tax. Was it required by the act to pay a tax upon receipts of profits from that source? In other words, were the receipts from wharfage properly included in plaintiff's gross annual receipts upon which the amount of the prescribed tax was to be computed?

On this question the circuit court said: "Scarcely any vessels lie at these wharves except the vessels that bring raw sugar to the plaintiff, and the wharves are used for the convenience and greater profit of the corporate enterprise. The money paid by the vessels for wharfage is, I think, a receipt of the business." The view of the circuit court of appeals was thus expressed: "The use which the plaintiff really made of its wharves was in 'carrying on or doing the business of . . . refining sugar.' They were part of the plant of that business, and, as it was actually conducted, they were an essential condition of it. Consequently their receipts were its receipts, and as such they were properly comprised in the assessment. *Adams Exp. Co. v. Ohio*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305."

This question is not wholly free from difficulty. But we think the better reason is with the ruling in the circuit court and in the circuit court of appeals, to the effect that the "wharves, in every substantial sense, [415] constituted a part of the plaintiff's "plant," and, if not absolutely necessary, were of great value, in the prosecution of its business; and that receipts derived by plaintiff from the use of the wharves by vessels—particularly because, with rare exceptions, the vessels using them brought to the plaintiff the raw sugar which it refined—were receipts in its business of refining sugar. The primary use of the wharves was in connection with, and in the prosecution of, that business. The importation of raw sugar from abroad was not, in any proper sense, a separate business, but an essential part of the plaintiff's general business of refining sugar. The wharves were part of the instrumentalities and conveniences employed by plaintiff for the successful management and conduct of its business of refining sugar. Without the wharves the gross amount of receipts and profits from such business would probably have been less than they were in fact. If the receipts from the use of the wharves were reasonably to be deemed receipts in the plaintiff's business of refining sugar, as we think they were, then they were properly treated as a part of its gross annual receipts, upon which, in excess of the sum of \$250,000, the tax in question was rightly imposed.

The remaining assignment of error relates to the including in the plaintiff's gross an-

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nual receipts of interest paid to it upon deposits in bank and dividends received by it upon shares of stock in other companies. Upon this point Judge McPherson, holding the circuit court, said: "This interest, I think, was properly included by the collector in determining the annual value of the business. It was corporate property, presumably used for corporate purposes, and was as much engaged in the business of refining as the capital invested in machinery or raw materials." Judge Dallas, with whom concurred Judge Acheson, delivering the judgment of the circuit court of appeals, said: "The interest received by the plaintiff upon its corporate funds, either deposited in bank or invested in income-producing securities, was also rightly included. [416] The special *verdict states that it was 'interest upon its investments of moneys and property as explained by the testimony of Mr. Ball,' and it appears from that testimony that the only business of the plaintiff was sugar refining, and that this interest was received by it upon investments or deposits of such part of the capital of that business as at the time being was not in active use therein. Mr. Ball, it is true, also testified that it did not have anything to do with sugar refining, but the question for our decision is not whether this interest was derived from the refining of sugar, which, of course, it was not, but whether or not it was received in the *business* of sugar refining, and upon this very different question the facts found are conclusive. The funds of the corporation, however any portion of them may have been temporarily applied or held, were all embarked in the sugar refining business, and to it, therefore, all receipts which those funds produced necessarily belonged. Any diminution of them would certainly have been its loss, and it seems to be equally clear that their augmentation, however occasioned, must have been its gain. Except in connection with, and as incidental to, that business, the plaintiff was neither an investor nor a depositor, and therefore, by becoming either the one or the other, it did not engage in an additional and separate business." Judge Gray, dissenting, said: "Keeping in mind the well-settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and that where the construction of a tax law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid, I cannot assent to the affirmance of the judgment of the court below in this respect. I do not think that the income derived from such investment of funds is in any proper sense re-

ceipts in the business of sugar refining. The very term 'gross receipts' in 'the business' would seem to exclude all such receipts as the interest upon investments here referred to."

We are of opinion that upon the point last stated there was error. The gross annual receipts, upon which, in excess of a *certain [417] amount, the tax was imposed, were, under the statute, only receipts in the business of refining sugar, not receipts from independent sources. But, clearly, neither interest paid to the plaintiff on its deposits in bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume, on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business; and whether they would be divided among stockholders or be used in the further prosecution of the business was for the plaintiff to determine. They could have been used for purposes wholly distinct from the business of refining sugar. We are of opinion that the receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business of refining sugar, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with that business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. In the absence of any showing to the contrary, it must be assumed that the declaration or the receipt of dividends on such stocks were wholly apart from the particular business in which the holder of the stock was engaged.

We hold that in the matter of interest received by the plaintiff on deposits in bank, as well as in the matter of dividends received by it on stocks in other companies, the judgments of both the circuit court and the circuit court of appeals were erroneous.

The judgment of each court is reversed, and the cause is remanded for such further proceedings as may be necessary for the correction of the errors hereinbefore specified, and as may be in conformity with this opinion.

It is so ordered.

The CHIEF JUSTICE: Mr. Justice **Brown** and myself are of opinion that the judgment of the circuit court of appeals in *this [418] case was made final in that court by the judiciary act of March 3, 1891, and that, therefore, the writ of error should be dismissed.

C. W. CORNELL and F. B. Cornell, Copartners, Doing Business under the Name and Style of Cornell Brothers, *Plffs. in Err.*,
v.

F. E. COYNE, Late United States Collector of Internal Revenue, First District of Illinois.

(See S. C. Reporter's ed. 418-440.)

Taxation of exports—validity of tax on filled cheese including that intended for export—construction of statute—title of act—exemption.

1. The imposition, under the sanction of the act of June 6, 1896 (29 Stat. at L. 253, chap. 337, U. S. Comp. Stat. 1901, p. 2236), § 9, of the same manufacturing tax on filled cheese manufactured for export, and in fact exported, as upon other filled cheese, is not obnoxious to the prohibition of U. S. Const. art. 1, § 9, par. 5, against the levy of a tax or duty on articles exported from any state.
2. The title of an act cannot be resorted to in aid of its construction where the act is free from doubt or ambiguity.
3. No exemption of filled cheese manufactured for export from the manufacturing tax imposed by the act of June 6, 1896 (29 Stat. at L. 253, chap. 337, U. S. Comp. Stat. 1901, p. 2236), § 9, was effected by the provision that "the tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section," although by U. S. Rev. Stat. § 3385 (U. S. Comp. Stat. 1901, p. 2212), exported manufactured tobacco and snuff are relieved from the manufacturing tax.

[No. 118.]

Argued January 18, 19, 1904. Decided February 23, 1904.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment sustaining a demurrer to the declaration in a suit to require a collector of internal revenue to refund a sum expended for internal revenue stamps to be affixed to filled cheese manufactured for export. *Affirmed.*

Statement by Mr. Justice **Brewer**:

On June 6, 1896, Congress passed an act (29 Stat. at L. 253, chap. 337, U. S. Comp. Stat. 1901, p. 2236) entitled "An Act Defining Cheese, and also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation, and Exportation of 'Filled Cheese.'" Section 2 defines "filled cheese."

NOTE.—On the title of an act as an aid in its construction—see note to *People ex rel. Hart v. McElroy*, 2 L. R. A. 609.

Section 3 directs that "manufacturers of filled cheese shall pay \$400 for each and every factory, per annum." Section 6 provides for the stamping and branding of the wooden packages in which manufacturers are required to pack filled cheese, and that "all sales or consignments made by manufacturers of filled cheese to wholesale dealers in filled cheese *or to exporters of filled cheese shall be in[419] original stamped packages." Sections 9 and 11 are as follows:

"Sec. 9. That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

"Sec. 11. That all filled cheese as herein defined imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal revenue tax of eight cents per pound, such tax to be represented by coupon stamps; and such imported filled cheese and the packages containing the same shall be stamped, marked, and branded, as in the case of filled cheese manufactured in the United States."

Plaintiffs in error were manufacturers of filled cheese, entered into contracts for its manufacture and export, and under such contracts manufactured and exported 1,580,479 pounds of filled cheese. They were required by the defendant in error, as collector, to purchase and affix stamps to the exported packages of filled cheese. They protested against such required purchase, and applied to the Commissioner of Internal Revenue, as authorized by § 3226, Rev. Stat. (U. S. Comp. Stat. 1901, p. 2088), for a return of the various sums so paid, but their application was rejected. Thereupon they commenced this action in the circuit court of the United States for the northern district of Illinois. In the declaration they alleged "that the requirements of the said defendant, whereby the plaintiffs were compelled in the manner aforesaid, to purchase and use the said revenue stamps, were wholly unauthorized and unwarranted by law; and that § 9, of the act of Congress aforesaid, and said act itself in that the same failed to contain provisions whereby filled cheese *manufactured for export trade[420] and exported and sold in foreign markets wholly without the United States might be

exported and sold free from the levy of any duty or tax thereon; or provision whereby the same might be freed from the force and effect of said act, are repugnant to said § 9, article 1, of the Constitution of the United States, and that this suit, therefore, involves the construction or application of the Constitution of the United States."

A demurrer to the declaration was sustained. They elected to stand by the declaration. Judgment was entered in favor of the defendant, and thereupon this writ of error was sued out.

Messrs. Charles W. Greenfield and William E. Mason argued the cause, and, with **Messrs. Charles E. Kremer and Lewis F. Mason**, filed a brief for plaintiffs in error:

The levy and collection of the tax was forbidden by the Constitution, which provides that no tax or duty shall be laid on articles exported from any state.

"Exported" is a perfect participle, and this clause should be construed to mean that no tax or duty shall be laid on any articles which are exported from any state.

Century Dictionary, verb *Export* and word *Participle*.

Provisions of the Constitution must receive a reasonable interpretation.

Story, Const. § 419.

And such reasonable interpretation should be given as well to limitations upon the power of Congress as to grants of power.

Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

The same word should not necessarily be construed in the same sense wherever it occurs in the same instrument.

Story, Const. § 454.

This provision was to prevent discrimination by Congress between the states, and prohibits any taxation by Congress upon articles which are "exported."

Pace v. Burgess, 92 U. S. 372, 23 L. ed. 657; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648; Story, Const. § 1014.

There is a distinction between the terms "tax" and "duty" as used in this clause of the Constitution. The latter is a charge fixed by reason of exportation or importation, while the former applies to any charge which may be laid upon persons or property for the support of the government.

Story, Const. § 952. *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95; *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Dooley v. United States*, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62.

This provision of the Constitution is self-executing.

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Groves v. Slaughter, 15 Pet. 449, 10 L. ed. 800; *Davis v. Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; *Dill v. Ellicott*, Taney, 233, Fed. Cas. No. 3,911; *Illinois C. R. Co. v. Ihlenberg*, 34 L. R. A. 393, 21 C. C. A. 546, 43 U. S. App. 726, 75 Fed. 873; *Law v. People*, 87 Ill. 385; *Washingtonian Home v. Chicago*, 157 Ill. 414, 29 L. R. A. 798, 41 N. E. 893; *Fuller v. Chicago*, 89 Ill. 282; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Lake County v. Rollins*, 136 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Doon Dist. Twp. v. Cunimins*, 142 U. S. 370, 35 L. ed. 1046, 12 Sup. Ct. Rep. 220.

This provision of the Constitution and the act of June 6, 1896, like statutes *in pari materia*, must be construed together, and taken together they constitute the law governing the powers and duties of the revenue officers of the government.

Cooley, Const. Lim. 3; Story, Const. § 374; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Billingsley v. State*, 14 Md. 369.

Statutes *in pari materia* are construed together.

United States v. Freeman, 3 How. 556, 564, 11 L. ed. 724, 727; *Doc ex dem. Patterson v. Winn*, 11 Wheat. 380, 386, 6 L. ed. 500, 501; *Atkins v. Fiber Disintegrating Co.* 18 Wall. 301, 21 L. ed. 841; *Ryan v. Carter*, 93 U. S. 84, 23 L. ed. 809; *The Elizabeth*, 1 Paine, 11, Fed. Cas. No. 4,352; *Potter's Dwarr. Stat.* p. 189, and note; *Smith*, Const. Stat. & Constr. p. 751.

Revenue laws are liberally construed.

Cluquot's Champagne, 3 Wall. 114, 18 L. ed. 116; *Smythe v. Fiske*, 23 Wall. 374, 23 L. ed. 47.

Against as well as in favor of the government.

United States v. Stowell, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244.

Courts in construing a statute will restrain its operation within narrower limits than its words import if satisfied that the liberal meaning of its language would extend to cases which a legislature never designed to include in it.

Brewer v. Blougher, 14 Pet. 178, 198, 10 L. ed. 408, 418; *United States v. American Bell Teleph. Co.* 159 U. S. 548, 40 L. ed. 255, 16 Sup. Ct. Rep. 69; *McKee v. United States*, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92; *Woolbridge v. McKenna*, 8 Fed. 650; *Oates v. First Nat. Bank*, 100 U. S. 239, 244, 25 L. ed. 580, 583.

Where there are two acts or provisions, one special and particular, the other general, if the general standing alone would include the same matter and thus conflict with the

special, the special provision must be taken as an exception.

Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; *Crane v. Reeder*, 22 Mich. 322; *Ex parte Crow Dog*, 109 U. S. 556, 570, *sub nom. Ex parte Kang-Gi-Shun-Ca*, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Black, *Constr. & Interpretation of Laws*, 116; Sedgwick, *Stat. & Const. Law*, 98.

A law requiring two repugnant and incompatible things is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible in order to arrive at the intention of the legislature.

Huidekoper v. Douglass, 3 Cranch, 1, 66, 2 L. ed. 347, 368.

Additional words of qualification may be added to a general provision.

Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582.

Courts avoid constructions which make a law unconstitutional.

United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004; *United States v. Central P. R. Co.* 118 U. S. 241, 30 L. ed. 175, 6 Sup. Ct. Rep. 1038; *Hooper v. California*, 155 U. S. 657, 39 L. ed. 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 211; *Grenada County v. Brodgen*, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125; *Parsons v. Bedford*, 3 Pet. 433, 449, 7 L. ed. 732, 737.

Courts also avoid a construction which makes a law ridiculous or absurd.

Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *United States v. Hogg*, 50 C. C. A. 608, 112 Fed. 909.

The court, in construing a doubtful statute, will consider—

(a) The title of the act.

United States v. Fisher, 2 Cranch, 358, 387, 2 L. ed. 304, 313; *United States v. Palmer*, 3 Wheat. 610, 631, 4 L. ed. 471, 477; *Smythe v. Fiske*, 23 Wall. 374, 23 L. ed. 47; *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Hadden v. The Collector*, 5 Wall. 107, 18 L. ed. 518; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Price v. Forrest*, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689.

(b) The act as a whole, including all its provisions.

United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *United States v. Stowell*, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244.

The regulation of the Commissioner requiring a manufacturer to affix the proper tax-paid stamp on the withdrawal of a pack-

age was unauthorized. The Commissioner or Secretary of the Treasury cannot make regulations which will defeat the law.

Campbell v. United States, 107 U. S. 410, 27 L. ed. 594, 2 Sup. Ct. Rep. 759; *United States v. 200 Barrels of Whiskey*, 95 U. S. 571, 24 L. ed. 491; *Morrill v. Jones*, 106 U. S. 467, 27 L. ed. 268, 1 Sup. Ct. Rep. 423.

If the collector, under the strict letter of the act of June 6, 1896, was required to levy and collect the tax in question, then said act is unconstitutional.

Pace v. Burgess, 92 U. S. 372, 23 L. ed. 657; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648; *Dooley v. United States*, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62; *Marbury v. Madison*, 1 Cranch, 178, 2 L. ed. 74.

The construction placed by Congress upon this clause of the Constitution, by inserting in all prior and subsequent internal revenue acts a provision for exportation without payment of the tax, should have great weight in determining the constitutionality of the act.

Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *The Laura*, 114 U. S. 411, *sub nom. Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 5 Sup. Ct. Rep. 881; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328; *Sehell v. Fauche*, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376; *United States v. Hill*, 120 U. S. 169, 182, 30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510.

Assistant Attorney General **McReynolds** argued the cause and filed a brief for defendant in error:

The title and preamble of an act are no part of it and cannot enlarge or confer powers or control the words of the same, unless they are doubtful or ambiguous.

Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 174, 188, 33 L. ed. 302, 308, 10 Sup. Ct. Rep. 68; *Price v. Forrest*, 173 U. S. 410, 427, 43 L. ed. 749, 755, 19 Sup. Ct. Rep. 434.

The validity of the tax now called in question seems beyond successful dispute.

Turpin v. Burgess, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835; *Pace v. Burgess*, 92 U. S. 372, 23 L. ed. 657; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

The word "exported" manifestly refers to an accomplished act, and can in no proper sense be construed to mean something merely intended or contracted to be done in the future.

United States v. The Forrester, Newberry,
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Adm. 81, Fed. Cas. No. 15,132; *Muller v. Baldwin*, L. R. 9 Q. B. 457.

The terms "exports" and "articles exported," in construing constitutional provisions, have been constantly used by this court as interchangeable and as meaning the same thing.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Woodruff v. Parham*, 8 Wall. 131, 19 L. ed. 384; *License Tax Cases*, 5 Wall. 462, 471, 18 L. ed. 497, 501; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Dooley v. United States*, 183 U. S. 154, 46 L. ed. 130, 22 Sup. Ct. Rep. 62; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648; Story, Const. § 1014.

The framers of the Constitution intended not merely that the exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports.

Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

The uniformity of exsises contemplated by the Constitution had reference to a "geographical uniformity," and the purpose was that such exactions should operate generally throughout the United States, that is, to be laid to the same amount on the same articles in each state.

Knowlton v. Moore, 178 U. S. 41, 96, 106, 44 L. ed. 969, 991, 995, 20 Sup. Ct. Rep. 747.

The words "imports" and "exports," when they appear in the Constitution, apply only to articles brought from, or sent to, foreign countries, and are used solely in reference to foreign commerce.

Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648; *Dooley v. United States*, 183 U. S. 154, 162, 46 L. ed. 130, 133, 22 Sup. Ct. Rep. 62.

Nothing produced in any state can become an article of interstate commerce until committed to a common carrier for transportation out of the state, or until it has started on its ultimate passage to another state.

Coe v. Errol, 116 U. S. 517, 525, 29 L. ed. 715, 718, 6 Sup. Ct. Rep. 475.

The same rule, except as to destination only, must determine the moment when an article of foreign commerce becomes such.

Gibbons v. Ogden, 9 Wheat. 1, 202, 6 L. ed. 23, 71; *Turner v. Maryland*, 107 U. S. 38, 50, 27 L. ed. 370, 375, 2 Sup. Ct. Rep. 44.

The fact that an article is manufactured for export does not make it an article of commerce. There is a clear distinction between manufacture and commerce.

Kidd v. Pearson, 128 U. S. 1, 20, 21, 22, 32 L. ed. 346, 350, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *United States v. E. C.* 192 U. S.

Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

Mr. Justice **Brewer** delivered the opinion of the court:

The contention is that inasmuch as this filled cheese was manufactured under contract for export, and was in fact exported, the tax of 1 cent per pound prescribed by § 9 was prohibited by the 5th paragraph of § 9, article 1, of the Constitution, which reads: "No tax or duty shall be laid on any articles exported from any state."

But this means that no burden shall be placed on exportation, and does not require that any bounty be given therefor. Congress has power to encourage exportation by remitting taxes on goods manufactured at home as it has power to encourage manufacturers by duties on imports, yet the Constitution does not compel it to do either the one or the other. This power of encouraging is illustrated by § 11 of this act, which requires all imported filled cheese to pay, in addition to import duties, an internal revenue tax of 8 cents a pound,—eight times as much as that manufactured at home. To remit on articles exported the tax which is cast upon other like articles consumed at home, while perhaps not technically a bounty on exportation, has some of the elements thereof. By this act all filled cheese is subject to a manufacturing tax of 1 cent a pound. To remit that tax in favor of filled cheese exported may encourage the manufacturer to seek a foreign rather than ^{*9}[427] home market, but if the full tax on all filled cheese manufactured is required for the support of the government, the remission of part necessitates revenue from some other source. Doubtless the remission is given in hope of widening the market and increasing the production, but that is only a possibility of the future, while the loss in the revenue is a fact of the present. Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export. While that which is asked in this case is the return of a manufacturing tax, there is nothing in the constitutional provision to distinguish between manufacturing and other taxes, and if the plaintiff's contention be sustained as to a manufacturing tax it would follow that the government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the

constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation. Such has been the ruling of this court. In *Turpin v. Burgess*, 117 U. S. 504, 506, 29 L. ed. 988, 989, 6 Sup. Ct. Rep. 835, 836, where the question was as to an export stamp tax on tobacco, Mr. Justice Bradley, speaking for the court, said:

"The constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a state. In the one case the words are, 'No tax or duty shall be laid on articles exported from any state.' Art. 1, § 9, par. 5. In the other they are, 'No state shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. 1, § 10, par. 2. The prohibition *in both cases has reference to the im-

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position of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition."

See also *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Justice Miller, in his lectures on the Constitution (p. 592), says:

"The Congress of the United States, during the late Civil War, imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton and tobacco in the country. It was argued that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States, it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, and *Turpin v. Burgess*, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835, seem to decide that the objection was not valid, and hold that only such property as is in the

actual process of exportation, and which has begun its voyage or its preparation for the voyage, can be said to be an export."

Some light is thrown on this question by the cases of *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, and *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. In the former a manufacturer of intoxicating liquors in Iowa claimed to be beyond the reach of the prohibitory law of the state on the ground that he manufactured only for shipment to other states, and therefore, as Congress had *ex-[429]clusive control over interstate commerce, it had like control over the manufacture for interstate commerce. But this court, in an elaborate opinion by Mr. Justice Lamar, unanimously held against the contention, and decided that commerce did not commence until manufacture was finished, and that therefore the state was not prevented from exercising exclusive control over the manufacture. In the latter case the question was whether a monopoly of the business of manufacturing sugar within a state was a restraint of interstate commerce, and therefore within the purview of the act of Congress to protect trade and commerce against unlawful restraints and monopolies (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), and it was held that it did not, Chief Justice Fuller announcing the opinion of the court, saying (pp. 12 and 13, L. ed. p. 329, Sup. Ct. Rep. p. 253):

"Commerce succeeds to manufacture, and is not a part of it. . . . The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."

There is nothing in the case of *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, inconsistent with these views. There the question was as to the validity of a stamp tax on a foreign bill of lading, and it was held that it was a tax directly on the exportation. As said in the opinion with reference to the constitutional provision (p. 292, L. ed. p. 866, Sup. Ct. Rep. p. 652): "The purpose of the restriction is that exportation, all exportation, shall be free from national burden." It is unnecessary to refer to the earlier legislation of Congress which, as shown by counsel for the government in his brief, has been in harmony with this construction. From what we have said it is clear that there is no constitutional objection to the imposition of the same manufacturing tax on filled

cheese manufactured for export and, in fact, exported, as upon other filled cheese.

[430] Although the only charge in the declaration and the only matter complained of in the assignments of error is the unconstitutionality *of the act, and especially of § 9 thereof, in failing to contain provisions for the exportation of filled cheese free from the levy of any tax or duty, counsel have in this court made a further contention that if the act be constitutional, it is because, properly construed, it does provide for exportation free from tax or duty. The argument is that the title of the act names as one of its purposes to regulate "exportation;" that while in the act there is no express provision for exportation, § 9, in reciting that "the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section," is to be construed as incorporating all provisions respecting stamps "relating to tobacco and snuff," including those for stamps on exports, which are issued free of charge.

Assuming, without deciding, that we may rightfully reverse the judgment of the circuit court for a failure to consider a question which was not presented, and that we may treat the declaration as amended so as to present this question, we are of opinion that the contention as to the construction of the act cannot be sustained. The title of an act is referred to only in cases of doubt or ambiguity.

"The title is no part of an act, and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. *United States v. Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U. S. 174, 188, 33 L. ed. 302, 307, 10 Sup. Ct. Rep. 68. The ambiguity must be in the context, and not in the title, to render the latter of any avail." *United States v. Oregon & C. R. Co.* 164 U. S. 526, 541, 41 L. ed. 541, 545, 17 Sup. Ct. Rep. 165, 170. See also *Prie v. Forrest*, 173 U. S. 410, 427, 43 L. ed. 749, 755, 19 Sup. Ct. Rep. 434, and cases cited.

[431] There is no doubt or ambiguity in the act. Section 9 explicitly declares "that upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof." And while the section contains a reference to existing laws *governing the engraving, issue, etc., of stamps relating to tobacco and snuff, that clause is a part of the sentence which provides that the tax levied by this section shall be represented by coupon stamps, and

the existing laws governing the engraving, issue, etc., of stamps are in terms "hereby made to apply to stamps provided for by this section" as far as applicable. In other words, the provisions of existing laws concerning the engraving, issue, etc., of stamps are made applicable only to stamps representing taxes. There is neither directly nor indirectly any reference to stamps issued without cost to cover an exportation free from tax or duty. While in § 3 there is special reference by number to various sections of the Revised Statutes concerning special taxes, and they are made to extend so far as applicable to the taxes authorized by this act, there is nowhere any mention of § 3385, Rev. Stat. (U. S. Comp. Stat. 1901, p. 2212), which provides for relieving exported manufactured tobacco and snuff from the manufacturing tax. Further, in § 6 it is directed that all sales to exporters of filled cheese shall be in original stamped packages, and this direction is in the same sentence with that providing for sales to wholesale dealers. Clearly there is nothing in the body of the act exempting exported filled cheese from the ordinary manufacturing tax on other filled cheese. But if there were a doubt as to the meaning of the statute that doubt should be resolved in favor of the government. Whoever claims a privilege from the government should point to a statute which clearly indicates the purpose to grant the privilege.

"But if there be any doubt as to the proper construction of this statute (and we think there is none), then that construction must be adopted which is most advantageous to the interests of the government. The statute, being a grant of a privilege, must be construed most strongly in favor of the grantor. *Gildart v. Gladstone*, 12 East, 668, 675; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. ed. 773, 822; *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66, 16 L. ed. 500; *Binghamton Bridge*, 3 Wall. 51, 75, 18 L. ed. 137, 143; *Rice v. Minnesota & N. W. R. Co.* 1 Black, 358, 380, 17 L. ed. 147, 153; *Leavenworth, *L. & G. R. Co. v. United* [432] *States*, 92 U. S. 733, 23 L. ed. 634; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036." *Hannibal & St. J. R. Co. v. Missouri River Packet Co.* 125 U. S. 260, 271, 31 L. ed. 731, 735, 8 Sup. Ct. Rep. 874.

Why Congress should grant an exemption from manufacturing tax in the case of exported tobacco, and not in the case of exported filled cheese, is not for us to determine. Doubtless the reasons which prompted such difference were satisfactory. It is enough that no exemption has been made in favor of the latter,

The judgment of the Circuit Court was right, and it is affirmed.

Mr. Justice **Brown** did not hear the argument, and took no part in the decision of this case.

Mr. Justice **Harlan**, dissenting:

As this case went off upon demurrer by the government to the declaration, its material allegations must be taken as true. The case cannot properly be dealt with upon any other basis.

The declaration shows that the plaintiffs in error, who were plaintiffs below, were engaged in the business of manufacturing what is known in commercial circles as filled cheese; and that in execution of certain contracts made with foreign customers the plaintiffs manufactured large quantities of filled cheese, and shipped it by instalments, directly from their factory in Illinois, to Liverpool and London. It alleged that each quantity or instalment of filled cheese manufactured, exported, and delivered by the plaintiffs under said contracts was forwarded by the plaintiffs *as soon as the same was ready for shipment from their factory in said district, and prior to the shipment thereof* the plaintiffs applied to the defendant as such collector for permission to ship and forward the same without purchasing, and attaching to said filled cheese or to the said packages containing the said filled cheese the revenue stamps re-

[433] quired by an alleged *act of Congress, approved June 6th, A. D. 1896, with reference to internal revenues; but notwithstanding the fact that such filled cheese was *manufactured for export, and was about to be delivered by the plaintiffs for export and shipment to a foreign market, . . .* the defendant did at various times during said period, and on the dates of shipment of said filled cheese, by force, duress, exact," etc.

Upon the occasion of each of the shipments the internal revenue collector exacted and collected (against the protest of the plaintiffs) a tax upon the cheese of 1 cent per pound, the collector insisting that such a tax was imposed by the act of Congress of June 6th, 1896, entitled "An Act Defining Cheese, and also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation, and Exportation of Filled Cheese." 29 Stat. at L. 253, chap. 337, U. S. Comp. Stat. 1901, p. 2236.

The first question to be considered is whether Congress intended by that act to impose a tax of 1 cent per pound upon filled cheese manufactured for exportation, and which, it is admitted, was in fact exported immediately after being so manufac-

tured. Such is the case before the court for consideration.

The 9th section of the act of 1896, under which the collection proceeded, provides that "upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, *issue, sale, accountability, effacement, and destruction* of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section." § 9.

Observe that the section refers to "existing laws" relating, among other things, to the *issue and sale* of stamps for tobacco and snuff. That reference, I submit, embraced § 3385 of the Revised Statutes, Title, *Internal Revenue* (U. S. Comp. Stat. 1901, p. 2212), which provides: *Manufactured to-[434] bacco, snuff, and cigars *intended for immediate exportation* may, after being properly inspected and branded, be removed from the manufactory in bond *without having affixed thereto the stamps indicating the payment of the tax thereon*. The removal of such tobacco, snuff, and cigars from the manufactory shall be made under such regulations, and after making such entries, and executing and filing with the collector of the district from which the removal is to be made such bonds and bills of lading, and giving such other additional security, as may be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. There shall be affixed to each package of tobacco, snuff, and cigars *intended for immediate export*, before it is removed from the manufactory, *an engraved stamp indicative of such intention*. Such stamp shall be provided and furnished to the several collectors as in the case of other stamps, and they shall account for the use of the same. When the manufacturer has made the proper entries, filed the bonds, and otherwise complied with the requirements of law and regulations as herein provided, the collector shall issue to him a permit for the removal, accurately describing the tobacco, snuff, and cigars to be shipped, the number and kind of packages, the number of pounds, the amount of tax, the marks and brands, the state and collection district from which the same are shipped, the number of the manufactory and the manufacturer's name, *the port* from which the said tobacco, snuff, and cigars are *to be exported*, the route or routes over which the same are to be sent to the port of shipment, and the name of the

vessel or line by which they are to be conveyed to the foreign port. The bonds required to be given for the exportation of the tobacco, snuff, and cigars shall be canceled upon the presentation of the proper certificates that said tobacco, snuff, and cigars [435] have been landed at any port without *the jurisdiction of the United States, or upon satisfactory proof that after shipment the same were lost at sea."

It requires no argument to prove that, under that section, manufactured tobacco and snuff "intended for immediate exportation" could be exported without payment of any tax and without having affixed thereto any stamp other than "an engraved stamp indicative of such intention." The effect of the reference in the last clause of the 9th section of the act of 1896, to "existing laws governing the engraving, issue, sale, account-ability, effacement, and destruction of stamps relating to tobacco and snuff," was, I think, to incorporate into that act § 3385 of the Revised Statutes, so far as it could be made applicable to filled cheese, and to allow filled cheese intended for immediate exportation to be removed from the manufactory without payment of any tax, having affixed to it no other stamp than one engraved and indicating the intention to export. In that view, which seems to me incontestable, the purpose of Congress was to put manufactured filled cheese intended for immediate exportation upon the same footing as manufactured tobacco and snuff intended for immediate exportation, and to permit its exportation without payment of any tax. Certainly § 3385 was one of the existing laws at the date of the passage of the act of 1896, and if applied to that act the result, I submit, must be as just stated. This question is within such narrow compass that it cannot be elucidated by extended discussion; and if the bare reading of the above statutes, all together, does not bring the mind to the conclusion indicated by me, argument to that end would be unavailing.

So I leave that question and come to the proposition that if the act of 1896 is to be construed as imposing a tax upon the plaintiff's cheese, when about to be exported, then it is in conflict with the Constitution.

The 8th section of article 1 of the Constitution enumerates certain powers which Congress may exercise, while the 9th section specifies certain things that Congress may [436] not *do. The express words of that instrument are that "no tax or duty shall be laid on articles exported from any state." Manifestly, so far as any prohibitory action by Congress is concerned, the object of that provision was to open the markets of the

world to the products and manufactures of the several states, freed from any tax or burden whatever imposed by the United State. This court said in *Fairbank v. United States*, 181 U. S. 283, 292, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 652, that the "purpose of the restriction [on the power of Congress] is that exportation, all exportation, shall be free from national burden."

I do not contend that the owner of an article about to be exported could rightfully ship it to a foreign country without paying such tax as had legally attached in favor of the government prior to the date on which the owner formed the purpose to export. An existing property tax upon a manufactured article which had become a part of the general mass of property and was held in the possession of the owner for purposes of sale or use in this country, could not be defeated by reason of the fact that the owner—subsequent to manufacture, and after a substantial interval of time—formed the intention to export it. But that is not this case, although the court seems to treat it as if it were one of that kind. The government admitted by its demurrer to the declaration that the filled cheese in question was manufactured for exportation; that upon the completion of the manufacture the plaintiffs, as soon as it was ready for shipment from their factory, set about to export it; and that it was ready to be delivered for such exportation when the collector took the position that before it could be removed from his district and exported, the tax of 1 cent per pound, imposed by the 9th section of the act of 1896 "upon all filled cheese which shall be manufactured," must be paid. It is, in effect, admitted of record that the plaintiffs never had any other purpose than to export the cheese, as soon as manufactured, in fulfilment of contracts previously made with foreign customers, and that they promptly prepared it for exportation. There was no appreciable interval of time between *the commencement of manufacture and the [437] preparation for exportation, when it could be reasonably said that the cheese had become a part of the general mass of property in the locality of its manufacture for purposes of sale, delivery, or consumption in this country. So that the question arises whether it is consistent with the constitutional injunction, "no tax or duty shall be laid on articles exported from any state," that at the instant when an article admittedly manufactured for exportation is being prepared in good faith for exportation, not for sale or consumption here, a national tax be laid on such article as property. If that question be answered in the af-

firmative, then the purpose of the constitutional restriction that "all exportation shall be free from national burden," may be defeated; for if, in such circumstances as are disclosed in this case, Congress can impose a tax of 1 cent per pound on filled cheese, manufactured and intended for immediate exportation, and about to be exported, it can impose such taxes on articles manufactured in this country and intended for immediate exportation as will make it impossible for manufacturers to secure, or will deter them from attempting to secure, contracts with foreign consumers or buyers. The result would be that Congress, in time of peace, and by means of taxation, could bring about a condition of utter occlusion between the manufacturers of this country and the markets of other countries. Indeed, the several states could bring about that result by taxation; for if an article manufactured for exportation and which was prepared for exportation as soon as manufacture was completed, is not an *export* from the moment such preparation was begun, then a state may impose a tax upon it as *property* and compel the payment thereof before the article is removed from its limits for exportation. I do not think that the framers of the Constitution contemplated such a condition as possible.

In support of the views expressed in it the opinion reproduces the following observations by Mr. Justice Miller in one of his lectures on Constitutional Law (p. 592):

[438] "The Congress *of the United States, during the late Civil War, imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton and tobacco in the country. It was urged that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States, it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coc v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, and *Turpin v. Burgess*, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835, seem to decide that the objection was not valid, and hold that only such property as is in the actual process of exportation, and which has begun its voyage or *its preparation for the voyage*, can be said to be an export."

I submit that these observations do not justify the conclusion announced by the court; for the eminent jurist who made

them says that property is to be deemed an export from the time it is in the actual process of exportation and "its preparation for the voyage" has begun. That is, in substance, the precise principle for which I am contending. Whilst the cheese was in the process of being manufactured, it was not, of course, a subject of taxation under the statute. It became manufactured filled cheese only when manufacture was completed. But, as soon as it was manufactured and prepared for shipment, and when it was about to be started on its journey to Europe, the collector exacted from the plaintiffs the property tax imposed by the act of 1896. In my judgment, within the meaning of the Constitution, and in every just sense, the cheese was in the actual process of exportation, and became an export from the moment when, *immediately after* the completion of manufacture, without loss of time, the plaintiffs, in good faith, prepared it for shipment in fulfilment of their contracts with foreign customers. In the *Fairbank Case* the court held that *a[439] mere stamp tax on a bill of lading taken at the time articles were shipped from a state to a foreign country was a tax on the articles themselves as exports, and was forbidden by the constitutional provision that no tax or duty shall be laid on articles exported from any state. It is now held that a tax on articles admittedly manufactured only for exportation, and not for sale or consumption in this country, and which are exported as soon as they can be made ready for shipment, after the completion of manufacture, in execution of contracts entered into prior to the commencement of manufacture, is a tax on the articles themselves as *property*, and not on them as exports. In short, the effect of the present decision is to say that, if Congress so wills, articles manufactured in this country, although manufactured only for exportation, and not for sale or consumption here, cannot be exported to other countries, except subject to such tax as Congress may choose to impose on the manufactured articles as property. Thus, despite the express prohibition of all taxes or duties upon articles exported from the states, Congress is recognized as having the same power over exports from the several states as it has exercised over imports from foreign countries. I do not think it has such power.

The views I have expressed are not in conflict with the judgment in *Turpin v. Burgess*, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835, cited in the opinion of the court. That was not a case of a property tax upon a manufactured article intended for exportation, but a mere stamp tax imposed by the internal revenue law upon manufactured to-

bacco, and placed upon the tobacco in order to indicate the purpose to export it. The only issue was as to the validity of the statute imposing that stamp tax. There was nothing to show any purpose to export the goods immediately upon the completion of manufacture. The goods remained in the factory, and the court said that they "might never be exported," and "whether they would be or not would depend altogether on the will of the manufacturer." There was no showing of preparation for exportation as soon as such *preparation could begin after manufacture. In the present case, as we have seen, it is admitted that the filled cheese was manufactured for exportation and was being prepared, immediately after manufacture, for exportation. The tax here was, in effect, collected while the cheese was being made ready for exportation, and therefore, to use the words of *Turpin v. Burgess*, whilst it "was being exported."

For the reasons stated, I am constrained to dissent from the opinion and judgment of the court.

I am authorized to say that the CHIEF JUSTICE concurs in this opinion.

NORTHERN PACIFIC RAILWAY COMPANY, *Petitioner*,
v.

LOUISE H. ADAMS and Frank H. Adams.

(See S. C. Reporter's ed. 440-454.)

Death by wrongful act — omitted duty must be owing to decedent, not to his heirs — carriers — stipulations avoiding liability for negligence toward free passengers — validity and effect.

1. The death of a free passenger on a railway train, not due to the omission on the part of the railway company of any duty owing to the deceased, cannot be considered wrongful or negligent at the suit of his heirs, brought under Idaho Rev. Stat. § 4100, providing that when a person's death is caused by "the wrongful act or neglect of another," his heirs or personal representatives may maintain an action for damages against the person causing the death.
2. A stipulation in a railway pass that the railway company shall not be liable to the user "under any circumstances, whether of negligence of agents or otherwise, for any injury to the person," violates no rule of public policy, and relieves the company from liability for personal injuries resulting from the ordinary negligence of its employees to

one riding on the pass, who has accepted it with knowledge of its conditions.

[No. 143.]

Argued January 25, 26, 1904. Decided February 23, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Washington in favor of plaintiffs in an action by the heirs of a decedent to recover damages suffered by reason of his death, which was alleged to have been due to defendant's wrongful act or neglect. *Reversed* and remanded for a new trial.

See same case below, 54 C. C. A. 196, 116 Fed. 324.

Statement by Mr. Justice **Brewer**:

A statute of Idaho reads as follows:

"When the death of a person, not being a minor, is caused *by the wrongful act or [441] neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just." Idaho Rev. Stat. § 4100.

Jay H. Adams resided in Spokane, Washington. He was a lawyer and the attorney of several railway companies, though not in the employ of petitioner. He was a frequent traveler on petitioner's and other railways. On November 13, 1898, he, with a friend, started on one of petitioner's trains from Hope, Idaho, to Spokane. The train consisted of an engine and eight cars, those behind the express car being in the following order: smoking car, day coach, tourist sleeper, dining car, Pullman sleeper. All were vestibuled except the tourist sleeper immediately in front of the dining car. It had open platforms, as an ordinary passenger coach. Shortly after leaving Hope, Mr. Adams, then in the smoking car, went back to the dining car for cigars. To reach the dining car he passed through the day coach and the tourist sleeper. After buying cigars he left the dining car and went forward. This was the last seen of him alive. His body was found the next day opposite a curve in the railroad track about six miles west of Hope. There was no direct testimony as to how he got off the train, whether by an accidental stumble, or by being thrown therefrom through the lurching of

NOTE.—As to the validity and effect of stipulation in free pass releasing carrier from liability for negligence—see note to *Boehring v. Chesapeake Beach R. Co.* post, 742.

the train, which was going at a high rate of speed. The road from Hope to the place where the body was found is in Idaho. He was riding on a free pass containing these provisions:

Conditions.

This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition, or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

[442] *The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

I accept the above conditions.

Jay H. Adams.

This pass will not be honored unless signed in ink by the person for whom issued.

This action was brought by the plaintiffs, the widow and son of the deceased, in the circuit court of the United States for the district of Washington. Verdict and judgment were in their favor for \$14,000, which were sustained by the court of appeals for the ninth circuit (54 C. C. A. 196, 116 Fed. 324), and thereupon the case was brought here on a writ of certiorari. 187 U. S. 643, 47 L. ed. 346, 23 Sup. Ct. Rep. 856.

Mr. C. W. Bunn argued the cause and filed a brief for petitioner:

The want of vestibules on the platforms of the tourist sleeping car was improperly submitted to the jury as a ground of liability.

Samson v. Southern R. Co. 50 C. C. A. 53, 111 Fed. 887.

The definite and specific proving power of circumstantial evidence depends upon its incompatibility with, and incapability of explanation upon, any reasonable hypothesis other than that of the truth of the principal fact, in proof of which it is adduced.

Wills, Circumstantial Ev. 274.

A theory cannot be said to be established by circumstantial evidence even in a civil action, unless the facts relied upon are of such a nature and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory.

Asbach v. Chicago, B. & Q. R. Co. 74 Iowa, 248, 37 N. W. 182; *Carruthers v. Chicago, R. I. & P. R. Co.* 55 Kan. 600, 40 Pac. 915; *Whcelan v. Chicago, M. & St. P. R. Co.* 85
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Iowa, 167, 52 N. W. 119; *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 90, 47 N. E. 971.

When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must fail also if it is just as probable that they were caused by the one as by the other.

Searles v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 66; *Grant v. Pennsylvania & N. Y. Canal & R. Co.* 133 N. Y. 659, 31 N. E. 220.

Where the evidence is equally consistent with either view—the existence or nonexistence of negligence—it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has failed to establish it. This is a rule which never ought to be lost sight of.

Cotton v. Wood, 8 C. B. N. S. 568; *Thomp. Neg.* § 364; *Baulec v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325; *Hayes v. Forty-second Street & G. Street Ferry R. Co.* 97 N. Y. 259; *Philadelphia & R. R. Co. v. Schertle*, 97 Pa. 450; *Wieland v. Delaware & H. Canal Co.* 167 N. Y. 19, 82 Am. St. Rep. 707, 60 N. E. 234; *Wiwirowski v. Lake Shore & M. S. R. Co.* 124 N. Y. 420, 26 N. E. 1023; *Cordell v. New York C. & H. R. R. Co.* 75 N. Y. 330; *Tyndale v. Old Colony R. Co.* 156 Mass. 503, 31 N. E. 655.

Conjecture cannot be allowed to supersede proof; and a jury will not be permitted to conjecture how an accident occurred.

Borden v. Delaware, L. & W. R. Co. 131 N. Y. 671, 30 N. E. 586; *Cumberland & P. R. Co. v. State*, 73 Md. 74, 20 Am. St. Rep. 571, 20 Atl. 785; *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Steffen v. Chicago & N. W. R. Co.* 46 Wis. 259, 50 N. W. 348; *Sorenson v. Menasha Paper & Pulp Co.* 56 Wis. 338, 14 N. W. 446; *Manning v. Chicago & W. M. R. Co.* 105 Mich. 260, 63 N. W. 312; *Finkelston v. Chicago, M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005; *Ellison v. Truesdale*, 49 Minn. 240, 51 N. W. 918; *Orth v. St. Paul, M. & M. R. Co.* 47 Minn. 384, 50 N. W. 363; *Hewitt v. Flint & P. M. R. Co.* 67 Mich. 61, 34 N. W. 659.

No action can be maintained by heirs or representatives where the deceased could not have sued.

Klepsch v. Donald, 4 Wash. 436, 31 Am. St. Rep. 936, 30 Pac. 991; *Tiffany, Death by Wrongful Act*, §§ 63, 66; *The Stella*, L. R. 10 Prob. Div. 161.

Contributory negligence has been held a good defense under statutes like the one in question.

Quinn v. New York, N. H. & H. R. Co. 56

Conn. 44, 7 Am. St. Rep. 284, 12 Atl. 97; *Lane v. Central Iowa R. Co.* 69 Iowa, 443, 29 N. W. 419.

One who accepts a purely gratuitous pass can bind himself by contract to relieve the carrier from liability for personal injury.

Duncan v. Maine C. R. Co. 113 Fed. 508; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 794, 38 Am. St. Rep. 901, 35 Pac. 422; *Muldoon v. Seattle City R. Co.* 10 Wash. 311, 45 Am. St. Rep. 787, 38 Pac. 995; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640; *Rogers v. Kennelbeck S. B. Co.* 86 Me. 261, 25 L. R. A. 491, 29 Atl. 1069; *Kinney v. Central R. Co.* 34 N. J. L. 513, 3 Am. Rep. 265; *Payne v. Terre Haute & I. R. Co.* 157 Ind. 616, 56 L. R. A. 472, 62 N. E. 472; 57 Cent. L. J. 83.

Mr. Reese H. Voorhees argued the cause, and, with **Mr. C. S. Voorhees**, filed a brief for respondent:

Lord Campbell's act, and the many acts inspired by it in the various states of this country, including Idaho and Washington, create and grant to other persons than the deceased or his estate, an independent right to recover for the losses sustained by such other persons through the negligence of a party causing death, such right of action being separate and distinct from any right of action which the deceased had, or could have enjoyed had he survived.

Blake v. Midland R. Co. 18 Q. B. 93, 10 Eng. L. & Eq. 443; *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 599; *Robinson v. Canadian P. R. Co.* [1892] A. C. 481; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L. R. A. 579, 77 N. W. 748, 78 N. W. 771; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Martin v. Baltimore & O. R. Co.* 151 U. S. 696, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Hulbert v. Topeka*, 34 Fed. 510; *The Oregon*, 73 Fed. 846; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Missouri P. R. Co. v. Bennett*, 5 Kan. App. 231, 47 Pac. 183; *Perkins v. New York C. R. Co.* 24 N. Y. 200, 82 Am. Dec. 281; *Adams v. Northern P. R. Co.* 95 Fed. 938; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 801; *Jeffersonville R. Co. v. Swayne*, 26 Ind. 484; *Littlewood v. New York*, 89 N. Y. 27, 42 Am. Rep. 271; *Western & A. R. Co. v. Bass*, 104 Ga. 392, 30 S. E. 874; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537; *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Bowes v. Boston*, 155 Mass. 344, 15 L. R. A. 365, 29 N. E. 633;

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Com. v. Metropolitan R. Co. 107 Mass. 236; *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 886; *Fink v. Garman*, 40 Pa. 95; *The Onoko*, 47 C. C. A. 111, 107 Fed. 984; *Roach v. Imperial Min. Co.* 7 Fed. 703; *Re Mayo*, 60 S. C. 401, 54 L. R. A. 660, 38 S. E. 634.

Having an independent right of action for their injury and loss under the statutes of Idaho and Washington, there must be found within the statutes creating such independent right of action an affirmative, positive restriction upon, or qualification of, its full enjoyment by the plaintiffs in order to bar them from its prosecution.

Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 240, 38 L. ed. 425, 14 Sup. Ct. Rep. 579.

There is certainly nothing harsh or inequitable in the statute giving to people wrongfully deprived of support, education, etc., their own right to recover for themselves the peculiarly personal loss thus sustained exclusively by them. Certainly the proposition is not so inequitable as to induce the court to impose an arbitrary condition to the enjoyment of this right, to support which condition there is no word in the statute.

Missouri P. R. Co. v. Bennett, 5 Kan. App. 231, 47 Pac. 183; *Bowes v. Boston*, 155 Mass. 344, 15 L. R. A. 365, 29 N. E. 633; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Hulbert v. Topeka*, 34 Fed. 510; *Hedrick v. Ilwaco R. & Nav. Co.* 4 Wash. 400, 30 Pac. 714; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L. R. A. 579, 77 N. W. 748, 78 N. W. 771; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 240, 38 L. ed. 425, 14 Sup. Ct. Rep. 579.

The provision relative to "personal representatives" cannot be construed by implication, in a remedial statute, so as to destroy the independence of the right of action which rests alone on the independent and separate loss to the widow and children.

Needham v. Grand Trunk R. Co. 38 Vt. 292; *Bowes v. Boston*, 155 Mass. 344, 15 L. R. A. 365, 29 N. E. 633; *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 25 L. R. A. 157, 44 Am. St. Rep. 335, 37 N. E. 770; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 801.

The deceased was a passenger and entitled to the same degree of care as other passengers, and as if he had paid his fare.

Philadelphia & R. R. Co. v. Derby, 14 How. 485, 14 L. ed. 509; *The New World v. King*, 16 How. 469, 14 L. ed. 1019; *Waterbury v. New York C. & H. R. R. Co.* 21 Blatchf. 314, 17 Fed. 67.

The state or public has an interest in every citizen's life, which interest is even superior to his own interest, and with that

interest the citizen may not deal by contract or otherwise.

Chase's Bl. Com. 2d ed. 72, 937, 940; *Illinois C. R. Co. v. Hammer*, 72 Ill. 350; *Cancemi v. People*, 18 N. Y. 129; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; 1 East P. C. p. 262; Story, Bailm. § 601a; *Philadelphia & R. R. Co. v. Derby*, 14 How. 485, 14 L. ed. 509; *The New World v. King*, 16 How. 469, 14 L. ed. 1019.

This subject is above the realm of the law of contracts, and cannot be judged by the rules of commercial convenience.

The E. B. Ward, 16 Fed. 261; *Cancemi v. People*, 18 N. Y. 128; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 365.

The contract is void as against public policy.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 135, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Inman v. South Carolina R. Co.* 129 U. S. 139, 32 L. ed. 616, 9 Sup. Ct. Rep. 249; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *The Kensington*, 183 U. S. 268, 46 L. ed. 193, 22 Sup. Ct. Rep. 102; *Philadelphia & R. R. Co. v. Derby*, 14 How. 485, 14 L. ed. 509; *The New World v. King*, 16 How. 469, 14 L. ed. 1019; *Vette v. Harmon*, 102 Fed. 17; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360, Gil. 110; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Roesner v. Hermann*, 10 Biss. 486, 8 Fed. 782; Whart. Neg. 589, 592, 641; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Cancemi v. People*, 18 N. Y. 128; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

The question is one of general law, upon which the Federal courts will reach a conclusion, independent of the ruling of any state court or courts.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 370, 37 L. ed. 774, 13 Sup. Ct. Rep. 914; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 136, 42 L. ed. 692, 18 Sup. Ct. 289.

A party cannot relieve himself from a

duty imposed by, or waive his objection to an act contrary to, public policy.

Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; Ray, Contractual Limitations, p. 2.⁴

The duty owing by the carrier is a public duty; it does not grow out of private contract with each individual carried, but is imposed for the welfare of the public.

Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 135, 42 L. ed. 691, 18 Sup. Ct. Rep. 289; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

Mr. Justice **Brewer** delivered the opinion of the court:

As the negligence of the company, found by the jury to have *caused the death, as[449] well as the resulting death, took place in Idaho, the plaintiffs' right of action rests on the statute of that state. What is the scope and meaning of that statute? The circuit court charged the jury:

"You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general."

In other words, although it should appear that the company in no respect failed in its duty to the deceased, it could yet be held responsible to the widow and son for the damages they suffered by reason of the death. But that is a misconception. Their right of action arises only when his death is caused by "the wrongful act or neglect." If there be no omission of duty to the decedent, his heirs have no claim. Suppose an individual is wantonly assailed, and, in order to protect his own life, is obliged to kill the assailant,—may the heirs of the decedent have that act of taking life, rightful as against the decedent, adjudged wrongful as against them, and recover damages from one who did only that which his duty to himself and family required him to do? The statute does not provide that when one's life is taken by another the heirs of the former may recover damages, but only when it is wrongfully taken,—that is, when it is taken in violation of the rights of the decedent; wrongful as against him. "Neglect" stands in the same category with "wrongful act." It implies some omission of duty. The trial court in this case charged the jury:

"Negligence, to create a liability on the part of parties in fault, must be a failure to observe the degree of care and prudence that is demanded in the discharge of the

duty which the person charged with the negligence owed under the peculiar circumstances of the case to the injured party."

[450] As stated in Pollock on Torts, p. 355, quoting from Baron *Alderson in *Blyth v. Birmingham Waterworks Co.* 11 Exch. 784, 25 L. J. Exch. N. S. 213:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,' provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care."

The two terms, therefore,—wrongful act and neglect,—imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act, with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation,—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages.

Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should "not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person." He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, and *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535. In the first of these cases Mr. Justice Bradley, who delivered the opinion of the court, closed an elaborate discussion of the questions with these words:

[451] "We purposely abstain from expressing any opinion as to *what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire."

The question, then, is distinctly presented whether a railroad company is liable in damages to a person injured through the negligence of its employees, who at the time is riding on a pass given as a gratuity, and upon the condition, known to and accepted

by him, that it shall not be responsible for such injuries. It will be perceived that the question excludes injuries resulting from wilful or wanton acts, but applies only to cases of ordinary negligence. The facts of this case certainly do not call for any broader inquiry than this. The specific matters of negligence charged are the placing a non-vestibuled car in a vestibuled train, and the high rate of speed at which the train passed around the curve at the place of injury. But nonvestibuled cars are in constant use all over the country,—were the only cars in use up to a few years ago,—and further, the deceased, having passed over the open platform, knew exactly its condition. As the court charged the jury:—"Mr. Adams must be presumed to have known that it was not vestibuled, and to have acted with perfect knowledge of the fact." The rate of speed was no greater than is common on other trains everywhere in the land, and the train was, in fact, run safely on this occasion. We shall assume however, but without deciding, that the jury were warranted, considering the absence of the vestibuled platform and the high rate of speed in coming around the curve, in finding the company guilty of negligence; but clearly it was not acting either wilfully or wantonly in running its trains at this not uncommon rate of speed, and all that can at most be said, is that there was ordinary negligence. Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risks of such negligence?

This question has received the consideration of many courts, and been answered in different and opposing ways. We shall *not [452] attempt to review the cases in state courts. Among those which hold that the company is not responsible may be mentioned *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L. R. A. 491, 29 Atl. 1069; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Kinney v. Central R. Co.* 34 N. J. L. 513, 3 Am. Rep. 265; *Payne v. Terre Haute & I. R. Co.* 157 Ind. 616, 56 L. R. A. 472, 62 N. E. 472; *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 794, 35 Pac. 422, 10 Wash. 311, 38 Pac. 995. This last case was decided by the supreme court of the state, in which the Federal court rendering the judgment in controversy was held. The English decisions are to the same effect. *McCawley v. Furness R. Co.* L. R. 8 Q. B. 57; *Hall v. North Eastern R. Co.* L. R. 10 Q. B. 437; *Duff v. Great Northern R. Co.* Ir. L. R. 4 C. L. 178; *Alexander v. Toronto & N. R. Co.* 33 U. C. Q. B. 474. Among those

holding that the company is responsible are: *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246, though that case is rested partially on a state statute; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640.

Turning to the decisions of this court, in *Philadelphia & R. R. Co. v. Derby*, 14 How. 438, 14 L. ed. 502, and *The New World v. King*, 16 How. 469, 14 L. ed. 1019, the parties injured were free passengers, but it does not appear that there were any stipulations concerning the risk of negligence, and the companies were held guilty of gross negligence. In *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385, Voigt, an express messenger riding in a car set apart for the use of an express company, was injured by the negligence of the railway company. There was an agreement between the two companies that the former would hold the railway company free from all liability for negligence, whether caused by the negligence of the railway company or its employees. Voigt, entering into the employ of the express company, signed a contract in writing, *whereby he agreed to assume all the risk of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railway company. It was held that he could not maintain an action against the railway company for injuries resulting from the negligence of its employees. Mr. Justice Shiras, who delivered the opinion of the court, reviewed many state decisions, and concluded with these words (p. 520, L. ed. p. 570, Sup. Ct. Rep. p. 393):

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

In the light of this decision but one answer can be made to the question. The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its

coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common-law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered; and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, *and[454] yet one which each was at liberty to make, and no public policy was violated thereby.

It follows from these considerations that there was error in the proceedings of the Circuit Court and Court of Appeals. *The judgments of those courts will be reversed* and the case remanded to the Circuit Court, with instructions to set aside the verdict and grant a new trial.

Mr. Justice Harlan and Mr. Justice McKenna dissent.

COUNTY OF ST. CLAIR, *Plff. in Err.*,
v.

INTERSTATE SAND & CAR TRANSFER
COMPANY.

(See S. C. Reporter's ed. 454-470.)

Interstate commerce—transportation of railroad cars across navigable river — state regulation.

An unconstitutional burden is imposed on interstate commerce by Ill. Rev. Laws 1874, chap. 55, penalizing the carrying on of a ferry without a license, when applied to the transportation of loaded or unloaded railroad cars across the Mississippi river from the Illinois to the Missouri shore, even assuming that a

NOTE.—On the establishment, regulation, and protection of ferries—see note to *Sistersville Ferry Co. v. Russell*, 59 L. R. A. 513.

On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

On license taxes as affecting interstate commerce—see notes to *Rothermel v. Meyerle*, 9 L. R. A. 366, and *American Fertilizing Co. v. Board of Agriculture*, 11 L. R. A. 179.

state may regulate a ferry upon a navigable stream forming the boundary between two states, where such statute makes the granting of the license discretionary, with citizens of Illinois preferred, and compels the licensee to conduct a general ferry business.

[No. 17.]

Argued and submitted March 19, 20, 1903.

Decided February 23, 1904.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois to review a judgment dismissing, on general demurrer, a complaint in an action to recover statutory penalties for transporting railroad cars across the Mississippi river without a ferry license. *Affirmed.*

See same case below, 109 Fed. 741.

The facts are stated in the opinion.

Mr. Charles W. Thomas submitted the cause for plaintiff in error:

The authority to establish and regulate ferries between states is not included in the power of the Federal government to regulate commerce with foreign nations and among the several states, and with Indian tribes. That authority was reserved to the states respectively, and never delegated to the United States.

Conway v. Taylor, 1 Black, 603, 17 L. ed. 191; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Tagwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884, 110 Mo. 557, 19 S. W. 809; *Marshall v. Grimes*, 41 Miss. 27; *People v. Babcock*, 11 Wend. 586; *Fanning v. Gregoire*, 16 How. 524, 14 L. ed. 1043; *Mills v. St. Clair County*, 7 Ill. 197, *Affirmed* in 8 How. 569, 12 L. ed. 1201; *Columbia-DeLaware Bridge Co. v. Geisse*, 38 N. J. L. 39; *Memphis v. Overton*, 3 Yerg. 390; *Chilvers v. People*, 11 Mich. 43; *Bowman v. Wathen*, 2 McLean, 377, Fed. Cas. No. 1,740.

A ferry is in respect of the landing place, and not of the water. The water may be to one, and the ferry to another.

13 Viner's Abr. 208a; *Conway v. Taylor*, 1 Black, 629, 17 L. ed. 201.

Mr. John F. Lee argued the cause, and, with **Mr. George R. Lockwood**, filed a brief for defendant in error:

The ferry business carried on by defendant is interstate commerce conducted on the Mississippi river, a navigable water of the United States; and the state of Illinois cannot require defendant to obtain a license from the board of commissioners of St. Clair county to conduct such commerce.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com.

Rep. 382, 5 Sup. Ct. Rep. 826; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 217, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Harman v. Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 564, 30 L. ed. 244, 246, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 350; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 508, 31 L. ed. 700, 715, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 889, 1062; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1075; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Brennan v. Titusville*, 153 U. S. 289, 302, 38 L. ed. 719, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Fargo v. Michigan*, 121 U. S. 230, 245, 30 L. ed. 888, 894, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Hooper v. California*, 155 U. S. 648, 653, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *St. Louis v. Consolidated Coal Co.* 158 Mo. 342, 51 L. R. A. 850, 81 Am. St. Rep. 310, 59 S. W. 103.

Even if the state of Illinois had power to exact a license fee from all persons engaged in carrying on interstate commerce

by means of ferries, the discriminations of the act in question in favor of existing ferries and landowners, and the authority given the boards of county commissioners to discriminate between applicants for a license, makes the act void so far as it relates to interstate commerce.

Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743.

Mr. Justice **White** delivered the opinion of the court:

This suit was commenced in a court of the state of Illinois by the county of St. Clair, a municipal corporation of the state of Illinois, against the Interstate Sand & Car Transfer Company, a Missouri corporation, to recover statutory penalties. We shall hereafter refer to the one party as the county and to the other as the company. The right of the county to recover was based upon the charge that the company had, during certain years, which were stated, incurred penalties to the amount sued for, because it had carried on a ferry for transporting railroad cars, loaded or unloaded, from the county of St. Clair in Illinois to the Missouri shore, and from the Missouri shore to the county of St. Clair, without obtaining a license from the county, as was required by the law of Illinois. The cause of action was thus stated in the complaint:

"And plaintiff avers that the said defendant, in order to keep and use its said ferry at the time of its establishment as aforesaid, constructed and caused to be built a permanent landing *place with certain cradles and roadways thereto, within the limits of said county, and has from thence hitherto maintained the same, by means whereof as well as by means of certain steamboats and barges, then and from thence hitherto used for that purpose by the defendant, it, the said defendant, was enabled to and did, at various times and continuously since the day last aforesaid, ferry for profit and hire, property, to wit, certain railroad cars, from said county across the Mississippi river aforesaid, and from the west bank of said river to the said county, and has so ferried said cars within the time aforesaid to the number of, to wit, 80,000 railroad cars across said river, without any license from the county board of the plaintiff so to do, whereby and by virtue of the statute in such case made and provided penalties have accrued to the plaintiff in the sum of \$3 for each one of said cars so ferried, to wit, the sum of \$240,000."

The case was removed by the company on diversity of citizenship to the circuit court of the United States for the southern district of Illinois. In that court the company filed a general demurrer, which was sustained. From the final judgment dismissing

the complaint the case was brought directly to this court because solely involving the construction or application of the Constitution of the United States.

The court below decided that the company was not liable for the penalties, because the law of Illinois purporting to impose upon the company the obligation of taking out a license was not binding, as it was repugnant to the commerce clause of the Constitution of the United States. The conclusions of the court upon this subject were in substance based on what was deemed to be the result of the rulings in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 153, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, and *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

In the argument at bar the county insists that the lower court erred in applying the cases mentioned, because those cases did not question the power of the several states to license and regulate ferries, but prevailed upon other considerations, and *hence were [458] inapposite. It is insisted that a consistent line of other cases decided by this court, commencing at an early day, determined that the right to establish, regulate, and license ferries, even though they be across a navigable river constituting a boundary between two states, rests exclusively within the several states, as embraced within police powers reserved to the several states, and not delegated to the national government. On the other hand, the company insists that, whilst undoubtedly there are decisions of this court apparently sustaining the contention of the other side, when properly considered the cases referred to must be limited to ferries over streams wholly within a state, and to the extent that certain of the cases cannot be so limited, they have been in effect overruled. As, then, both sides confidently rely upon prior adjudications of this court, and both in effect argue that the cases which are asserted to sustain the view urged by the other side are in irreconcilable conflict with other cases, it becomes necessary to briefly advert to the cases relied upon by both parties in order to ascertain whether the asserted antagonism between the decided cases really obtains so far as it may be necessary for the decision of the question arising on this record, and if not, to apply the rule settled by the previous cases, and, if the conflict does exist between the adjudications, to determine which of the prior decisions announce the correct rule, and to follow it.

In *Gibbons v. Ogden* (1824) 9 Wheat. 1, 6 L. ed. 23, wherein it was held that the acts of the legislature of New York, granting to Livingston and Fulton exclusive rights to navigation, by steamboats, in the navigable

waters within the jurisdiction of the state of New York, was repugnant to the commerce clause of the Constitution, in the course of the opinion Mr. Chief Justice Marshall said (p. 65, L. ed. p. 38) :

[459] "Internal commerce must be that which is wholly carried on within the limits of a state; as where the commencement, progress, and termination of the voyage are wholly confined to the territory of the state. This branch of power includes *a vast range of state legislation, such as turnpike roads, toll bridges, exclusive rights to run stage wagons, auction licenses, licenses to retailers, and to hawkers and peddlers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers, by land or water. All such laws must necessarily affect, to a great extent, the foreign trade and that between the states, as well as the trade among the citizens of the same state. But, although these laws do thus affect trade and commerce with other states, Congress cannot interfere, as its power does not reach the regulation of internal trade, which resides exclusively in the states."

In *Fanning v. Gregoire* (1853) 16 How. 524, 14 L. ed. 1043, the question for decision was whether a subsequent grant of a license for a ferry across the Mississippi river interfered with and violated the rights of a prior license to a ferry of like character. In other words, the question was whether the grant of the first license was exclusive and prevented the grant of a second license. The court decided that the first grant was not exclusive; and in concluding the opinion—speaking through Mr. Justice McLean, and noticing the argument that the guaranty contained in the ordinance of 1787 in respect to the free navigation of the Mississippi river and the power delegated to Congress to regulate commerce between the states were in conflict with the asserted power of the state to grant the second ferry license in question—said (p. 534, L. ed. p. 1047) :

"Neither of these interfere with the police power of the states, in granting ferry licenses. When navigable rivers within the commercial power of the Union may be obstructed, one or both of these powers may be invoked."

In *Conway v. Taylor* (1861) 1 Black, 603, 17 L. ed. 191, the case was substantially this: An exclusive franchise had been granted by the laws of Kentucky to operate a ferry from the Kentucky shore across the Ohio river. A person having commenced to operate a ferry from the Ohio shore to the Kentucky side, in conflict with the exclusive right, his power to do so was resisted in the Kentucky courts on the ground that it was [460] *violative of the Kentucky ferry franchise. The courts of Kentucky held that it

was in conflict with the Kentucky franchise for the person operating the ferry from the Ohio shore to conduct a ferry from the Kentucky side back to Ohio, and therefore restrained the ferry to that extent. The Kentucky court in effect enforced the exclusive right of the one owning the Kentucky ferry to ferry from Kentucky across to Ohio, but declined to restrain the right of the Ohio ferry owner to ferry from Ohio to Kentucky. The judgment of the Kentucky court came to this court for review, and it was affirmed. In the course of the opinion, announced by Mr. Justice Swayne, it was expressly stated that the right existed in the several states bordering on navigable rivers which were a boundary between two states to grant a ferry privilege from their own borders to cross the river. The court said (p. 629, L. ed. 201) :

"The concurrent action of the two states was not necessary. 'A ferry is in respect of the landing place, and not of the water. The water may be to one and the ferry to another.' 13 Vin. Abr. 208a.

"The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others."

Further along in the opinion (p. 633, L. ed. p. 203), the language which we have previously cited from the opinion of Mr. Chief Justice Marshall in *Gibbons v. Ogden* was quoted in part, as follows (italicized as in the reports) :

"The court said: 'They' (state inspection laws) 'form a portion of the immense mass of legislation which embraces everything within the territory of a state *not surrendered to the general government*; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, *ferries, etc.*, are parts of this mass.'"

After referring to *Fanning v. Gregoire*, and citing the passage *which we have previously [461] quoted as affirming the doctrine that a state had a right to grant a ferry license across a navigable river, being the boundary between the granting, and another, state, the question of the operation of the commerce clause of the Constitution of the United States was passed on. The court declared (p. 633, L. ed. p. 203), that there was no repugnancy to the commerce clause of the Constitution in the mere licensing by a state of a ferry; that the regularity and nature of the business of ferrying was such that the granting of a privilege on the subject did not regulate inter-

state commerce, and therefore, despite an exclusive ferry privilege, interstate commerce was free from restraint by the state. In conclusion, however, the court pointed out (p. 634, L. ed. p. 203), that undoubtedly if in the grant of a ferry privilege there were contained provisions repugnant to the commerce clause, it would be the duty of the court to prevent their enforcement.

In *Wiggins Ferry Co. v. East St. Louis* (1882) 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257, the case was this: The ferry company was in the enjoyment of a ferry franchise to operate across the Mississippi river between Illinois and Missouri. It was domiciled in Illinois, that state being the situs of its boats and other property. This property was taxed in Illinois as other property, and there was also levied upon the company a license tax for the privilege of carrying on the ferry, the validity of which last exaction was the question which the case presented. The collection of the license charge was resisted on the ground that the corporation was exempt by the contract arising from the grant of its franchise from the payment of a license charge, and that if not, the exaction of the license tax for the privilege of ferrying across a navigable river lying between two states was repugnant to the commerce and other clauses of the Constitution of the United States not necessary to be specially referred to.

[462] After disposing adversely to the corporation of the contention concerning the alleged exemption, the court considered the application of the commerce clause of the Constitution, *and decided that proposition against the corporation. In doing so the court referred to the passage in the opinion of Chief Justice Marshall in *Gibbons v. Ogden*, which we have already quoted, and also referred approvingly to the opinions in *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191, and *Fanning v. Gregoire*, 16 How. 524, 14 L. ed. 1043.

In *Gloucester Ferry Co. v. Pennsylvania* (1885) 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, the facts were these: The ferry company was incorporated and domiciled in New Jersey, carried on a ferry business over the Delaware river between Camden, New Jersey, and Philadelphia. The situs of its boats and property was in New Jersey; but the company owned in Philadelphia a wharf or slip at which its boats landed. The taxing officers of the state of Pennsylvania assessed against the corporation, on the ground that it was doing business within the state, a tax upon the estimated value of its capital stock, and the validity of this tax was the question decided. After referring to the reasoning of the supreme court of Pennsylvania affirming the validity of the tax, in which it was pointed

out that the company did business in the state because it landed in the state of Pennsylvania, and there in part carried on its ferry business, the court said (p. 203, L. ed. p. 161, Inters. Com. Rep. p. 385, Sup. Ct. Rep. p. 827):

"As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware river from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in such transportation.

"It matters not that the transportation is made in ferryboats, which pass between the states every hour of the day. The means of transportation of persons and freight between the states does not change the character of the business as one *of commerce,[463] nor does the time within which the distance between the states may be traversed. Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed,—that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

After reviewing and applying many prior adjudications of this court, in which the want of power of the several states to burthen interstate commerce had been pointed out, in its various aspects, the court considered the statement of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, which we have previously quoted, and observed (p. 215, L. ed. p. 166, Inters. Com. Rep. p. 390, Sup. Ct. Rep. p. 834):

"The power of the states to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons v. Ogden*, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the states,

are component parts of an immense mass of legislation, embracing everything within the limits of a state not surrendered to the general government; but in this language he plainly refers to ferries entirely within the state, and not to ferries transporting passengers and freight between the states and a foreign country."

Although no reference was made in the opinion to *Fanning v. Gregoire*, *Conway v. Taylor*, and *Wiggins Ferry Co. v. East St. Louis*, in concluding the opinion it was said (p. 217, L. ed. p. 167, Inters. Com. Rep. p. 390, Sup. Ct. Rep. p. 835):

[464] "It is true that, from the earliest period in the history of the *government, the states have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the states can more advantageously manage such interstate ferries than the general government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the states bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the states of taxes or other burdens upon the commerce between them. Freedom from such imposition does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. . . . How conflicting legislation of the two states on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware river. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferrykeepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case is not complicated by any action of that state concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, what-

ever be the instrumentality by which it is carried on."

The tax imposed by the state of Pennsylvania was decided to be void, *as being repugnant to the commerce clause of the Constitution. [465]

In *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, a law of the state of Kentucky regulating the tolls to be charged by a bridge company operating a bridge across the Ohio river between Kentucky and Ohio came under review. After an extended consideration of the previous cases, with one exception, including the cases to which we have previously referred, it was decided that, as the bridge was over a navigable stream between two states, the power to regulate the tolls thereon was in Congress, and therefore the state regulation was void.

The position of the parties as to the cases which we have reviewed is this: The county insists that the statement in *Gibbons v. Ogden*, that the establishment of ferries was within the reserved powers of the states, and the rulings in *Fanning v. Gregoire*, *Conway v. Taylor*, and *Wiggins Ferry Co. v. East St. Louis*, affirmatively settle that a state may establish ferries over a navigable river, the boundary between two states, and license the same, and that doing so is not only not repugnant to the commerce clause of the Constitution of the United States, but is in consonance therewith, since the power as to ferries was reserved to the states, and not delegated to the national government. The *Gloucester Ferry Case*, it is said, rested upon the nature of the particular tax imposed by the state of Pennsylvania, and that the case may hence not be considered as overruling the previous cases, not only because it did not expressly refer to them, but also because some expressions found in the opinion which we have cited are construed as substantially affirming the right of the state to regulate and license a ferry like the one here in question. On the other hand, the corporation urges that the rulings in *Fanning v. Gregoire* and *Conway v. Taylor* proceeded upon a misconception and partial view of the language of Chief Justice Marshall in *Gibbons v. Ogden*. That language, it is insisted, when the sentences which immediately precede the passage *quoted in *Fanning v. Gregoire* and [466] *Conway v. Taylor*, are considered, clearly demonstrates that the Chief Justice was referring to the power of the states to license and control ferries on streams of a local character, and this, it is said, is demonstrated by the statement on the subject in the *Gloucester Ferry Case*. The case of *Wiggins Ferry Co. v. East St. Louis*, it is argued, proceeded, not upon the right of the state over the ferry, but upon its power to tax

property whose situs was within its jurisdiction, and this was the view adopted by the court below. The *Gloucester Ferry Case*, it is urged, did not proceed upon the nature of the tax, but upon the want of power in the state of Pennsylvania to exert its control over a ferry crossing a river which was a boundary between two states, so as in effect to burthen the carrying on of interstate commerce. And that case, it is further insisted, therefore qualifies, if it does not specifically overrule, the earlier cases.

We do not think, however, that for the purposes of this case we need enter into these contentions, because we consider that in any view which may be taken of the previous cases, each and all of them are conclusive of this case without reference to any real or supposed conflict between them.

First. None of the cases, whatever view may be taken of them, import power in a state to directly control interstate commerce. Conceding, *arguendo*, that the police power of a state extends to the establishment, regulation, and licensing of ferries on a navigable stream, being the boundary between two states, none of the cases justify the proposition that such power embraces transportation by water across such a river which does not constitute a ferry in a strict technical sense. In that sense "a ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them." *New York v. Starin*, 106 N. Y. 11, 12 N. E. 631; *Broadnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633. It proceeds [467] at *regular intervals, and, growing out of the local necessities and the public interest in its operation, is subject to local control, and at common law the exclusive franchise to operate a ferry within designated limits might be conferred upon a particular person or persons. In a strict sense the ferry business is confined to the transportation of persons with or without their property, and a ferryman carrying on only a ferry business is bound to transport in no other way. *New York v. Starin*, 106 N. Y. 11, 12 N. E. 631; *Wyekoff v. Queens County Ferry Co.* 52 N. Y. 32, 11 Am. Rep. 650.

Indeed, the essential distinction between a ferry in the restricted and legal signification of that term and transportation as such, constituting interstate commerce, was pointedly emphasized in a passage from the opinion in *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191, which we have previously quoted, and the distinction between the two was necessarily involved, if it may not be said to have been controlling, in the decision of that case.

The difference between a ferry in its true

sense and transportation of the character of that now under review is shown in the case of *New York v. New England Transfer Co.* 14 Blatchf. 159, Fed. Cas. No. 10,197. In that case a boat was operated from Jersey City in New Jersey to Mott Haven in New York, and from Mott Haven to Jersey City. In this boat, by means of tracks, railroad cars, both passenger and freight, were run and carried under contract with the railroad company for the purpose of further transportation. The contention was that the operation of this boat constituted the running of a ferry, and therefore to so operate it required a ferry license from the proper authority of the city of New York. The court (Shipman, J.), whilst not denying the power of the city of New York to require a license for a ferry operating over the route in question, held that the use of the boat in the manner specified was not the operation of a ferry. After pointing out the similarity between bridges and ferries, and directing attention to *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571, in which it was *held that a mere rail- [468] road bridge, utilized for the purpose of transporting cars across a navigable river, did not infringe an exclusive right to maintain a bridge for general purposes theretofore granted by state authority, and demonstrating the identity in principle between the case before it and that case, said (p. 167):

"The reasoning which denies that a railroad bridge is an interference with an exclusive right theretofore granted to build an ordinary bridge, applies with almost equal force to the question, whether a ferry franchise is interfered with by a ferry which is designed for the transportation of railroad cars only. The boat of the defendants is provided with two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat, it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrangement of boat and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else. The ferry is a part of a continuous through railroad line from places north and east of the city of New York, to places south and southwest of that city, and the trips of the boat are dependent upon the arrival of through railroad trains.

"Such a ferry is unlike an ordinary ferry for the transportation across a river of per-

sons, animals, and freight, at intervals more or less regular, for fare or toll."

Second. As we conclude from the considerations previously expressed that the transportation of railroad cars—whether loaded or unloaded—across the Mississippi river at the point in question was not the maintenance of a ferry in the proper sense of that term, and that such business was essentially interstate commerce, the only question remaining for decision is, *Did the county have the power to require the obtaining of a license by the company as a prerequisite to the carrying on of such interstate commerce, and to impose the penalties sued for because a license had not been obtained? In examining this question we need not stop to determine how far, if at all, a state may, under its general police power, require the taking out of a license for the carrying on of the business of interstate commerce to the extent necessary to enable the state or its subdivisions to exercise such supervision as may be required for the safety of life and property. This results because, even conceding, *arguendo*, such power, we think it clear that such conditions were attached to the obtaining of a license in this case as relieved the company from the duty of complying with the requirements of the law under which liability is here asserted. That liability is contained in chapter 55 of the Revised Laws of Illinois, in force in 1874. By this law authority was conferred upon the county to grant a ferry license, and it was made the duty of a person or corporation desiring to carry on a ferry to make application for such license. But power was conferred upon the county to withhold the grant of a license in a particular case if deemed best, and to grant it, preferably, to a citizen of the state of Illinois; and the acceptance of the license imposed the absolute obligation upon the applicant to carry on a technical ferry business, to operate at designated hours during the day and during the entire night. In other words, the law under which license was required not only subjected the applicant for the license to discriminatory provisions, but in addition compelled the licensee, if he desired to carry on a purely interstate commerce business, to conduct a general ferry business. However valid these conditions may be when applied to a ferry business in the restricted sense, under the assumption which we have indulged in, *arguendo*, that the state had the power to regulate a ferry upon a navigable stream forming the boundary between two states, it is obvious that the conditions to which we have alluded were illegal *because a direct burden upon interstate commerce was made a condition precedent to the doing of business of that character.

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Because we have, *arguendo*, rested our conclusion in this case upon the assumption that the respective states have the power to regulate ferries over navigable rivers constituting boundaries between states, we must not be understood as deciding that that doctrine, which undoubtedly finds support in the opinions announced in *Fanning v. Gregoire* and *Conway v. Taylor*, has not been modified by the rule subsequently laid down in the *Gloucester Ferry* and the *Covington Bridge Cases*. As this case has not required us to enter into those considerations we have not done so.

Affirmed.

WILLIAM J. BUTTFIELD, *Plff. in Err.*,
v.

NEVADA N. STRANAHAN, Collector of
the Port of New York.

(See S. C. Reporter's ed. 470-498.)

Foreign commerce — validity of tea inspection act — due process of law — delegation of legislative power.

1. No individual has such a vested right to trade with foreign nations as precludes Congress, in the exercise of its plenary power to regulate foreign commerce, from prohibiting, by the tea inspection act of March 2, 1897 (29 Stat. at L. 604, chap. 358, U. S. Comp. Stat. 1901, p. 3,194), on considerations of public policy, the importation of teas inferior to the government standards, on the theory that the importer is thereby deprived of his property without due process of law.
2. An unconstitutional delegation of legislative power to the Secretary of the Treasury is not made by the provision of the tea inspection act of March 2, 1897 (29 Stat. at L. 604, chap. 358, U. S. Comp. Stat. 1901, p. 3,194).

NOTE.—On the power of Congress to regulate commerce—see notes to *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 6 L. R. A. 579; *Bullard v. Northern P. R. Co.* 11 L. R. A. 246; *Re Wilson*, 12 L. R. A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Uiman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L. R. A. 657; *Chauvin v. Valiton*, 3 L. R. A. 194, and *Ullman v. Baltimore*, 11 L. R. A. 225.

On delegation of legislative power—see note to *Bradshaw v. Lankford*, 11 L. R. A. 582.

- 194), forbidding the importation of teas inferior to the government standards of purity, quality, and fitness for consumption, which authorizes him to establish such standards upon the recommendation of a board of tea experts, but such provision merely leaves to the Secretary the executive duty to effectuate the legislative policy declared in the statute.
3. Assuming that no opportunity was afforded by the tea inspection act of March 2, 1897 (29 Stat. at L. 604, chap. 358, U. S. Comp. Stat. 1901, p. 3,194), to an importer of teas for a hearing with reference to the establishing of government standards of purity, quality, and fitness for consumption, or on the question whether his tea should be rejected as not entitled to admission into the United States because inferior to the standards, the statute is not thereby rendered objectionable as a denial of due process of law.
4. Due process of law is not denied an importer of teas by the provision of the tea inspection act of March 2, 1897 (29 Stat. at L. 604, chap. 358, U. S. Comp. Stat. 1901, p. 3,194), commanding the destruction of teas not exported within six months after their final rejection as not entitled to admission into the United States because inferior to the government standards.

[No. 294.]

Argued January 4, 1904. Decided February 23, 1904.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment entered on a verdict directed for defendant in an action against the collector of the port of New York to recover damages for the alleged wrongful seizure, removal, and destruction of certain tea which had been refused admission into the United States because inferior to the standards established by the tea inspection act. *Affirmed.*

Statement by Mr. Justice **White**:

This case presents for determination the question of the constitutionality of a statute known as the tea inspection act, approved March 2, 1897. (29 Stat. at L. 604, chap. 358, U. S. Comp. Stat. 1901, p. 3,194.) The act is copied in full in the margin.†

†An Act to prevent the importation of impure and unwholesome Tea.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.

Sec. 2. That immediately after the passage of this act, and on or before February fifteenth of each year thereafter, the Secretary of the Treas-

*On January 20, 1902, eight packages of tea were imported into the port of New York, per the steamer Adana, by a firm of which the plaintiff in error was the general partner. The tea was entered for import at the New York custom-house, *and was stored in a bonded warehouse. At that time certain standards, enumerated in the margin,† which were selected by the board of tea inspectors, had been put in force by the Treasury regulations under said act of March 2, 1897.

*The eight packages of tea in question were embraced in the class known as "Country green teas," numbered 7 on list of standards. The tea was examined on February 7, 1902, and was rejected as "inferior to standard in quality." By the *term "quality" as thus used was meant the cup quality of the tea, that is to say, its taste and flavor. An appeal was taken by the importer to the board of general appraisers, and that board, on March 10, 1902, certified to the collector that "the said tea is inferior in quality to the standard prescribed by law," and accordingly overruled the appeal. The firm was notified of the decision on March 12, 1902.

In November following the plaintiff in error—who had acquired the interest of his partner in the tea—applied to the collector for permission to withdraw the tea for consumption, on payment of the duties. The request was refused. Application was then made for the release of the tea from bond in order to export it. This was also refused on the ground that the tea had been finally

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- †No. 1. Formosa Oolong.
 No. 2. Foochoon Oolong.
 No. 3. North China Congon.
 No. 4. South China Congon.
 No. 5. India tea (used for Ceylon tea).
 No. 6. Pingsuey, green tea.
 No. 7. Country green tea.
 No. 8. Japan tea, pan fired (used for sun dried).
 No. 9. Japan tea, basket fired.
 No. 10. Japan tea, dust or fannings.
 No. 11. Capers (used for scented orange pekoe).
 No. 12. Canton Oolong (a).
 No. 13. Scented Canton (a).
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ury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with

rejected under the act of March 2, 1897, more than six months previous to the application. The plaintiff in error was also notified that the tea would be ordered to the public stores for destruction.

This action was commenced in the supreme court of the state of New York, county of New York, against the collector of the port of New York, to recover damages for the alleged wrongful seizure, removal, and destruction of the tea in question. Aver-

ments were made of the importation, storing, tender of duties, and refusal to accept the same, and of demand for the tea and refusal to deliver. A general denial was filed. The action being on account of acts done by the defendant under the revenue laws of the United States, as collector of customs, it was removed, on his application, to the circuit court of the United States for the southern district of New York.

*At the trial of the case before Circuit[476]

all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

Sec. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same, at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

Sec. 4. That on making entry at the custom-house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice, and accord with the specifications therein contained; or, in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall, in the manner aforesaid, furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall draw or cause to be drawn samples of each line in every invoice, and shall forward the same to a duly qualified examiner, as provided in section seven: *Provided, however,* That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this act.

Sec. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards herein-

before provided, and no re-examination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the custom authorities; but if, on examination, such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless, on a re-examination called for by the importer or consignee, the finding of the examiner shall be found to be erroneous: *Provided,* That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion, and the remainder held for further examination, as provided in section six.

Sec. 6. That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if, upon such final re-examination by such board, the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea or merchandise described as tea, out of the limits of the United States, within a period of six months after such final re-examination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

Sec. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this act, shall be forwarded to the proper port by the collector or chief officer at that port of entry; that in all cases of examination or re-examination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

Judge Coxe and a jury, the exhibit reproduced in the margin was introduced in evidence. §

*As indicated on this exhibit, the Country[477] green teas thereon designated were arranged in their order of quality, from the highest

Sec. 8. That in cases of re-examination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of con-

demnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of

§ EXHIBIT No. 8.
Schedule of Country Green Teas Arranged in Order of Quality.

1	Choicest Moyune	Choicest Teenkai			
2	Choice Moyune	Choice Teenkai			
3	Finest Moyune	Finest Teenkai			
4	Fine to Finest Moyune	Fine to Finest Teenkai			
5	Fine Moyune				
6	On Fine Moyune	Fine Teenkai			
7	Fully Good Medium Moyune	On Fine Teenkai			
8	Good Medium Moyune	Fully Good Medium Teenkai	Finest Fychow		
9	On Good Medium Moyune	Good Medium Teenkai	Fine "		
10	Fair Moyune	On Good Teenkai	Good Medium Fychow	Finest Wenchow	
11	Good Common Moyune	Fair Teenkai	Fair "	Fine "	
12	Common Moyune	Good Common Moyune	Good Common	Good Med. "	Good, clean, genuine Shanghai packed
13		Common Teenkai	Common	Fair "	
14				Good Common	
15				Common "	
16					Mixed, Shanghai packed
17					Common, refined and adulterated Shanghai packed

to the lowest, No. 1 being the highest grade, and No. 17 the lowest. The designation in each perpendicular column represented the teas grown in a particular district, and all the teas enumerated on the same horizontal line were considered as being equal in grade.

The chairman of the board of tea experts of the Treasury Department testified that the standard for Country green teas in force at the time the tea in question was imported was Hyson of a Fine Teenkai, or No. 6 on the list of standards, and that before fixing this standard "the board made diligent search for any Country green teas of lower grades—Hysons of lower grades—of pure teas on the New York market obtainable by the trade, and were unable to find any." The term "Hyson," it may be observed, indicated that the tea was made out of the coarsest leaves. For the plaintiff it was testified that the quality of the tea in controversy corresponded in quality with the grade No. 7 on Exhibit 8; while the evidence for the government was to the effect that it would grade as Fair Fychow, No. 11 on Exhibit 8. The testimony also tended to show that the tea in question differed only in respect to the cup quality from the government standard; the evidence for the government being that it was "a tea of a decidedly low grade, . . . a pure tea, but of low quality."

At the close of the evidence the court overruled a motion to direct a verdict for the plaintiff, and an exception was reserved. Thereupon the court, granting a motion on behalf of the defendant, instructed that the only question was as to the constitutionality of the statute under which the defendant, as collector of the port, acted, and directed a verdict in his favor. Upon the judgment entered on the verdict, which was returned in accordance with this instruction, the case was brought directly to this court.

Mr. James L. Bishop argued the cause, and, with **Mr. James H. Simpson**, filed a brief for plaintiff in error:

The tea inspection act confers upon the

Secretary and the board of tea experts the uncontrolled power to fix standards of purity, quality, and fitness for consumption, and thus to prescribe arbitrarily what teas may be imported and dealt in.

Sang Lung v. Jackson, 85 Fed. 502; *Cruikshank v. Bidwell*, 86 Fed. 7.

The power to regulate commerce with foreign nations and between the states is subject to such limitations as are prescribed by the Constitution and its amendments.

Gibbons v. Ogden, 9 Wheat. 196, 6 L. ed. 70; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Lottery Case*, 188 U. S. 321, 362, 47 L. ed. 492, 504, 23 Sup. Ct. Rep. 321.

The power to regulate commerce is not an end in itself. It is an instrumentality which may be employed for many distinct purposes.

Cooley v. Port Wardens, 12 How. 310, 319, 13 L. ed. 1001, 1004.

Congress may, under this power, improve the harbors and navigable rivers of the country, but if, in the exercise of that power, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the 5th Amendment, and can do so only on payment of just compensation.

Monongahela Nav. Co. v. United States, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622.

So, when this power was exercised to prevent unjust discrimination in tariff rates by common carriers engaged in interstate commerce, it was held that, in the enforcement of the provisions of that law, a witness was protected by the constitutional provisions contained in the 5th Amendment from being compelled to disclose evidence of a criminating character.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

The several states may, in the absence of national legislation, pass police laws upon

United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

Sec. 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

Sec. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations.

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Sec. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this act shall not be subject to the prohibition hereof, but the provisions of the act entitled "An Act to Prevent the Importation of Adulterated and Spurious Teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

Sec. 12. That the act entitled "An Act to Prevent the Importation of Adulterated and Spurious Teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this act goes into effect.

Approved, March 2, 1897.

many subjects which do, in effect, regulate commerce.

Southern S. S. Co. v. Port Wardens, 6 Wall. 33, 18 L. ed. 749; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 489, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 631, 41 L. ed. 854, 17 Sup. Ct. Rep. 418; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92.

General police power being exclusively within the control of the states, Congress cannot exercise such general police powers under the power to regulate commerce.

Lottery Case, 188 U. S. 364, 47 L. ed. 504, 23 Sup. Ct. Rep. 321; *License Cases*, 5 How. 594, 599, 12 L. ed. 296, 299.

However extensive the powers of Congress may be over commerce with foreign nations, the laws which it makes for carrying into execution these powers must be "necessary and proper."

M'Culloch v. Maryland, 4 Wheat. 421, 4 L. ed. 605; *Legal Tender Cases*, 12 Wall. 573, 20 L. ed. 319.

The point at which the demands of government under the police power are restrained by the paramount constitutional guaranties of liberty and property cannot be fixed, but must be left to be determined by the process of exclusion, as applied to particular cases. Under our form of government the question whether that limit has been overreached in a particular instance must always be a judicial question.

Marbury v. Madison, 1 Cranch, 137, 176, 2 L. ed. 73; *Smyth v. Amcs*, 169 U. S. 468, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 83, 86, 46 L. ed. 94, 100, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215; *State v. Chicago, M. & St. P. R. Co.* 68 Minn. 381, 38 L. R. A. 672, 64 Am. St. Rep. 482, 71 N. W. 400; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Waters v. Wolf*, 162 Pa. 153, 42 Am. St. Rep. 815, 29 Atl. 646; 22 Am.

& Eng. Enc. Law, 2d ed. p. 937; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

It cannot be successfully contended that the right of a citizen to carry on a lawful business can be placed under the arbitrary and uncontrolled will of an individual or board.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *Sioux Falls v. Kirby*, 6 S. Dak. 62, 25 L. R. A. 621, 60 N. W. 156; *Live Stock Dealers' & Butchers' Asso v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 399, Fed. Cas. No. 8,408; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L. R. A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Harmon v. State*, 66 Ohio St. 249, 58 L. R. A. 618, 64 N. E. 117; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *Re Grice*, 79 Fed. 627; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; *New York Sanitary Utilization Co. v. Health Department*, 61 App. Div. 106, 70 N. Y. Supp. 510.

This position is not inconsistent with anything decided by this court under the alien exclusion laws.

Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Chae Chan Ping v. United States*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

Or with the legislation making the decision of immigration or custom officers against the right of aliens to enter the country final.

Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967.

The alien exclusion acts do not rest upon the power of Congress to regulate commerce, but upon the sovereign power to exclude all aliens from national territory, which is incident to every independent nation. Similar

laws applicable to citizens would be unconstitutional.

United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

Nor is this position inconsistent with the cases which sustain police restrictions and prohibitions upon immoral, harmful, and dangerous pursuits, or with the proper regulation of professions, trades, and industries, although innocent and beneficial.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Harmon v. Ohio*, 66 Ohio St. 249, 58 L. R. A. 618, 64 N. E. 117; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *State v. Fleischer*, 41 Minn. 69, 42 N. W. 696; *Monmouth v. Popel*, 183 Ill. 634, 56 N. E. 348; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 383, 18 L. ed. 370.

The action of boards fixing standards of qualification for the practice of certain pursuits is open to review by the courts, and if the requirements are unreasonable or the proceedings unjust or unfair, they may be corrected.

Dent v. West Virginia, 129 U. S. 114, 125, 32 L. ed. 623, 627, 9 Sup. Ct. Rep. 231; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

But the proceedings of the Secretary in fixing the tea standards are not reviewable.

Sang Lung v. Jackson, 85 Fed. 502; *Buttfield v. Bidwell*, 37 C. C. A. 506, 96 Fed. 328.

The act is unconstitutional because it prevents the plaintiff and others from dealing in a wholesome and ordinary article of commerce, and destroys a trade in which he and others had been engaged.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Biesecker*, 169 N. Y. 53, 57 L. R. A. 178, 88 Am. St. Rep. 534, 61 N. E. 990; *People v. Hawkins*, 157 N. Y. 18, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 275; *People v. Marx*, 99 N. Y. 379, 52 Am. Rep. 34, 2 N. E. 29; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Dorsey v. State*, 38 Tex. Crim. Rep. 527, 40 L. R. A. 201, 70 Am. St. Rep. 762, 44 S. W. 54; *Helena v. Dwyer*, 64 Ark. 424, 39

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L. R. A. 266, 62 Am. St. Rep. 206, 42 S. W. 1071; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239.

The constitutional validity of a law is to be decided not by what has been done under it, but what may by its authority be done.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; *Montana Co. v. St. Louis Min. & Mill Co.* 152 U. S. 160, 170, 38 L. ed. 398, 400, 14 Sup. Ct. Rep. 506; *People ex rel. Balcom v. Mosher*, 163 N. Y. 32, 79 Am. St. Rep. 552, 57 N. E. 88; *Colon v. Lisk*, 153 N. Y. 194, 60 Am. St. Rep. 609, 47 N. E. 302; *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 854, 26 Am. St. Rep. 464, 28 N. E. 1040.

If the purpose of this law is to secure the consumption of a better or superior class of teas, it is unconstitutional for the same reason that any sumptuary law would be unconstitutional.

Cooley, Const. Lim. 7th ed. p. 549.

This law ought not to be sustained, because the establishment of this precedent will open the door to methods of government which experience has shown to be fatal to liberty.

Boyd v. United States, 116 U. S. 635, 29 L. ed. 753, 6 Sup. Ct. Rep. 524.

The act is unconstitutional because it attempts to delegate to the Secretary of the Treasury, and a board named by him, legislative powers which can only be exercised by Congress.

Stoutenburgh v. Hennick, 129 U. S. 148, 32 L. ed. 639, 9 Sup. Ct. Rep. 256; *Dent v. United States (Ariz.)* 71 Pac. 920; *United States v. Blasingame*, 116 Fed. 654; *United States v. Keokuk & H. Bridge Co.* 45 Fed. 178; *United States v. Rider*, 50 Fed. 406; *Harmon v. State*, 66 Ohio St. 249, 58 L. R. A. 618, 64 N. E. 117; *Schaezlein v. Cabaniss*, 135 Cal. 466, 56 L. R. A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *Kilbourn v. Thompson*, 103 U. S. 168, 191, 26 L. ed. 377, 387; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *Wayman v. Southard*, 10 Wheat. 43, 6 L. ed. 253.

The act is unconstitutional because it does

not provide that notice and an opportunity to be heard be afforded the importer before the rejection of his tea by the tea examiner, or the tea board of general appraisers.

Kuntz v. Sumption, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 722; *Rectz v. Michigan*, 188 U. S. 505, 509, 47 L. ed. 563, 567, 23 Sup. Ct. Rep. 390; *Stuart v. Palmer*, 74 N. Y. 186, 30 Am. Rep. 289; *Turpin v. Lemmon*, 187 U. S. 58, 47 L. ed. 74, 23 Sup. Ct. Rep. 20; *Davidson v. New Orleans*, 96 U. S. 97, 107, 24 L. ed. 616, 621; *Leut v. Tillson*, 140 U. S. 316, 327, 35 L. ed. 419, 425, 11 Sup. Ct. Rep. 825; *Simon v. Craft*, 182 U. S. 427, 436, 45 L. ed. 1165, 1171, 21 Sup. Ct. Rep. 836; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

This is not a proceeding for the collection of public revenue, in which cases summary remedies may be used which could not be applied in cases of a judicial character.

King v. Mullins, 171 U. S. 429, 43 L. ed. 224, 18 Sup. Ct. Rep. 925; *Bell's Gap. R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 33 L. ed. 892, 896, 10 Sup. Ct. Rep. 533.

The act is unconstitutional because it authorizes the confiscation of the importer's property without due process of law.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *Hey Sing Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115; *Dunn v. Burlingame*, 62 Me. 24; *King v. Haynes*, 80 Me. 206, 13 Atl. 882; *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *State v. Robbins*, 124 Ind. 308, 8 L. R. A. 438, 24 N. E. 978; *Ridgeway v. West*, 60 Ind. 371.

Mr. Edward B. Whitney argued the cause, and, with *Solicitor General Hoyt*, filed a brief for defendant in error:

Every intendment is in support of the constitutionality of the act.

United States v. Gettysburg Electric R. Co. 160 U. S. 668, 680, 40 L. ed. 576, 581, 16 Sup. Ct. Rep. 427; *Pine Grove Twp. v. Talcott*, 19 Wall. 666, 673, 22 L. ed. 227, 232; *Nicol v. Ames*, 173 U. S. 509, 514, 515, 43 L. ed. 786, 791, 792; *Com. v. Blackington*, 24 Pick. 353, 355.

The power to regulate commerce with foreign nations includes the power to prohibit the importation of these low-grade teas.

United States v. The William, 2 Hall L. J. 255, Fed. Cas. No. 16,700; *Lottery Case*, 188 U. S. 321, 354, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321; 2 Story, Const. § 1093.

The right to exclude any article from commerce with the Indian tribes, Congress-

sional power over which is identical with that over foreign commerce, is well settled.

United States v. 43 Gallons of Whisky, 93 U. S. 188, 194, 195, 23 L. ed. 846, 847.

And it has recently been held that the right to regulate interstate commerce also implies the right to prohibit.

Lottery Case, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

The power to regulate commerce with foreign nations being an enumerated power, it is entirely unlimited so long as it does not violate any of the specific constitutional restrictions upon legislative authority.

Lottery Case, 188 U. S. 321, 353, 356, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321.

An enumerated power is "distinct and independent, to be exercised in any case whatever."

McCulloch v. Maryland, 4 Wheat. 421, 422, 4 L. ed. 605; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 541, 24 L. ed. 148, 152.

It acknowledges no limitations other than those prescribed in the Constitution.

Leisy v. Hardin, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

It may be used for any lawful purpose.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Geofroy v. Riggs*, 133 U. S. 258, 266, 267, 33 L. ed. 642, 645, 10 Sup. Ct. Rep. 295.

The power of Congress over foreign commerce is much greater than that of the states over domestic production. The latter is not unlimited, but is restricted to that very indefinite sphere included within what is called "the police power;" yet even the states may prohibit the manufacture of an inferior article.

Patapsco Guano Co. v. North Carolina Bd. of Agri. 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862.

The intent of the statute is (and for proper reason) to exclude teas of inferior quality, though sufficiently pure, and not unwholesome.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 116, 25 L. ed. 782, 783, 784.

The act is to be considered according to its intent. It is remedial and to be construed as such, notwithstanding that the tea must be destroyed to get rid of it if the importer refuses to send it away within six months after its rejection.

United States v. Stowell, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244.

The fact that the title of the statute is narrower in scope than the statute itself is immaterial. The title may be used in construing a statute when the body of the

statute is ambiguous; but the ambiguity must be found in the word to be construed or in its context, and not in the title.

Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; *Had-den v. The Collector*, 5 Wall. 107, 110, 18 L. ed. 518, 519.

The delegation of details to the Secretary of the Treasury was proper, and indeed absolutely necessary.

Merritt v. Welsh, 104 U. S. 694, 702, 705, 26 L. ed. 896, 899, 900.

Recent decisions of this court recognize that to rigidly enforce the doctrine that Congress cannot delegate legislative power would often in effect be a restriction upon legislative power, and they allow to Congress very wide latitude in this respect.

Marshall Field & Co. v. Clark, 143 U. S. 649, 680, 694, 36 L. ed. 294, 306, 310, 12 Sup. Ct. Rep. 495; *Dunlap v. United States*, 173 U. S. 65, 43 L. ed. 616, 19 Sup. Ct. Rep. 319.

It has been held in lower courts that the discretion lodged in the Secretary of War as to allowing bridges over navigable rivers is an unconstitutional delegation of power, but the latest decisions are to the contrary.

United States v. Moline, 82 Fed. 592; *E. A. Chatfield Co. v. New Haven*, 110 Fed. 788.

The Secretary of War has a general right to make rules for the regulation of navigation on navigable rivers, which have the force of law; and both he and the Secretary of the Navy have large legislative powers over their respective departments of the public defense.

United States v. Ormsbee, 74 Fed. 207.

The power of the Secretary of the Interior to make regulations concerning the forest reservations of the United States, under the sundry civil appropriation act, is sustained.

Dastervignes v. United States, 58 C. C. A. 346, 122 Fed. 30.

The Guano islands act of 1856 (11 Stat. at L. 119, chap. 164, U. S. Comp. Stat. 1901, p. 3739), delegated to the discretion of the President, unhampered by any rules or limitations, the question whether newly discovered guano islands should be considered as appertaining to the United States; and this was held a strictly executive power.

Jones v. United States, 137 U. S. 202, 209, 217, 34 L. ed. 691, 694, 698, 11 Sup. Ct. Rep. 80.

Territorial governments have always been given great legislative powers by a delegation similar to that which is made by the states to their municipalities.

1 Dill. Mun. Corp. § 308; *State, Paul*, 192 U. S. U. S., Book 48.

Prosecutor, v. Gloucester County Circuit Judge, 50 N. J. L. 585, 1 L. R. A. 79, 15 Atl. 272.

The number of instances to be found in our laws where a wide discretion is left to an executive officer is necessarily very great.

Re Griner, 16 Wis. 423; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; *State v. Heinemann*, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818; *Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Overshiner v. State*, 156 Ind. 187, 51 L. R. A. 748, 83 Am. St. Rep. 187, 59 N. E. 468; *Scholle v. State*, 90 Md. 729, 50 L. R. A. 411, 46 Atl. 326; *Martin v. Witherspoon*, 135 Mass. 175; *Re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, 38 Pac. 981; *Wilson v. Eureka City*, 173 U. S. 32, 36, 37, 43 L. ed. 603, 605, 606, 19 Sup. Ct. Rep. 317; *The Laura*, 114 U. S. 411, *sub nom. Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 5 Sup. Ct. Rep. 881; *United States v. Duell*, 172 U. S. 576, 43 L. ed. 559, 19 Sup. Ct. Rep. 286.

Congress can authorize the Secretary of the Treasury or Secretary of the Interior to require, in their discretion, oaths the violation of which is ground for prosecution for perjury.

United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; *Caka v. United States*, 152 U. S. 211, 219, 38 L. ed. 415, 418, 14 Sup. Ct. Rep. 513.

In establishing a bankruptcy system, it can delegate to each state the determination from time to time of the exemptions which are to be recognized by the Federal courts within its limits in the interest of local uniformity of practice.

Hanover Nat. Bank v. Moyses, 186 U. S. 181, 189, 190, 46 L. ed. 1113, 1120, 22 Sup. Ct. Rep. 857.

The establishment of a standard of fitness for admission to medical practice may be fixed by a state medical society or university.

Hewitt v. Charier, 16 Pick. 353.

Municipal officers may be authorized on grounds of expediency amounting almost to necessity to make regulations, the violation of which shall be subject to criminal prosecution by the state's attorney.

Brodline v. Revere, 182 Mass. 598, 66 N. E. 607.

Due process of law was not denied to the plaintiff.

Origet v. Hedden, 155 U. S. 228, 236, 238, 39 L. ed. 130, 133, 134, 15 Sup. Ct. Rep. 92; *Auffmordt v. Hedden*, 137 U. S. 310, 312, 318, 34 L. ed. 674, 675, 11 Sup. Ct. Rep.

103; *Cary v. Curtis*, 3 How. 236, 11 L. ed. 576.

Assuming the act otherwise to be constitutional, the provision for destroying teas not exported within six months after their rejection is constitutional also.

Passavant v. United States, 148 U. S. 214, 37 L. ed. 426, 13 Sup. Ct. Rep. 572; *Origel v. Hedden*, 155 U. S. 228, 39 L. ed. 130, 15 Sup. Ct. Rep. 92; *Nishimura Ekiu v. United States*, 142 U. S. 651, 663, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 339; *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The assignments of error assail the act of the trial court in denying the motion for the direction of a verdict in favor of plaintiff and in giving a peremptory instruction in favor of the defendant. Summarized, the contentions are as follows: 1st, that the act of March 2, 1897, confers authority to establish standards, and that such power is legislative and cannot constitutionally be delegated by Congress to administrative officers; 2d, that the plaintiff in error had a [492] vested *right to engage as a trader in foreign commerce and as such to import teas into the United States which, as a matter of fact, were pure, wholesome, and free from adulteration, fraud, and deception, and which were fit for consumption; 3d, that the establishment and enforcement of standards of quality of teas, which operated to deprive the alleged vested right, constituted a deprivation of property without due process of law; 4th, that the act is unconstitutional, because it does not provide that notice and an opportunity to be heard be afforded an importer before the rejection of his tea by the tea examiner, or the tea board of general appraisers; and, 5th, that, in any event, the authority conferred by the statute to destroy goods upon the expiration of the time limit for their removal for export, and the destruction of such property without a judicial proceeding, was condemnation of property without hearing and the taking thereof without due process of law.

Whether the contentions just stated are tenable are the questions for consideration.

In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears. *Nicol v. Ames*, 173 U. S. 509, 514,

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515, 43 L. ed. 786, 791, 19 Sup. Ct. Rep. 522; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 680, 40 L. ed. 576, 580, 16 Sup. Ct. Rep. 427.

The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case*, 188 U. S. 321, 353-356, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321; *Leisy v. Hardin*, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but *indirectly, as [493] a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. 9 Stat. at L. 237, chap. 70; Rev. Stat. § 2933, U. S. Comp. Stat. 1901, p. 1936.

The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in *United States v. 43 Gallons of Whiskey*, 93 U. S. 194, 23 L. ed. 847, as exclusive and absolute, and was declared to be "as broad and as free from restrictions as that to regulate commerce with foreign nations." In that case it was held that it was competent for Congress to extend the prohibition against the unlicensed introduction and sale of spirituous liquors in the Indian country to territory in proximity to that occupied by the Indians, thus restricting commerce with them. We entertain no doubt that it was competent for Congress, by statute, under the power to regulate foreign commerce, to establish standards and provide that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards.

As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right

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to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution.

[494] *That the act of March 2, 1897, was not an exercise by Congress of purely arbitrary power is evident from the terms of the law, and a consideration of the circumstances which led to its enactment. The history of the act and its proper construction, as also the reasons for deciding that the regulations of the Secretary of the Treasury establishing the standard here in question were warranted by the statute, were succinctly stated in the opinion of the court of appeals for the second circuit, in *Buttfield v. Bidwell*, 37 C. C. A. 506, 96 Fed. 328, and we adopt such statement. The court said:

"The basic question in this case is as to the true construction of the act of Congress of March 2, 1897, entitled 'An Act to Prevent the Importation of Impure and Unwholesome Tea.' Section 1 makes it unlawful 'to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in § 3 of this act, and the importation of all such merchandise is hereby prohibited.' Section 2 provides for the appointment by the Secretary of the Treasury, immediately after the passage of the act, and on or before February 15 of each subsequent year, of the board of tea experts, 'who shall prepare and submit to him standard samples of tea.' Section 3 provides that the Secretary of the Treasury, upon the recommendation of said board, 'shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States,' samples of such standards to be deposited in various custom-houses, and supplied to importers and dealers at cost, and declares that 'all teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards, shall be deemed within the prohibition of the first section hereof.' Sections 4-7 provide for the examination of importations of tea, for a re-examination by the board of general appraisers in case of a protest by the importer or collector against the finding of the primary examiner, and for testing the purity, quality, and fitness for consumption in all cases of examination or re-examination, 'according *to the usages and customs of the tea trade, includ-

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ing the test of an infusion of the same in boiling water, and, if necessary, chemical analysis.' . . . The history of the enactment shows that the word ['quality'] was industriously inserted to make the act a more stringent substitute for the existing legislation. By the act of March 2, 1883 [22 Stat. at L. 451, chap. 64], then in force, any merchandise imported 'for sale as tea,' adulterated with spurious or exhausted leaves, or containing such an admixture of deleterious substances as to make it 'unfit for use,' was prohibited; and exhausted leaves were defined to include any tea which had been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means. Thus the importation of tea containing such an admixture of leaves as to be deprived of its proper quality or virtue by any method of treatment was prohibited. That act, however, contained no provision for the establishment of government standards; and the establishment of uniform standards in the interest of the importer and of the consumer had become a recognized necessity. In a report by the Senate committee on commerce, in 1897, the provision was suggested as designed, among other things, to protect the consumer against 'worthless rubbish,' and insure his 'receiving an article fit for use.' The report pointed out that the 'lowest average grade of tea ever before known was now being used' by our consumers, and proposed as a remedy the establishment of standards of the 'lowest grades of tea fit for use.' As originally introduced in the House, the bill prohibited the importation of 'any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in § 3 of this act.' It was amended in the Senate by inserting the word 'quality' between the words 'purity' and 'fitness for consumption' wherever they occurred in the House bill. The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or *presumably or possibly so[496] because of their inferior quality. The House concurred in the amendment, and the measure was enacted in its present terms. We conclude that the regulations of the Secretary of the Treasury are warranted by the provisions of the act."

The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by

the circuit court of appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, where it was decided that the 3d section of the tariff act of October 1, 1890 [26 Stat. at L. 567, chap. 1244], was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said of the legislation considered in *Marshall Field & Co. v. Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established [437] *standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment, to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him.

It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the board of tea inspectors and the Secretary of the Treasury in establishing the standard in question, and before the general appraisers upon the re-examination of the tea. Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of stand-

ards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred.

It remains only to consider the contention that the provision of the statute commanding the destruction of teas not exported within six months after their final rejection was unconstitutional. The importer was charged with notice of the provisions of the law, and the conditions upon which teas might be brought from abroad, with a view of their introduction into the United States for consumption. Failing to establish the right to import, because of the inferior quality of the merchandise as compared with the standard, the duty was imposed upon the importer to perform certain requirements, and to take the goods from the custody of the authorities within a period *of time fixed by the statute, which was [498] ample in duration. He was notified of the happening of the various contingencies requiring positive action on his part. The duty to take such action was enjoined upon him, and, if he failed to exercise it, the collector was under the obligation, after the expiration of the time limit, to destroy the goods. That plaintiff in error had knowledge of the various steps taken with respect to the tea, including the final rejection by the board of general appraisers, is conceded. We think the provision of the statute complained of was not wanting in due process of law.

Affirmed.

Mr. Justice **Brewer** and Mr. Justice **Brown**, not having heard the argument, took no part in the decision of this case.

WILLIAM J. BUTTFIELD, *Plff. in Err.*,
v.

GEORGE R. BIDWELL.

(See S. C. Reporter's ed. 498, 499.)

Foreign commerce — validity of tea inspection act — due process of law — delegation of legislative power.

This case is governed by the decision in *Buttfield v. Stranahan*, ante, p. 525.

[No. 296.]

Argued January 4, 1904. Decided February 23, 1904.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment entered upon a verdict directed in favor of defendant in an action against the collector of the port of New York to recover damages sustained by being prevented from importing into the United States certain teas found to be inferior in quality to the standards established under the tea inspection act.

The facts are stated in the opinion.

Mr. **James L. Bishop** argued the cause, and, with Mr. **James H. Simpson**, filed a brief for plaintiff in error.

Mr. **Edward B. Whitney** argued the cause, and, with *Solicitor General Hoyt*, filed a brief for defendant in error.

For contentions of counsel see their briefs as reported in *Buttfield v. Stranhan, ante*, p. 525.

Mr. Justice **White** delivered the opinion of the court:

This action was brought by Buttfield to recover damages sustained by being prevented from importing into the United States a large number of packages of Country green [499] teas, being *four shipments from China. These teas, on re-examination by the board of general appraisers, were found to be inferior in quality to the standard prescribed by law; and Bidwell, as collector for the port of New York, so notified Buttfield. Thereupon the teas were withdrawn from the bonded warehouse, and exported. Judgment was entered for Bidwell upon a directed verdict in his favor. The right to reversal of that judgment is predicated solely upon the asserted unconstitutionality of the tea inspection act of March 2, 1897 [29 Stat. at L. 604, chap. 358, U. S. Comp. Stat. 1901, p. 3,194]. It will not be necessary to determine whether, even supposing the statute to be unconstitutional, a cause of action is stated in any of the four counts of the complaint below. The statute having been held to be valid in the opinion just announced in *Buttfield v. Stranahan*, 192 U. S. 470, *ante*, p. 525, 24 Sup. Ct. Rep. 349, the judgment must be and is hereby affirmed.

Mr. Justice **Brewer** and Mr. Justice **Brown** took no part in the decision of this case.

WILLIAM J. BUTTFIELD, as Claimant of
Seven Packages of Tea, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 499, 500.)

Foreign commerce — validity of tea inspection act — *due process of law* — *delegation of legislative power*.

tion act — due process of law — delegation of legislative power.

This case is governed by the decision in *Buttfield v. Stranahan, ante*, p. 525.

[No. 516.]

Argued January 4, 1904. Decided February 23, 1904.

IN ERROR to the District Court of the United States for the Eastern District of New York to review a judgment of forfeiture in a proceeding for the condemnation of tea reimported after exportation upon final rejection as not entitled to admission into the United States under the tea inspection act. *Affirmed*.

See same case below on demurrer, 126 Fed. 224.

The facts are stated in the opinion.

Mr. **James L. Bishop** argued the cause, and, with Mr. **James H. Simpson**, filed a brief for plaintiff in error.

Mr. **Edward B. Whitney** argued the cause, and, with *Solicitor General Hoyt*, filed a brief for defendant in error.

For contentions of counsel see their briefs as reported in *Buttfield v. Stranhan, ante*, p. 525.

Mr. Justice **White** delivered the opinion of the court:

This was a proceeding for the condemnation of seven packages *of tea which had [500] been reimported after export from this country upon a final rejection of the tea by the board of general appraisers as not entitled to admission into the United States for consumption under the tea inspection act of March 2, 1897 [29 Stat. at L. 604, chap. 358, U. S. Comp. Stat. 1901, p. 3,194]. Buttfield appeared as claimant, and a demurrer filed on his behalf to the information was overruled. The claimant failing to plead further, a final decree and judgment of forfeiture was entered. A reversal is asked upon the sole ground that the act of March 2, 1897, referred to, is repugnant to the Constitution of the United States. Upon the authority of *Buttfield v. Stranahan* just decided, 192 U. S. 470, *ante*, p. 525, 24 Sup. Ct. Rep. 349, the judgment below is affirmed.

Mr. Justice **Brewer** and Mr. Justice **Brown** took no part in the decision of this case.

AMERICAN STEEL & WIRE COMPANY,
Plff. in Err.,
v.

R. A. SPEED, Clerk of the County Court of
Shelby County, Deft. in Err.

(See S. C. Reporter's ed. 500-523.)

State taxation — merchants' tax — validity under commerce clause — goods shipped from one state to another not imported — error to state court — Federal question — discrimination against dealers in articles manufactured from produce of another state.

1. A state is not precluded by the commerce clause of the Federal Constitution from imposing a merchants' tax upon a nonresident manufacturing corporation which has selected a city of that state as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assort them, store them in a warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company,—since, under such circumstances, the goods, when stored in the warehouse, were no longer in transit, but had reached their destination, and were held in the state for sale.
2. Goods brought into one state from another are not imported within the meaning of U. S. Const. art. 1, § 10, ¶ 3, forbidding state taxation of imports, and are, therefore, though still in the original packages, subject to state taxation after they have reached their destination and are held in the state for sale.
3. The mere determination as to who are merchants within a state tax law involves no Federal question which can be reviewed on writ of error to a state court, where the levy of the merchants' tax violates no Federal right.
4. No unconstitutional discrimination is made by imposing the Tennessee merchants' tax on a corporation dealing only in goods manufactured from the produce of other states, because of the provision of Tenn. Const. art. 2, § 30, that "no article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees," where the highest court of the state has held that this provision refers only to a direct levy of taxation

upon articles manufactured from the produce of the state, and that the merchants' tax applies equally to all merchants.

[No. 356.]⁴

Submitted January 11, 1904. Decided February 23, 1904.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which reversed the decree of the Chancery Court of Shelby County in that State in favor of complainant in a suit to recover the amount of a merchants' tax paid under protest, and upheld the validity of such tax. *Affirmed.*

See same case below, 67 S. W. 806.

The facts are stated in the opinion.

Mr. Josiah Patterson submitted the cause for plaintiff in error. Messrs. Patterson, Neely, & Henderson, and Pam, Calhoun, & Glennon, were on his brief:—

Where the construction of the Constitution of the state or the statutory law of a state is involved, this court will follow the uniform decisions of the court of last resort in such state, and will adopt its interpretation, notwithstanding this court would have reached a different conclusion from an application of the principles of general jurisprudence.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Miller v. Swann*, 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52; *Baltimore Traction Co. v. Baltimore Belt R. Co.* 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Christy v. Pridgeon*, 4 Wall. 196, 18 L. ed. 322; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894.

Where the construction of a local statute is involved, and it appears that the court

NOTE.—On corporate taxation and the commerce clause—see note to *Sandford v. Poe*, 60 L. R. A. 641.

On license taxes as affecting interstate commerce—see notes to *Rothermel v. Meyerle*, 9 L. R. A. 366, and *American Fertilizing Co. v. Board of Agriculture*, 11 L. R. A. 179.

On importations in original packages—see notes to *Re Wilson*, 12 L. R. A. 624; *State ex rel. Cochran v. Winters*, 10 L. R. A. 616; and *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 539.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land*

Co. 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what questions the Federal Supreme Court will consider in reviewing judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note, and *State v. Loomis*, 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

of last resort in the state, has, previously to the controversy, placed an interpretation on such local statute, different from the interpretation placed on it in the pending suit, then this court may adopt either one or the other construction, in accordance with its own opinion of the rules of general law which should govern the case.

Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; *Wilson v. Ward Lumber Co.* 67 Fed. 674; *National Foundry & Pipe Works v. Oconto Water Co.* 68 Fed. 1006; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Bartholomew v. Austin*, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359; *Jones v. Great Southern Fire Proof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370; *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296.

Where the decision of a court of last resort in a state is adverse to some right claimed under the Constitution of the United States, or some law of Congress, and such decision does not involve the construction of the Constitution of such state, or any of its local laws or usages, but the claim of right is denied on the opinion of such state court as to the principles of general law applicable to the case, then such decision is not a precedent binding on this court, and the Federal questions presented will be determined by this court according to its own independent judgment of the principles of general jurisprudence involved in the controversy.

Boyce v. Tabb, 18 Wall. 546, 21 L. ed. 757; *Oleott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Willis v. Wyandotte County*, 30 C. C. A. 445, 58 U. S. App. 665, 86 Fed. 872; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L. R. A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201.

Where a party brings a case on writ of error to the court of last resort in a state, and claims that he has been deprived by the decision of such court of some right secured to him under the Constitution of the United States, then this court becomes the exclusive and final arbiter of such Federal question, and will, after giving the opinion of the state court respectful consideration, decide the case for itself, independently of any construction which such court of last resort may have placed on the Constitution, or local laws and usages of such state.

Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed.

922, 3 Sup. Ct. Rep. 193; *Central Trust Co. v. Citizens' Street R. Co.* 82 Fed. 1; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977.

The absence of any law of Congress in respect to an article which is the subject of interstate commerce operates as an affirmative declaration that the importation of that article shall be free of any regulation or restriction whatever by the state into which such article is imported.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 507, 31 L. ed. 714, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 475.

Goods imported from one state into another are the subjects of interstate commerce, and, in the absence of any law of Congress, they will remain under the protection of the Federal Constitution exempt from any regulation or interference on the part of the state into which they are imported, until the status of such goods is changed by mingling them with the general property of the state, and thereby terminating their character as subjects of interstate commerce.

Brown v. Maryland, 12 Wheat. 436, 6 L. ed. 684; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

The power to tax is the power to destroy, and, therefore, the taxation of the subjects of interstate commerce is a regulation of "commerce among the several states," inhibited by the Constitution.

Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 10 Sup. Ct. Rep. 725; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360.

The constitutionality of a tax imposed by a state is not to be determined by the manner of its imposition, or the agency through which it is collected, but by the subject on which the tax is imposed. If the tax operates as a burden on a subject of interstate commerce, it is obnoxious to the Fed-

eral Constitution, without regard to its character or the method of its enforcement.

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *Bank Tax Case*, 2 Wall. 200, 17 L. ed. 793; *New York ex rel. Bank of Commerce v. New York City & County Tax Comrs.* 2 Black, 620, 17 L. ed. 451.

As long as goods imported from one state into another remain in the original packages in which they were transported, they will continue the subjects of interstate commerce, and the owner of the goods, in the absence of any law of Congress, may sell them in the original packages in the state into which they are imported, without restriction, interference, or regulation by such state.

Brown v. Maryland, 12 Wheat. 436, 6 L. ed. 684; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Pabst Brewing Co. v. Terre Haute*, 98 Fed. 330.

The original package of commerce is a package, bundle, or aggregation of goods put up for convenience of transportation into whatever covering or receptacle the importer may elect, and delivered by him to the carrier at the initial point of shipment, to be transported from one state into another; and where a number of smaller packages are, for convenience, placed within a larger package, or bound together in a bundle, such bundle or larger package will constitute the original package of commerce; and when the bundle is unbound, or the larger package opened, in order to expose the smaller packages for sale, the goods will become mingled with the general property of the state and cease to be subjects of interstate commerce.

May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Sawrie v. Tennessee*, 82 Fed. 615; *Keith v. State*, 91 Ala. 2, 10 L. R. A. 430, 8 So. 353; *McGregor v. Cone*, 104 Iowa, 465, 39 L. R. A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041; *Guckenheimer v. Sellers*, 81 Fed. 997; *Austin v. State*, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, 48 S. W. 305.

When goods designed for exportation from one state into another state start on their

journey at the initial point of transportation, they at once become subjects of interstate commerce, and are protected by the Federal Constitution from any interference or regulation by any state through which they may pass, until they reach their ultimate destination, notwithstanding, on the way, they may be delayed for a reasonable time on account of inadequate means of transportation, or for reshipment, or assortment, or distribution, or on account of any accident, or any other cause which may supervene to prevent the goods going directly from the initial point of shipment to the point of destination.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *State, Detmold, Prosecutor v. Engle*, 34 N. J. L. 425; *State, Lehigh & W. Coal Co., Prosecutor, v. Carrigan*, 39 N. J. L. 35; *Smith v. Turner*, 7 How. 405, 12 L. ed. 753; *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87.

As the absence of legislation on the part of Congress is equivalent to a positive declaration that interstate commerce shall be free, it follows that its subjects may be transported from one state into another, and there sold in the original packages, without the impositions of burdens of any kind; and that the imposition of a tax on such subjects by the state into which they are imported cannot be justified or upheld on the ground that the tax is equal and applies impartially to all goods of like character within the limits of such state.

Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

When goods imported from one state into another, whether in the original packages of commerce or not, are, by the state into which they are imported, made subjects of an invidious and discriminating tax, because of their foreign origin, the Federal Constitution will intervene to protect them from such invidious or discriminating tax, and its

protection will continue as long as the goods can be identified, and the invidious discrimination exists.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Brown v. Maryland*, 12 Wheat. 436, 6 L. ed. 684; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 258.

Messrs. **Charles T. Gates, Jr.**, and **W. H. Carroll** submitted the cause for defendant in error. *Mr. James M. Greer* was on their brief:

The judgment of the supreme court of Tennessee is final, conclusive, and not reviewable by this court in respect of:

1. The questions of fact involved in said judgment.

Dower v. Richards, 151 U. S. 664, 38 L. ed. 307, 14 Sup. Ct. Rep. 452; *Re Buchanan*, 158 U. S. 36, 39 L. ed. 887, 15 Sup. Ct. Rep. 723.

2. The interpretation and application to the facts found, of the Constitution and statutes of Tennessee as declared in said judgment.

Western U. Teleg. Co. v. Missouri, 190 U. S. 425, 47 L. ed. 1121, 23 Sup. Ct. Rep. 730; *New York v. Roberts*, 171 U. S. 661, 43 L. ed. 324, 19 Sup. Ct. Rep. 58.

The Tennessee constitutional exemption applies only to the manufactured article in the hands of the manufacturer at his place of business, and does not exempt goods or articles manufactured of the produce of the state, in the hands of the merchant or dealer, from the merchant's tax.

State v. Crawford, 2 Head, 461.

The construction of these revenue acts of Tennessee by the supreme court of that state is binding upon this court; and, moreover, by the well-settled principles announced and enforced by this court, said acts are in no sense discriminatory against plaintiff in error as a foreign dealer or its goods as articles manufactured in another state.

New York v. Roberts, 171 U. S. 658, 666, 43 L. ed. 323, 326, 19 Sup. Ct. Rep. 58; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

Plaintiff in error was lawfully assessed upon the goods which it had shipped from its factory to itself in Memphis, where said goods were insured for its own benefit, and stored in warehouses for the purposes of sale and deliveries thereafter to be made.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Kelley v. Rhoads*, 7 Wyo. 237, 39 L. R. A. 594, 75 Am. St. Rep. 904, 51 Pac. 593.

There has never been a decision of this
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court in the slightest degree tending to establish the proposition that goods shipped from one state into another, and there put at rest in the latter state, and made a constituent of the mass of property in the state in precisely the same manner as other property which is brought into a state for sale and lodged or stored in a warehouse, are not proper subjects for taxation so long as they remain in the same package in which they were brought into the state and stored or lodged in the warehouse.

Brown v. Maryland, 12 Wheat. 436, 6 L. ed. 684; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Jay v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Re Rahrer*, 140 U. S. 545, 559, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 21, 36 L. ed. 606, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Pittsburg S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 539, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 475; *Emert v. Missouri*, 156 U. S. 318, 319, 39 L. ed. 436, 437, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Oliver Finney Grocery Co. v. Speed*, 87 Fed. 408; *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976.

By whatever form or name plaintiff in error sought to cover up its business and evade the equal and just tax laws of Tennessee, the fact still remains that it was engaged in the business of a merchant in the city of Memphis.

State ex rel. Badische Anilin & Soda Fabrik v. Roberts, 152 N. Y. 59, 36 L. R. A. 756, 46 N. E. 161; *Judson*, Taxn. § 181.

Mr. Justice **White** delivered the opinion of the court:

Whether the plaintiff in error is entitled to recover the sum of certain taxes which were paid under protest, on the ground that the taxes were repugnant to the Constitution of the United States, is the question for decision on this record.

Section 28, article 2, of the Constitution of the state of Tennessee, so far as pertinent to the issue to be decided, is as follows:

"All property, real, personal, or mixed, shall be taxed. . . . All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property at the same value. But the legislature shall have pow-

er to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to nonresidents and sent beyond the state shall not be taxed at a higher rate than the ad valorem tax on property."

Section 30, article 2, of the same Constitution, provides:

"No article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees."

The assessing and taxing laws of the state of Tennessee in force at the time the taxes in controversy were levied provided, first, for a general ad valorem tax upon all prop-
[509]erty; second, for *a merchants' tax separate from the general ad valorem levy, this latter tax being of two classes: A tax upon the average capital invested in business, and a privilege tax, which was at a different rate, and in other respects distinct from the merchants' tax just referred to. Moreover, at the time the tax assessments in question were made the statutes of the state of Tennessee concerning the merchants' tax contained the following:

"The term 'merchants,' as used in this act, includes all persons, co-partnerships, or corporations engaged in trade or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats, or other craft stationed or plying in the waters of this state, and confectioners, whether such goods, wares, or merchandise be kept on hand for sale or the same be purchased and delivered for profit as ordered."

Moreover, the assessment laws, whilst providing that all "persons, copartners, and joint stock companies engaged in the manufacture of any goods, wares, merchandise, or other articles of value shall pay an ad valorem tax upon the actual cash value of their property, real, personal, or mixed, . . ." made the following exception: "Provided, the value of articles manufactured from the produce of the state in the hands of the manufacturer shall be deducted in assessing the property." And a like exception qualified a provision imposing an ad valorem tax upon the capital and franchises of manufacturing corporations. Besides, the assessing statutes contained a general provision exempting "all growing crops of whatever nature or kind—the direct product of the soil of this state—in the hands of the producer or his immediate vendee, and manufactured articles from the produce of this state in the hands of the manufacturer."

Whilst these laws were in force the officer whose duty it was to list the merchant tax assessed against the American Steel & Wire Company, which we shall hereafter call the steel company, both the general merchants'

tax and a merchants' privilege tax. The company resisted the assessment, and, *after[510] unsuccessfully pressing, through the administrative channels provided by the law of Tennessee, its objections, paid the tax under protest, and thereupon, as authorized by the law of Tennessee, commenced this suit to recover the amount paid.

Without going into detail, it suffices to say that the bill filed in the action to recover substantially alleged as follows: That the company was a New Jersey corporation, having a place of business in the city of Chicago, and owning and operating the various plants for the manufacture of wire, nails, etc., in states other than the state of Tennessee. And, for the purpose of facilitating the sale and delivery of the goods by it manufactured, it had selected Memphis, Tennessee, as a distributing point, and had made an arrangement in that city with the Patterson Transfer Company, a corporation engaged at Memphis in the transfer of merchandise. By this arrangement the Patterson Transfer Company was to take charge of the products when shipped to Memphis, consigned to the steel company, store them in a warehouse there, assort them and make delivery to the persons to whom the goods were sold by the steel company. It was averred that the Patterson Transfer Company, in fulfilling its obligations under the contract, was in no sense a merchant, but only a carrier, and that the steel company, in storing and delivering its goods at Memphis, was not a merchant in Memphis, but was simply a manufacturer, delivering in the original packages goods made in other states to the persons who had bought them. In substance, besides, it was alleged that the goods in the warehouse in Memphis were merely in transit from the point of manufacture outside of the state of Tennessee to the persons to whom they had been previously sold. The levy of the tax was charged to be repugnant to the commerce clause of the Constitution of the United States: First, because the goods in the warehouse in Memphis were in the original packages as shipped from other states and had not been sold in Tennessee, and hence had not been commingled with the property of that state, and because, in any event, they had acquired no situs in Tennessee, as they *were moving in the chan-
[511]nels of interstate commerce from the place where the goods were manufactured, for delivery to the persons to whom in effect they had been sold. Second. Because, as the state of Tennessee exempted from taxation articles manufactured from the produce of that state, no tax could be imposed by Tennessee upon articles manufactured from the produce of other states, without operating a discrimination against articles

manufactured from the produce of other states. Issue was joined on the complaint. The trial court, deducing from the proof conclusions of ultimate fact in favor of the complainant, entered a decree in favor of the steel company. The case was taken to the supreme court of the state. In that court the validity of the tax was upheld and the judgment below was reversed. The questions raised concerning the repugnancy of the tax to the Constitution of the United States were expressly considered and decided adversely to the steel company. This writ of error was thereupon prosecuted.

The supreme court of Tennessee stated the facts as follows:

"Complainant is a corporation created under the laws of New Jersey. Its situs is in the state of New Jersey, and its principal business office is situated at Chicago, Ill. It is engaged in the manufacture of nails, staples, barbed and smooth wire, at different points north of the Ohio river. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this state.

"Prior to the 1st of February, 1900, its manufactured products were sold and distributed throughout the southwest from Louisville, Kentucky; Memphis, Tennessee; Greenville, Vicksburg, and Natchez, Mississippi; and New Orleans, Louisiana. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the southwest at which to mass and distribute its manufactured products to its customers in that section. At this time, and [512] for many years prior thereto, *the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis, and from the landings on the Mississippi river. Appellee entered into an arrangement with the Patterson Transfer Company, whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples, and wire, and then to deliver them, either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainant.

"None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, and neither its officers nor employees have any knowledge whatever of the price at which goods are sold by complainant. Under the arrangement between them, the business of the Pat-

terson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated.

"The goods of complainant are manufactured at different points, and it is convenient and useful, from a business point of view, to mass them at some place at which they can be assorted, and from which they can be distributed to complainant's customers. It is impracticable to assort the goods either at the river landing or at the railroad depots when they reach Memphis, and, in order to facilitate the work, the Patterson Transfer Company has rented three warehouses in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant, and no other goods, are stored therein.

"The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the southwestern country, and make *contracts exclusively with job- [513] bers; and in each instance where a contract is made it is embodied in writing, on a form prepared by complainant, in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be delivered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and, upon so selecting, they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figures in the freight on the goods.

"As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the

life of the contract, the kind of wire, or kind of nails or staples he desires delivered to him under the contract. These contracts also specify from sixty to ninety days as the time within which the products are to be delivered; and at any time during the period prescribed in the contract the customer may designate the kind of goods he desires delivered under it.

"These contracts are made usually before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the southwestern country in the manner [514] above stated, visiting the various *jobbers, ascertaining the amount of goods they will require within sixty or ninety days, and the contract is prepared to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity, upon the goods being delivered to him after he shall have made, and according to, his specification, which he may make during the life of the contract; the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of complainant in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification, which is forwarded to the latter from the complainant's central office at Chicago, it being understood, according to the course of business between the two companies, that the Patterson Transfer Company will select out of the mass of goods those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification from the central office at Chicago.

"This method of transacting the business is modified in practice, in so far as the ful-

filment of the contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the *contracts with the [515] Memphis jobbers, in the following manner: The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant, as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter, and dray receipt to the office of complainant in Chicago, and that office makes out an invoice and sends it directly to the jobber. Another variation is made in the course of the business, in favor of the Memphis jobbers, to the following effect: Any jobber in Memphis who is a recognized customer of the complainant can, without any previous written contract, or other special agreement, make out a specification of the goods he desires, and hand this, in duplicate form, to the Patterson Transfer Company. Upon this being done it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select out of the mass of goods in the warehouses, goods corresponding to those contained in the specification, and deliver them to such jobber, this delivery being usually made by the next day, or, at most, within two or three days. Other deliveries on specifications sent direct to the Chicago office are not usually made within less than six or eight days, and sometimes a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications, which are the special subject of this paragraph, one copy is kept by it, and the other copy is forwarded to the office at Chicago, where, upon its arrival and reception, the customer is charged with the goods specified, at current prices.

"The testimony shows that of the mass of goods kept on hand in Memphis, in the above-mentioned warehouses, about 90 per cent ultimately goes to jobbers who reside outside of Memphis, and beyond the limits of this state. The remaining 10 per cent goes to the Memphis jobbers in fulfilment of the *general contracts previously referred to, [516] pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about 2½ per cent of all the goods kept on hand.

"No one but an agreed or recognized cus-

tomor of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to anyone by the Patterson Transfer Company except under the express directions of complainant, or under general directions given by complainant to the said Patterson Transfer Company, in favor of recognized and approved customers of the complainant, whose names are furnished by it to the Patterson Transfer Company.

"The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates considerably, owing to the state of trade from time to time. Sometimes the stock is as low in value as \$30,000, and sometimes the complainant has on hand a stock of the value of more than \$100,000.

"Some of the goods—a very small amount—are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant are transported to Memphis on barges belonging to transportation companies, in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so; but, taking advantage of the seasons when there is a good stage of water in the rivers, which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point in anticipation of future sales.

"The testimony shows that when goods are shipped from complainant's mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant's products [517] were shipped at a *certain time, on barges, to the port of Memphis. These barges are met at the river landing by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses, and assort them. Then, from time to time, it ships the goods on specifications, as before explained. On receiving the goods they are credited to the complainant on the books of the Patterson Transfer Company, and, on being shipped out, they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complainant, in care of the Patterson Transfer Company.

"All the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sales agents are exclusively engaged in selling these products. They are produced by complainant beyond the limits of this state, 192 U. S.

and are made the subject of contracts by its sales agents throughout the southwest, in the manner before explained. These sales agents report all contracts effected by them directly to the office in Chicago, whether made with the jobbers at Memphis, or elsewhere beyond the limits of this state. All invoices for goods, when sold by specifications in the manner above stated, are made out at the office at Chicago, and forwarded directly to the customer, in the manner and under the circumstances previously stated.

"Some of the complainant's goods are produced at one factory and some at another, and, consequently, when a purchaser contracts for the delivery to him, within sixty to ninety days, of a certain number of packages, it frequently turns out that some of the goods desired are the product of one factory, and some of another, and it is, accordingly, most convenient in the conduct of complainant's business that goods from complainant's various factories should be massed at some point where they can be dealt with in the manner before explained.

"Complainant's goods are put up in the following original packages: The nails and staples are put up in kegs, each keg weighing 100 pounds; the smooth wire in coils tied by wires, *and each coil weighing 100 [518] pounds; the barbed wire on reels, the wire on each reel weighing 100 pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, and is, in this form, delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges, or by railroads, to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and delivered by it to the complainant's customers at Memphis, under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign state. Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed in any particular from the time it leaves the factory until it ultimately reaches the hands of the customer.

"The testimony shows that Memphis has, within recent years, become, by reason of

its accessibility to railway and river transportation, a great distributing point; and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

"Other facts proven by the complainant are as follows: The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding states pays any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this state." [75 S. W. 1037.]

[519] With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the steel company, to be sold and delivered as contracts for that purpose were completely consummated. All question, therefore, as to the power of the state to levy the merchants' tax based on the contrary contention, being without merit, may be put out of view. The other propositions pressed upon our attention require consideration. They relate to two subjects: First, the asserted want of power of the state of Tennessee to tax because the goods were imported from another state, and were yet, it is contended, in the original packages; and, second, because of the alleged discrimination asserted to result from the provision of the state Constitution exempting goods manufactured from the produce of the state.

1. Since *Brown v. Maryland*, 12 Wheat. 436, 6 L. ed. 684, it has not been open to question that taxation imposed by the states upon imported goods, whether levied directly on the goods imported or indirectly, by burdening the right to dispose of them, is repugnant to that provision of the Constitution providing that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports." (Article 1, § 10, paragraph 3.) And *Brown v. Maryland* also settled that where goods were imported they preserved their character, as imports, and were therefore not subject to either direct or indirect state taxation as long as they were unsold in the original packages in which they were imported. A recent case referring to the authorities and restating this elementary doctrine is *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976. Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another state constituted an importation, in the

constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense, and *were subject to [520] state taxation after they had reached their destination and whilst held in the state for sale. This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown v. Maryland*. *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. The doctrine upon which the cases rest was this,—that imports, in the constitutional sense, embrace only goods brought from a foreign country, and consequently do not include merchandise shipped from one state to another. The several states, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the state.

Those two cases decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the states of the Union. The cases themselves have been approvingly referred to in decisions in this court too numerous to be cited, and we therefore content ourselves by mentioning two of the cases where the doctrine was restated. *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259. But it is strenuously insisted that the principle of the cases referred to, reiterated again and again and uniformly followed for so long a period of time, has been, by inevitable implication, overruled by the cases of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725, and other cases resting on the rule expounded in those cases.

We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that, in *Leisy v. Hardin* and *Lyng v. Michigan*, and most of the similar cases relied on, the decisions in *Woodruff v. Par-* [521] *ham* and *Brown v. Houston* were referred to without even an intimation that those cases were deemed to be overruled or even quali-

fied. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains. *Brown v. Maryland* illustrates the first of these cases, while *Woodruff v. Parham*, *Brown v. Houston*, *Leisy v. Hardin*, *Lyng v. Michigan* are examples of the other. Thus, in *Brown v. Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff v. Parham* and *Brown v. Houston*, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in *Brown v. Maryland*—that is, sale in the original packages at the point of destination—was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In *Leisy v. Hardin* and *Lyng v. Michigan* the same question in a different aspect was presented. The [522] goods had reached their *destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce, and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purposes of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in

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the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases.

2. The discrimination is asserted to have arisen from the provision of the state Constitution, saying that "no article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees." But in *Kurth v. State* (1887) 86 Tenn. 134, 5 S. W. 593, it was decided that this provision of the Constitution referred only to a direct levy of taxation on articles manufactured of the produce of the state, and did not apply to taxes levied by virtue of the grant conferred by the Constitution to tax "merchants, peddlers, and privileges, in such manner as they (the legislature) may from time to time direct." The two provisions, it was held, should be construed together, so that the one would not limit the other. We have been referred to no case decided by the supreme court of Tennessee modifying this interpretation of the state Constitution, and its correctness is in effect directly affirmed by the ruling made by the court in this case. Now the tax complained of on this record is not the general ad valorem tax levied on property as such, but is a merchants' tax, and is therefore not within the purview of the exemption clause from which it is asserted the discrimination arises. Construing the taxing statutes of the state, the court below decided in this case that they equally apply to all merchants, and hence did not discriminate as against any member of the merchants' class. The argument *is made that under the facts [523] found by the court below it was erroneously held that the steel company, because of the business which it carried on in the state of Tennessee, was a merchant within the statutes, and the power to review this question, it is insisted, should be exerted because the question is Federal in its nature. The contention is without merit. As the levy of the merchants' tax violated no Federal right, the mere determination of who were merchants within the state law involved no Federal question. The construction of the state law being conclusive and embracing all persons doing a like business with the steel company, it follows that there was no discrimination. Conceding it to be true, as argued, that in the past there would seem to have been conflict of opinion in the court of Tennessee in interpreting various statutes concerning the merchants' tax, this contrariety does not concern the meaning of the statute construed in this case. As that statute has been construed by the state court as applying to all merchants and as embracing alike all persons engaged in the character of business which the steel company was car-

rying on, it follows that there is no ground upon which to predicate the complaint of undue discrimination. Nor do we think that the opinion of the supreme court of Tennessee in *Benedict v. Davidson County* (not yet officially reported), 67 S. W. 806, conflicts with the views just expressed. That case involved, not a merchants' tax, but the validity of a general ad valorem levy on property as such, and, therefore, affords no ground for the contention that manufacturers in Tennessee who shipped the goods by them made from the products of the state to a depot for sale, and there sold them under conditions and circumstances identical with those presented here, could not be taxed as merchants under the law of Tennessee.

Affirmed.

[524] *UNITED STATES, *Plff. in Err.*,
v.

ST. ANTHONY RAILROAD COMPANY.

(See S. C. Reporter's ed. 524-543.)

Public lands — unlawful cutting of timber from public domain — lands 20 miles from railroad not adjacent — measure of damages.

1. Lands 20 miles distant from a railroad right of way are not "adjacent" within the meaning of the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), § 1, granting to certain railroad companies the right of way through the public lands to the extent of 100 feet on each side of the central line of the road, with the right to take materials for its construction from the public lands adjacent to the line of the road.
2. The value of timber unlawfully cut from the public domain by a railroad company at the time when, and the place where, it was cut, is the measure of damages in a suit by the United States to recover its value, where the cutting was done on the advice of counsel, and in the belief that the lands from which it was cut were "adjacent" to the line of the road, within the meaning of the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), § 1, and that the action was therefore legal.

[No. 147.]

Argued January 28, 1904. Decided February 23, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Idaho dismissing the complaint in an action by the United States against a railroad company to recover the value of timber unlawfully cut from the public domain. *Reversed* and remanded to the Circuit Court, with di-

rections to enter judgment in favor of the United States.

See same case below, 52 C. C. A. 354, 114 Fed. 722.

Statement by Mr. Justice **Peckham**:

This action was brought by the United States against the railroad company to recover damages for the unlawful cutting down and conversion by the company, in the year 1899, of certain timber on the public lands belonging to the United States in the state of Idaho. The value of the timber thus cut was, as alleged, over \$20,000. The trial was had in the circuit court of the United States for the district of Idaho, southern division, and resulted in a judgment dismissing the complaint, which was affirmed, upon appeal, by the circuit court of appeals, ninth circuit (52 C. C. A. 354, 114 Fed. 722), and the government has appealed to this court.

The defendant answered the complaint and denied its averments as to unlawfully entering upon the lands and cutting *the[525] timber. As a further and separate defense the defendant averred that it was duly incorporated on May 18, 1899, under and pursuant to the laws of the state of Idaho, for the purpose of constructing and operating a railroad from the town of Idaho Falls in Bingham county, Idaho, to St. Anthony, in Fremont county, in that state, a distance of approximately 40 miles. On or about July 7, 1899, the board of directors duly adopted the route for the railway, which was practically a straight line between the town of Idaho Falls and the town of St. Anthony, and passed through and over the public lands of the United States. The defendant fully performed all things required by railroad companies by the act of Congress granting to railroads the right of way through the public lands of the United States, approved March 3, 1875, and it thereby became entitled to the benefit of the privileges therein granted to railroad companies. For the purpose of procuring the necessary material with which to construct its railroad, the defendant, through its authorized agents, entered upon the lands described in the complaint, which were, as defendant alleged, adjacent to the line of the railroad, for the purpose of procuring ties and timbers for the construction of the road, and did, during the summer and fall of 1899, cut and remove timber growing on the lands, not to exceed 1,682,975 feet; that the ties and timbers were cut from the nearest public lands to said line of road, and were, as the defendant averred, adjacent thereto; that all the ties and timbers were necessary for the original construction of the road, and were used for that purpose, and the defendant

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cut and removed the timber in good faith, with no intention of violating any law or committing any trespass, but believing that it had the right to enter upon the lands and take the timber.

For the purpose of the trial there was an agreed statement of facts made, and therein it was stated that the cutting of the timber was upon the lands of the government, and the amount thereof was correctly stated in the answer, and its value upon delivery to the defendant was as alleged in the complaint.

[526] *The defendant did not act under any mistake of fact in regard to the status of the timber and the lands upon which it grew, and did what was done, believing it had the legal right so to do. It is not disputed that the lands were unoccupied, unentered public lands of the United States.

Upon the question whether the lands where the timber was cut were or were not adjacent, it was agreed:

"That said lands from the place where said timber was cut to the line of the road were and are the following distances, namely: from 17 to 23 miles by air line; from 20 miles to 25 miles by wagon road, and from 22 to 26 miles following the sinuosities of the river upon which said timber was in part conveyed. By far the larger part of the timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road and involves no unusual grades, and said timber could, with reasonable profit, be hauled by wagon from the place where it was cut to said railroad, where it was used for ties and in the construction of bridges. It is further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the land and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefited thereby."

The statute under which the cutting is justified is § 1 of "An Act Granting to Railroads the Right of Way through the Public Lands of the United States," approved March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), and is set forth in the margin.†

Assistant Attorney General Purdy argued the cause, and filed a brief for plaintiff in error:

The word "adjacent" is a relative term, and in order to ascertain its true meaning in any given case resort must be had to the context and the character of the objects with reference to which the word is used.

Century Dict. & Cyc.; Crabbe, English Synonyms; 1 Bouvier, Law Dict. p. 93; Black, Law Dict. p. 36; Anderson, Law Dict.

The Land Department has held that the word "adjacent" applied to the tier of sections through which the right of way extends, and perhaps an additional tier of sections on either side of the road.

Re Denver & R. G. R. Co. 8 Land Dec. 41.

This court has, in effect, held that lands situated 50 to 100 miles distant from a railroad company's right of way are not adjacent lands.

Stone v. United States, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778.

The word "adjacent," when used in any particular context, must receive a reasonable construction and one which will protect the interests of all parties concerned.

Henderson v. Long, 1 Cooke (Tenn.) 128, Fed. Cas. No. 6,354; *New York v. Hart*, 16 Hun, 380; *Miller v. Cabell*, 81 Ky. 184; *Re Camp Hill*, 142 Pa. 517, 21 Atl. 978; *Municipality No. 2*, 7 La. Ann. 76; *People v. Schermerhorn*, 19 Barb. 556; *People ex rel. Blakslee v. Land Office Comrs.* 135 N. Y. 447, 32 N. E. 139; *Saunders v. New York C. & H. R. R. Co.* 135 N. Y. 613, 32 N. E. 54; *Clapton v. Taylor*, 49 Mo. App. 118; *Carrier v. Schoharie Turnp. Co.* 18 Johns. 57; *Continental Improv. Co. v. Phelps*, 47 Mich. 300, 11 N. W. 167; *Brooklyn Heights R. Co. v. Brooklyn*, 46 N. Y. S. 299, 18 N. Y. Supp. 876; *Kent v. Perkins*, 36 Ohio St. 639; *Kimberley Waterworks Co. v. De Beers Consol. Mines*, 66 L. J. P. C. N. S. 108; *Birmingham v. Allen*, 46 L. J. Ch. N. S. 673; *Darley Main Colliery Co. v. Mitchell*, L. R. 11 App. Cas. 142; *Rex v. Hodgkins, Murphy & H.* 341; *Reg. v. Brown*, 17 Q. B. 839.

Mr. Parley L. Williams argued the cause and filed a brief for defendant in error:

Contrary to the general rule of construction of land grants, we have the highest

†Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent

of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, sidetracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

authority for a liberal construction of this act in favor of the railway company.

United States v. Chaplin, 31 Fed. 890; *United States v. Denver & R. G. R. Co.* 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11.

"Adjacent," strictly speaking, means near to, but not necessarily touching.

Bouvier, Law Dict.; Worcester, Dict.; Webster, International Dict.; Standard Dict.; Encyclopædic Dict.; *Re Ward*, 52 N. Y. 397; *United States v. Stone*, 64 Fed. 667, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778.

Each case must be adjudged upon its own facts, and under general instructions from the court; "adjacency" is a question for the jury.

United States v. Denver & R. G. R. Co. 31 Fed. 886; *United States v. Chaplin*, 31 Fed. 890. See also *United States v. Lynde*, 47 Fed. 297; *United States v. Northern P. R. Co.* 29 Alb. L. J. 24; 1 Am. & Eng. Enc. Law, 2d ed. 633; *Bachelder v. United States*, 28 C. C. A. 246, 55 U. S. App. 227, 83 Fed. 986.

When the defendant is a knowing and wilful trespasser, the full value of the property at the time of bringing the action, with no deduction for his labor and expense, is the measure of damages. But when the defendant is an unintentional or mistaken trespasser, the measure of damages is the value at the time of conversion, less the amount which such trespasser has added to its value.

E. E. Bolles Wooden-ware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398.

A wilful act is one committed with an evil intent, with a legal malice, without reasonable ground for believing the act to be lawful, and without legal justification.

Bowers v. State, 24 Tex. App. 542, 5 Am. St. Rep. 901, 7 S. W. 247; *Chicago, St. L. & P. R. Co. v. Nash* (Ind.) 24 N. E. 884; *State v. Preston*, 34 Wis. 682.

The measure of damages for cutting and taking away trees, when done in good faith, under claim of title, is the value of the trees as standing timber, and not their value as augmented by defendant's labor in converting them into logs.

Clark v. Holdridge, 12 App. Div. 613, 43 N. Y. Supp. 115; *Gaskins v. Davis*, 115 N. C. 85, 25 L. R. A. 813, 44 Am. St. Rep. 439, 20 S. E. 188; *United States v. Northern P. R. Co.* 67 Fed. 890; Sedgw. Damages, 8th ed. pars. 503, 504.

In the absence of fraud, violence, or wilful negligence or wrong, the proper measure of damages generally in trover, as in other like actions, is such a sum as will afford compensation for the actual injury sustained.

Winchester v. Craig, 33 Mich. 205; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Heard v. James*, 49 Miss. 236.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The important question in this case is as to the meaning of the term "adjacent" when used in the 1st section of the statute of 1875. The act is a general one, and is therefore applicable to no particular road, except as the facts in each case may bring the road within its language. It grants the right of way through the public lands in the United States upon conditions named, to the extent of 100 feet on each side of the central line of the road. The lands from which materials for the construction of the railroad may be taken must be adjacent to this piece of land but 200 feet wide. The term is a somewhat relative and uncertain one, and in one aspect the case may be determined with at least some reference to the size of the strip or right of way granted, and to which the land must be adjacent. It may also be remembered that the whole length of the road is but 40 miles. In some views of the case the narrowness and shortness of the line might have some effect upon the question of the distance to which the word "adjacent" might carry one in the search for timber. As the word is frequently uncertain and relative as to its meaning, it might naturally, perhaps, be regarded as more extended when used with reference to a large object than with reference to a comparatively small one. In other words, it must be defined with reference to the context, at least to some extent.

We are not disposed to unduly limit the meaning of the word as used in the statute so as to exclude lands which might otherwise fairly be regarded as within its pur- [531] pose, and thereby defeat the intent of Congress. The act is not to be construed in an unnecessarily narrow manner, nor, at the same time, should the construction of its language be extraordinarily enlarged in order to attain some special and particular end. In *United States v. Denver & R. G. R. Co.* 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11, another question arose under this same section, and the construction of the act in that regard was certainly as liberal as its language would warrant. It was there held that a railroad company had the right to cut and take the timber or material from public lands adjacent to the line of the road and use the same on portions of its line remote from the place from which it was taken.

In speaking of the proper construction of

the act, it was said by Mr. Justice Jackson, for the court:

"It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 625, 28 L. ed. 1109, 1111, 5 Sup. Ct. Rep. 606, Mr. Justice Field, speaking for the court, thus states the rule upon this subject: 'The acts making the grants . . . are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.'

[532] "Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals *or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. *Bradley v. New York & N. H. R. Co.* 21 Conn. 294; *Pierce, Railroads*, 491.

"This is the rule, we think, properly applicable to the construction of the act of 1875, rather than the more strict rule of construction adopted in the case of purely private grants; and in view of this character of the act, we are of opinion that the benefits intended for the construction of the railroad, in permitting the use of timber or other material, should be extended to and include the structures mentioned in the act as a part of such railroad."

It was also said that the railroad should be treated "as an entirety, in the construction of which it was the purpose of Congress to aid by conferring upon any railway company entitled to the benefits of the act the right to take timber necessary for such construction from the public lands adjacent

to the line of the road. This intention would be narrowed, if not defeated, if it were held that the timber which the railway company had the right to take for use in the construction of its line could be rightfully used only upon such portions of the line as might be contiguous to the place from which the timber was taken. If Congress had intended to impose any such restriction upon the use of timber or other material taken from adjacent public lands, it should have been so expressed. No rule of interpretation requires this court to so construe the act as to confine the use of timber that may be taken from a proper place for the purpose of construction to any particular or defined portion of the railroad. To do this would require the court to read into the statute the same language as to the place of use which is found in the statute as to the place of *taking. In other words, it would [533] require the court to interpolate into the statute the provision that the place at which the timber shall be used shall be '*contiguous, adjoining, or adjacent*' to the place from which it is taken. The place of *use* is not, by the language of the statute, qualified, restricted, or defined, except to the extent of the construction of the railroad as such, and it is not to be inferred from the restriction or limitation imposed as to the *place* from which it may be rightfully taken that it is to be used only adjacent to such place."

In the above case it was admitted that the lands from which the timber was taken were adjacent to the line of the road within the meaning of the statute.

It is also seen in the extract from the opinion that the word "adjacent" is therein used in connection with the words "contiguous" and "adjoining," so as to give an impression that it is almost, though not entirely, synonymous with those words. And we think this is true. "Contiguous, lying close at hand, near," is the meaning given it by the lexicographers. It need not be adjoining or actually contiguous, but it must be, as said, near or close at hand.

Although a liberal construction of the statute may be proper and desirable, yet the fair meaning of the language used must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the court, would yet pretty plainly be beyond the limitation contained in the statute. While not to be construed so as to defeat the intent of the legislature, or to withhold what is given either expressly or by fair implication, it is surely improper to so extend the ordinary and usual meaning of the word as to permit the railroad company to enter upon any land of the government, as being adjacent, simply be-

cause the road wants the timber. The statute was not intended to furnish a general license to the company to enter upon any public land and to range to any extent thereon for timber for its road. In all cases it must be adjacent.

[534] In the lower Federal courts there have been some cases in *which the question of the proper construction of this section of the act of Congress received attention. In *United States v. Denver & R. G. R. Co.* 31 Fed. 886, that land was regarded as adjacent which could be reached by ordinary transportation by wagons. The parties in that case agreed that the timber was cut from lands adjacent to the line of railway, and the question was whether timber thus cut could be taken from lands adjacent to the line of road and used on any part of the line. But the meaning of the word was referred to in the opinion, and it was stated that it depended very much upon the context and the subject-matter to which it should be applied for its proper effect; that with reference to the lands which might be taken for stations, sidetracks, etc., the word "adjacent" was used in the same sense of "contiguous" or "adjoining," while with reference to material for building the road the word should have the larger significance of nearness without actual contact. It was said to be unreasonable to limit the meaning of the word to the government subdivisions lying next to the right of way, and it was said that the meaning of the term "adjacent" probably included the right to take timber from public lands within ordinary transportation by wagon. This meaning was arrived at because the company could thus avail itself of all timber which could be so transported with a profit to the company, while excluding other lands from which transportation with profit could not be thus effected. We are not satisfied of the correctness of this construction or of its reasonableness. Lands might in this way be found adjacent which were 50 or 100 or more miles away, and which could not be regarded as adjacent within any meaning of that word heretofore given, and could only be said to be adjacent in order to serve an exigency and to allow a railroad to procure timber gratuitously from the government. The purpose may, perhaps, be good, but the meaning cannot be stretched too far, even to accomplish a possibly desirable end.

[535] Again, in *United States v. Chaplin*, 31 Fed. 890, it was held, in the circuit court, district of Oregon, that land was *adjacent to the line of road within the purpose and intent of the act when, by reason of its proximity thereto, it is directly and materially benefited by the construction of such road. The court said in that case:

"What is 'adjacent' land within the meaning of the statute must depend on the circumstances of each particular case. Where the 'adjacent' ends and the nonadjacent begins may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the land from the construction of the road, my impression is that the term 'adjacent' ought not to be construed to include any land save such as, by its proximity to the line of the road, is directly and materially benefited by its construction."

We fail to see the correctness of this rule. Lands hundreds of miles distant might be directly and materially benefited by the construction of a railroad, and yet be far beyond the utmost extent heretofore supposed to be included by the word adjacent. To give this extended meaning to the word is, as it seems to us, merely to say that Congress might have included lands for that reason if it had so chosen, and, therefore, it is well enough to enlarge the ordinary meaning of the word to accomplish a purpose not plainly stated, but only guessed at.

In *Denver & R. G. R. Co. v. United States*, 34 Fed. 838, while the question as to what were adjacent lands was not in issue, as the 4th paragraph in the agreed statement of facts stipulated that the lands from which the timber was cut were adjacent to the line of railway, yet Mr. Justice Brewer, then circuit judge, in his opinion said that he did not agree with the idea that the proximity of the lands was immaterial, or that Congress intended to grant anything like a general right to take timber from public lands where it was most convenient. He said that while the grant was limited to adjacent lands, he did not appreciate the logic which concludes that if there be no timber on adjacent lands, the grant reaches out and justifies taking the timber from distant lands 50 or 100 miles away. The real question in the case was whether timber taken *from land which was adjacent could be [536] taken to any portion of the road, no matter how distant from the place of cutting. As it was agreed the timber taken was adjacent, it does not appear how far from the line of the road it was cut. The circuit judge, overruling, in this respect, the district judge, held the timber could be used all along the line of the road. This is the same view subsequently taken by this court in 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11, *supra*.

In *Bachelder v. United States*, 28 C. C. A. 246, 55 U. S. App. 227, 83 Fed. 986, it was held by the circuit court of appeals that under the act of June 8, 1872 (17 Stat. at L. 339, chap. 354), which uses language similar to the section in question, the cutting of

timber 25 miles from the road was not, as matter of law, unlawful. The question whether the lands were adjacent was held to be a mixed question of law and fact, and the test of illegality was whether the timber was within reasonable hauling distance by wagons. The judgment of the court below ([N. M.] 48 Pac. 310) was therefore reversed.

In *Stone v. United States*, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 667, it was held that the act in question did not authorize the taking of timber for the construction of a road from public lands which were 50 miles distant from the end of the road. That case was affirmed in this court. 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778. The trial court had charged the jury that, under the act of 1875, the term "adjacent lands" means lands in proximity, contiguous to, or near to the road, and that lands so far distant from the railroad as lands in Kootenai county, Idaho, where it is claimed that the railroad ties were cut, were not adjacent lands within the meaning of the law. This court concurred with the circuit court of appeals in adjudging the charge to be a sound interpretation of the act.

The report in the *Stone Case* showed, as stated in the opinion of the circuit court of appeals, that no timber fit for its use was found along the line of either of the railroads, that both of them penetrated a barren region, almost entirely destitute of timber, and that timber was cut from the lands [537] along the *line of the Northern Pacific Railroad about 50 miles distant from the eastern end of the other roads, which was the nearest point where available timber could be had.

We thus have the authority of this court that lands which are adjacent within the meaning of this act of 1875 must be lands in proximity, contiguous or near to, the line of the road. While "proximity" or "nearness" to an object is somewhat uncertain as a measure of distance, yet the use of such words as a definition brings to the mind the idea that lands which are in fact far off, or distant, are not adjacent. And the question is whether lands which are 20 miles off can reasonably be described as in proximity or near to a line of road a couple of hundred feet wide. In our belief no one, in describing the locality of such lands, would say they were adjacent to the railroad.

The above-cited cases show a conflict in the minds of the Federal judges as to what are the material facts upon which to base an answer to the question, When are lands adjacent within the meaning of this statute? "Adjacent," we admit, is a relative term, and sometimes may depend for its proper

application upon the facts in the particular case.

The matter of the construction of this language was the subject of a letter from Mr. Vilas, who was then Secretary of the Interior, to the Attorney General, dated January 10, 1889, after the decision of the cases in 31 Fed. *supra*. The Secretary was of the opinion that while nothing in the term "adjacent," as used in the statute, rendered it necessary to imply that the lines of survey should be resorted to to define its extent, there was at the same time nothing in this indefiniteness which, in his opinion, could authorize the view that timber or other material could be taken from public lands so far away as may be reached by wagon transportation in a single day, or any other given period of time. He thought that the use of the word "adjacent" intended and meant the right to the public lands which were *conveniently contiguous to the right of way and immediately accessible from it*, and he did not believe *that it was the purpose of Con- [538] gress or that his department ought to decide that the railroad company could range the public lands to secure material for the construction of the road when it did not happen to exist on those lands which, in the ordinary acceptance of the phrase, would be regarded as adjacent to the right of way. Taking into consideration the whole case, the Secretary was of opinion that it was—

"As far as sound discretion will warrant executive officers to go until an authoritative decision by the courts, to hold that, under this phrase, material may be taken from the tier of sections through which the right of way extends, as immediately adjoining the right of way, and perhaps an additional tier of sections on either side, as within the idea of 'adjacency.' . . . In view of all the facts and considerations applicable, it is believed the definition and rule given are fair and just, and legitimately to be adopted. I think it wiser and safer to pursue such a rule, subject, as it is, to review by the courts, than to leave the matter open to the varying notions of different officers or the necessities of the companies." [8 Land Dec. 44.]

There is in our judgment much to be said in favor of this view of the statute. It falls in with the general system adopted by the United States for the survey of its public lands. Those sections touching the line of the road would, of course, be included within the term, while those next to them might also be included, because, although not touching, they would be near to such line, and would, therefore, come within any definition of the term as being close or near to the line without being contiguous to or actually touching it. It is not at all unrea-

[538] sonable to say that very probably Congress had in mind this general system of division of the public lands, and that the word "adjacent" would properly be interpreted with respect thereto. If the word "adjoining" had been used instead of "adjacent," those sections touching the line of the road could be regarded as the adjoining lands, and when the word "adjacent" instead of "adjoining" is used, it might, not unnaturally, be said to include the next tier of sections away *from the line of the road. We do not think that sections still further removed could, under this rule, be regarded as adjacent. The rule also gives certainty and definiteness to an otherwise somewhat doubtful expression, and, as the Secretary says, prevents the companies from ranging the public lands to secure material for the construction of their roads, and thus raising questions of legality in cutting in almost every case where the lands were beyond the sections described by the Secretary. This alone is an important consideration.

If not bounded by section lines, the term "adjacent" becomes of more or less uncertain meaning. We cannot, however, conclude that within any fair construction of the statute, these lands were in any event adjacent to the line of the road. The word is also used in the same section, when speaking of the use of ground adjacent to the right of way for purposes of depots, machine shops, etc. In such use it is clear the word is greatly limited. We take it there is a limit beyond which lands could not be described as adjacent to the line of the railroad, even if they were benefited by its construction and were the nearest public lands upon which timber could be found, and the timber thereon could be transported by wagon with profit to the company. Lands which are 20 miles off we cannot regard as adjacent to the line of a railroad within the meaning of this statute. On the other hand, lands within 2 miles, we assume all would agree, are so adjacent. Now, at what point between these two extremes lands are on one side adjacent and on the other not adjacent, is a very difficult matter to decide. It is necessarily somewhat vague and uncertain, and we are not called upon to determine it in this case. All we have to do now is to declare that lands as far off as the lands in question are not adjacent lands, and it is unnecessary to say at what point on the intervening lands adjacency begins. It is very difficult to determine just where twilight ends and night begins, but it is easy enough to distinguish noon from midnight. If we say that 2 miles would be within the term and 20 would be beyond it, it might be [540] asked why 19 miles *would not also be beyond it, or 3 miles be within it, and these

questions might puzzle one to answer. It can only be said that a distance of 20 miles is beyond it any way and 2 miles would be within it. If, then, short distances be proposed and an answer requested as to whether they are or are not within or without the limit, each division might be so small that no clear and decided difference could be asserted between it and the land immediately adjoining, and so it might result in no difference being stated between two and twenty, and yet we know there is a division and it lies somewhere between those two points. The nearer an approach is made to a junction between what is stated to be the adjacent and the nonadjacent lands, the more difficult it becomes to show any difference warranting a different decision, and yet, as we have said, there is a point at which there can be no doubt. We think 20 miles is certainly beyond any fair distance in which lands could be said to be adjacent to the line of this road. And we say this while fully recognizing and keeping in mind the liberal rule of construction set forth by this court in the *Denver Railroad Case*, 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11, *supra*. We appreciate the fact that the act was passed to "secure public advantages and to subserve the public interests," but nevertheless it does not grant free license to roam the public lands and take timber wherever thereon it may be found, or wherever by possibility it might be taken with profit to the company. The statute says that the land must be adjacent, and there must, of necessity, therefore, be a point where the lands are not adjacent, even though the timber might be removed therefrom with some possible profit to the company. As Congress has not given the definition of adjacent, such as has been adopted by any of the lower courts, we cannot, even by a so-called liberal construction, enlarge the ordinary meaning of the word to the extent made necessary in order to justify this cutting.

We cannot take, for the reasons already stated, the fact of wagon-road transportation as a means of deciding whether the lands are or are not adjacent, for it seems to us that it may lead *us far beyond any [541] reasonable limit to the word. The same may be said as to the benefits to the land by the building of the road. That also would in many cases lead too far from the line. In this case most of the transportation was done by water, the timber being driven or rafted down the river, and in that way the distance was from 22 to 26 miles, although such timber might have been hauled by wagon with reasonable profit. Now, suppose the nearest timber lands of the government were 100 miles away, but, by reason of water communication, the timber could be

floated down to the line of the road "with reasonable profit,"—would such lands then be adjacent? We think clearly not. And it is because of the fact that the distance would be plainly too great to conform to any of the meanings which have heretofore been given to the word. It strikes one so at first blush. We are of opinion that the same ought to be said of these lands. They are not adjacent, for they are not near; they are not in close proximity to this strip of land 200 feet wide. This ordinary limitation of the meaning of the word should not be enlarged for the purpose of thereby embracing lands which otherwise would not come within any fair construction of the statute.

The further question is as to the time when the value of the timber is to be ascertained.

The parties agreed that the amount of the timber growing on the lands is correctly stated in the answer, and the value thereof at the place where the timber was cut was \$1.50 per thousand feet and the value upon delivery to the defendant was \$12.35 per thousand feet. The delivery to the defendant was made by the Thompson Mercantile Company, with which the railroad company had entered into a contract to be supplied with the necessary ties and timbers for the construction of its road, and in such contract the mercantile company was, by the expressed terms thereof, appointed the agent of the defendant, and in that capacity it was authorized by the defendant to cut timber for the purpose mentioned. The

[542] *mercantile company did cut the timber on the lands which it in good faith supposed were adjacent to the line of the railroad, and delivered such timber to the railroad company upon the line of its road. We think the measure of damages should be the value of the timber after it was cut at the place where it was cut. The defendant does not, in our judgment, come within either the case of *E. E. Bolles Wooden-Ware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398, or that of *Pine River Logging Co. v. United States*, 186 U. S. 279, 46 L. ed. 1164, 22 Sup. Ct. Rep. 920. In both of those cases the parties doing the cutting did it wilfully and in bad faith. In the *Wooden-Ware Case* the timber was sold by the original trespasser to a third party without notice of the trespass, and the party purchasing was guilty of no wilful wrong. It was, however, held that the defendant, having purchased from the original wrongdoer and wilful trespasser, was liable for the value of the timber at the time and place it was purchased by defendant.

In the *Pine River Logging Case* the parties to the contract were held liable for the

full value of the timber after it was cut and had increased in value by reason of the labor expended upon it by the parties who did the cutting. This was on the ground that they were wilful trespassers, acting in bad faith, and ought to be made to suffer some punishment for their depredations; but it was stated that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern.

Although in this case it is agreed that the defendant did not act under a mistake, meaning thereby that the facts touching the status of the timber and the lands where the timber was cut were known, yet what was done was in the belief by the defendant that the lands were adjacent to the line of the road and that the cutting was legal. It was done upon the advice of counsel, and the defendant used ordinary care and prudence in first being advised as to the law upon the facts as they have been agreed upon, and there was no intention on the part of *the[543] defendant to violate any law or to do any wrongful act. This, we think, clearly takes the case out of the principle of those above cited, and the measure of damages must, therefore, be the value of the timber at the time and at the place where it was cut.

The judgment must be reversed, and the case remanded to the Circuit Court for the District of Idaho, Southern Division, with directions to enter judgment in favor of the United States for the amount of the timber as stated in the answer, and for its value at the rate of \$1.50 per thousand feet.

So ordered.

UNITED STATES *ex rel.* CHARLES P. STEINMETZ, *Plff. in Err.*,

v.

FREDERICK I. ALLEN, Commissioner of Patents.

(See S. C. Reporter's ed. 543-566.)

Error to court of appeals of District of Columbia—suit involving validity of authority exercised under the United States—patents—union of process and apparatus claims—validity of patent office rule of practice—mandamus to compel appeal from primary examiner—estoppel.

1. A suit in which the validity of a regulation established by the Commissioner of Patents, under the authority of U. S. Rev. Stat. § 483 (U. S. Comp. Stat. 1901, p. 272), for the conduct of proceedings in the Patent Office, is assailed, is one in which there is drawn in question the validity of "an authority exercised under the United States" within the meaning of the act of February

9, 1893, § 8 (27 Stat. at L. 436, chap. 74, U. S. Comp. Stat. 1901, p. 573), giving an appeal in such cases from the final judgment or decree of the court of appeals of the District of Columbia to the Federal Supreme Court.

2. So far as rule 41 of the Patent Office rules of practice prevents an inventor from uniting in one application process and apparatus claims which are essentially the same invention, it is invalid as an abuse of the discretion vested in the Patent Office to permit or deny a joinder of inventions.
3. Mandamus lies to compel the Commissioner of Patents to require the primary examiner to forward to the board of examiners-in-chief the appeal to which an inventor is entitled, under U. S. Rev. Stat. § 4909 (U. S. Comp. Stat. 1901, p. 3390), upon a second rejection of any of his claims by the primary examiner, where such examiner has twice denied his right to unite in one application process and apparatus claims which are essentially the same invention.
4. An inventor is not estopped from insisting upon his application for a patent in which were united process and apparatus claims for essentially the same invention, by requiring his process claims to be placed in interference with those of an existing patent after receiving a letter from the primary examiner permitting the retention of the process and apparatus claims pending the determination of the interference, but stating that the acceptance of an interference on one of the process claims would be held by the office to be an election of the prosecution of such claims, and further prosecution of the apparatus claims would not be permitted.

[No. 383.]

Argued January 12, 13, 1904. Decided February 23, 1904.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed the judgment of the Supreme Court of that District dismissing a petition for mandamus to compel a Commissioner of Patents to require the primary examiner to forward an appeal to the board of examiners-in-chief. *Reversed*, with directions to reverse the judgment of the Supreme Court, and to direct that court to grant the writ of mandamus.

See same case below, 31 Wash. L. Rep. 358.

Statement by Mr. Justice **McKenna**:

This is a petition in mandamus filed in the supreme court of the District of Columbia [544] to compel the Commissioner of *Patents to require the primary examiner to forward an appeal, prayed by the petitioner, to the board of examiners-in-chief, to review the ruling of the primary examiner requiring petitioner to cancel certain of his claims in his application for motor meters.

The supreme court dismissed the petition, and its action was affirmed by the court of

appeals. This writ of error was then sued out.

The decision of the primary examiner was based upon rule 41 of practice in the Patent Office, and the case involves the validity of the rule under the patent laws.

The petitioner filed an application in the Patent Office, November 21, 1896, for a patent for "certain new and useful improvements in motor meters." He expressed his invention in thirteen claims. They are inserted in the margin.†

†1. The herein-described method of measuring alternating electric currents, which consists in setting up or establishing a shifting field of magnetism from three intersecting lines or axes of magnetism and adapted to actuate a rotatable armature in a motor meter arranged within the energizing coils producing said lines of magnetization.

2. The herein-described method of actuating an alternating-current motor meter, which consists in setting up or establishing a shifting field of magnetism from three intersecting lines or axes of magnetization, and adapted to actuate a rotatable armature arranged within the energizing coils producing said lines of magnetization.

3. The herein-described method of actuating a single-phase alternating-current motor meter, which consists in setting up or establishing a shifting field of magnetism from three intersecting lines or axes of magnetization and adapted to actuate a rotatable armature arranged within the energizing coils producing said lines of magnetization.

4. The herein-described method of actuating an alternating-current motor meter, which consists in setting up or establishing a shifting field of magnetism by means of magneto-motive forces acting along three intersecting lines and subjecting an armature to the inductive action of said field.

5. The herein-described method of actuating an alternating-current motor meter, which consists in setting up or establishing a shifting field of magnetism by means of magneto-motive forces being proportional to the current and the other two to the electro-motive force, and subjecting an armature to the inductive action of said field.

6. The herein-described method of actuating an alternating-current motor meter which consists in setting up or establishing a shifting field of magnetism by means of magneto-motive forces acting along three intersecting lines, one magneto-motive force being proportional to the current and the other two to the electro-motive force, the several magneto-motive forces being so proportioned and related to each other that the resultant of the last two is displaced in phase from the first by the complement of the angle of lag, and subjecting an armature to the inductive action of said field.

7. In a Watt meter for alternating electric currents, means for producing a magnetic flux proportional to the current and varying in phase therewith, means for producing a second magnetic flux proportional to the electro-motive force and lagging in phase behind the same, and means for producing an auxiliary flux along a line at an angle to said second flux, and of such magnitude and phase that the

[545] *The first six were held by the primary examiner to be claims for a process; the balance of the claims to be for an apparatus; and on the 15th of May, 1900, ordered that the latter, that is, claims 7, 8, 9, 10, 11, 12, and 13, be canceled from the application. In other words, he required a division between the process claims and the apparatus claims, in accordance with rule 41. That rule is as follows:

[546] **41. Two or more independent inventions cannot be claimed in one application; but where several distinct inventions are dependent upon each other and mutually contribute to produce a single result, they may be claimed in one application.

"Claims for a machine and its product must be presented in separate applications.

"Claims for a machine and the process [547] in the performance of *which the machine is used must be presented in separate applications.

resultant of the two last-mentioned fluxes will lag behind the first by the complement of the angle of lag.

8. The combination in an electro motor of a field-magnet system and means for inducing therein magnetic fluxes of three phases, one a flux due to a series coil and proportional to the current, a second flux due to a shunt potential coil and lagging behind the electro-motive force, and a third flux lagging behind said second flux and having a fixed angular relation thereto such that the resultant of the second and third fluxes is dephased by substantially the complement of the angle of lag from the flux due to the series coil.

9. The combination in a recording electric meter of a field-magnet system acting on the armature and having a plurality of intersecting magnetic axes, means for inducing along one of said magnetic axes a flux proportional to the current and varying in phase therewith, and means for inducing along the other magnetic axes a plurality of other fluxes dependent upon the potential of the metered circuit, which lag behind the electro-motive force by different amounts and act upon the armature at different points, said fluxes being so proportioned in value and phase that their joint action upon the armature will enable the meter to register the true energy consumed in an alternating-current circuit without being substantially affected by changes of phase relation.

10. In a Watt meter for alternating currents, the combination of a field-magnet system having three intersecting magnetic axes, means for producing along one of said axes a magnetic flux proportional to the current and varying in phase therewith means for producing along another of said axes an alternating flux proportional to the electro-motive force and lagging behind the same, and means for producing along the third axis an auxiliary magnetic flux also proportional to the electro-motive force, of such a magnitude and phase that the joint action of the several fluxes upon the armature will enable the meter to register the true energy consumed in an alternating-current circuit without being substantially affected by changes of phase relation.

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"Claims for a process and its product may be presented in the same application."

Petitioner persisted in his application as filed, and the primary examiner repeated his order for a division of the claims. Petitioner regarded such order as "a second final rejection" of his claims to the apparatus, and appealed therefrom to the board of examiners-in-chief. The primary examiner refused to answer the appeal and to forward the same with his answer thereto and the statements required by the rules of the Patent Office. Thereafter, on the 20th of August, 1900, petitioner petitioned the Commissioner of Patents to direct the primary examiner to forward said appeal, which petition was denied. It was repeated to the present Commissioner, defendant in error, and by him denied on the 7th of February, 1902.

These facts constitute petitioner's claim to relief.

The answer of the respondent asserts the

11. In a meter for alternating currents, the combination of a field-magnet system having three intersecting magnetic axes, means for producing along one of said axes a magnetic flux proportional to the current and varying in phase therewith, means for producing along another of said axes an alternating flux proportional to the electro-motive force and lagging behind the same, and means for producing along the third axes an auxiliary magnetic flux also proportional to the electro-motive force and of such magnitude and phase that the joint action of the two potential fluxes upon the armature will produce a torque sufficient to overcome the static friction of the meter.

12. In a single-phase alternating current meter, the combination of a field-magnet system having three intersecting magnetic axes, a field coil in which the current phase varies as the conditions of the circuit change, producing a magnetization along one magnetic axis, a potential coil producing a magnetization along another magnetic axis, a reactance device in series with said potential coil for lagging the current behind the electro-motive force, and a second potential coil depending for its current upon the first potential coil, producing a magnetization along the third magnetic axis; the two potential coils conveying currents which differ in phase from each other, and each generating a flux which acts upon the armature at a point removed from the point at which the flux due to the other potential coil acts upon the armature.

13. In an electric meter, the combination of a multipolar field-magnet structure having three magnetic axes, current coils mounted upon some of the field poles and producing a magnetization along one of said magnetic axes, potential coils mounted upon other field poles and producing a magnetization along another one of said magnetic axes, and other potential coils mounted upon a portion only of the last-named field poles, or some of them, and producing a magnetization along the third magnetic axis, and an armature acted upon by the flux induced by the field coils.

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validity of rule 41, justifies the action of the Patent Office, alleges that petitioner is estopped from contesting the orders of the primary examiner, and also alleges that those orders "did not involve the rejection of any claim or an action upon the merits of any claim made by the relator," as provided in rule 13, and that "the statutes and rule 133 of the rules of practice do not provide for an appeal to the examiners-in-chief from an examiner's requirement for division, and the examiners-in-chief have no jurisdiction to pass upon the question whether or not division should be required."

The answer presents also the following facts: Prior to making the order of May 15, 1900, to wit, on October 9, 1899, the primary examiner wrote a letter to petitioner regarding the division of the process claims and the apparatus claims, in accordance with rule 41, before further action would be given upon the merits of the case.

[548] Petitioner replied December 15, 1899, requesting "that the *requirement for division be waived for the present," in order that his process claims be placed in interference with the claims of a patent to one Duncan. To this request the examiner answered:

"Pending the determination of the interference, applicant may retain the method and apparatus claims in this case, but the acceptance of an interference on one of the method claims will be held by the office to be an election of the prosecution of the method claims, and the further prosecution of the apparatus claims in this application will not be permitted."

Petitioner replied January 19, 1900, urging that the interference be declared, and on February 7, 1900, it was declared and decided in favor of petitioner. After the decision the examiner wrote the letter of May 15, 1900. These proceedings, respondent contends, constitute an estoppel.

The first ruling of the Commissioner of Patents upon the petition to require the primary examiner to respond to petitioner's appeal was as follows:

"Where applicant does not care to comply with the examiner's requirements in a matter of division such as is here involved, it has been the practice for the past thirty years to treat the question, not as one of merits, and appealable to the examiners-in-chief, but as a proper matter for petition to the Commissioner. I see no reason for overturning this practice. This petition is denied."

The second order of the Commissioner, respondent, after reciting certain of the facts, concluded as follows:

"The requirement for division is purely a matter of form, not involving the merits of the claims, since the claims may be, and

in the present case are, regarded as allowable. The examiner has not refused to grant a patent to this applicant upon any of the claims presented, but has merely required that they be included in two patents instead of one. It is a question of procedure, or of the manner of securing the protection, which is in controversy, and not the right of the applicant to a patent upon any of the claims presented.

*"The examiner was right in taking the [549] position that the question involved is not appealable to the examiners-in-chief, and although it is a general rule of law that the appellate tribunal is the one to determine whether or not it has jurisdiction when an appeal is taken to it, it is not considered necessary in the office practice to follow that practice strictly, since the Commissioner is the head of the office and has the final decision upon all questions arising within it and may settle questions of this kind upon direct petition. The examiner's decision upon the question whether or not an appeal to the examiners-in-chief is regular and proper is not final, since it may be reviewed by the Commissioner upon petition, but he has authority to pass upon that question in the first instance.

"The petition is denied."

Messrs. Frederic H. Betts and Melville Church argued the cause and filed a brief for plaintiff in error:

The books are full of cases in which a single patent covering both process and apparatus has been adjudicated, sustained, and found to be infringed.

Merrill v. Ycomans, 94 U. S. 568, 24 L. ed. 235; *Telephone Cases*, 126 U. S. 1, 31 L. ed. 863, 8 Sup. Ct. Rep. 778; *Hoyt v. Horne*, 145 U. S. 302, 36 L. ed. 713, 12 Sup. Ct. Rep. 922.

Cases are not wanting in which this defense of misjoinder of process and apparatus has been seriously urged, argued, and directly decided.

Fire-Extinguisher Case, 21 Fed. 40.

Patents (inventions) may be united, if two or more included in one set of letters relate to a like subject, or are in their nature or operation connected together.

Hogg v. Emerson, 6 How. 483, 12 L. ed. 524.

The whole tendency of the courts has of late years been towards the condemnation of undue subdivision of invention and of undue multiplication of patents.

Electrical Accumulator Co. v. Brush Electric Co. 2 C. C. A. 682, 1 U. S. App. 320, 52 Fed. 137; *H. W. Johns Mfg. Co. v. Robertson*, 89 Fed. 506.

Congress never intended that the cost of

a patent should depend upon the whims of commissioners of patents.

Ogden v. Maxwell, 3 Blatchf. 319, Fed. Cas. No. 10,458; *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244.

The examiners, the examiners-in-chief, and the Commissioner, acting as an appellate tribunal, are all judicial officers.

Butterworth v. United States, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25; *United States v. Duell*, 172 U. S. 576, 43 L. ed. 559, 19 Sup. Ct. Rep. 286.

The word "reject" is universally used as the equivalent of "refuse,"—especially when used to indicate a denial of a petition or request.

Webster's International Dict.; Century Dict.; Standard Dict.; Soule's Synonyms; International Dict. & Cyc.; Richardson's English Dict.; American Enc. Dict.

To insist upon unreasonable conditions, or upon conditions which jeopardized any inherent or statutory right of the applicant, is equivalent to a refusal.

Rejection for or without reason, and rejections upon the merits of the invention or otherwise, are equally within the purview of the statute, and the Commissioner, by rule, can add nothing to nor subtract anything from the statutory requirements, to the prejudice of an applicant.

Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; *Tracy v. Swartnout*, 10 Pet. 80, 9 L. ed. 354; *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; *Teal v. Felton*, 12 How. 285, 13 L. ed. 990; *Anchor v. Howe*, 50 Fed. 367.

The rules of the office made pursuant to statutory authority, and not inconsistent with law, have all the force and authority of the statute itself, and are, so long as they remain unrepealed, as binding upon the office as they are upon applicants.

United States v. Eliason, 16 Pet. 291, 10 L. ed. 968; *Gratiot v. United States*, 4 How. 80, 11 L. ed. 884; *Re Hirsch*, 74 Fed. 931; *Wilkins v. United States*, 37 C. C. A. 588, 96 Fed. 837; *James v. Germania Iron Co.* 46 C. C. A. 476, 107 Fed. 597; *District of Columbia v. Roth*, 18 App. D. C. 547; *Rio Grande Irrig. & Colonization Co. v. Gildersleeve*, 174 U. S. 603, 43 L. ed. 1103, 19 Sup. Ct. Rep. 761.

Any interference with a right of appeal is never tolerated and mandamus is the proper remedy to remove any obstruction to the exercise of the right.

United States v. Gomez, 3 Wall. 752, 16 L. ed. 212; *Ex parte Zellner*, 9 Wall. 244, 19 L. ed. 665; *Vigo's Case*, 21 Wall. 648, 22 L. ed. 690; *Ex parte Jordan*, 94 U. S. 248, 24 L. ed. 123; *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *Ex parte South & North* 192 U. S.

Ala. R. Co. 95 U. S. 221, 24 L. ed. 355; *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 18 L. ed. 335.

Assistant Attorney General **McReynolds** argued the cause, and, with *Mr. John M. Coit*, filed a brief for defendant in error:

The validity of an authority exercised under the United States is not drawn in question simply because the correctness of a decision rendered by one exercising such authority is disputed. The validity of the authority must be called in question, and not merely the rightfulness or wrongfulness of the officer's action.

Baltimore & P. R. Co. v. Hopkins, 130 U. S. 211, 226, 32 L. ed. 908, 914, 9 Sup. Ct. Rep. 503; *United States v. Lynch*, 137 U. S. 280, 285, 34 L. ed. 700, 702, 11 Sup. Ct. Rep. 114; *South Carolina v. Seymour*, 153 U. S. 353, 360, 38 L. ed. 742, 745, 14 Sup. Ct. Rep. 871; *Linford v. Ellison*, 155 U. S. 503, 39 L. ed. 239, 15 Sup. Ct. Rep. 179.

Mandamus will not issue against a public officer except to compel the performance of some plain, clear, ministerial duty, and will not issue to control his discretion.

Decatur v. Paulding, 14 Pet. 515, 10 L. ed. 568; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437; *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; *United States ex rel. Dunlap v. Black*, 138 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12.

The Commissioner is the head of the Patent Office, and when he personally acts upon a case he cannot be required to refer it to a lower tribunal in his office.

Commissioner of Patents v. Whitley, 4 Wall. 522, 18 L. ed. 335.

He is not simply an appellate tribunal.

Butterworth v. United States, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25.

The examiner's action to be appealable must dispose of the whole case, and not merely require certain steps preliminary to an adjudication of the claim.

Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15.

Every failure to issue a patent is not a rejection.

Butterworth v. United States, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25.

Division involves no question of merits.

Ex parte Yale, C. D. 1869, 110; *Ex parte Mefford*, 25 Off. Gaz. 881; *Ex parte Fefel*, 57 Off. Gaz. 409; *Ex parte Demeny*, 64 Off. Gaz. 1649.

Some discretion must necessarily be left on this subject to the head of the Patent Office.

Bennet v. Fowler, 8 Wall. 445, 19 L. ed. 431.

A process and an apparatus are distinct, separable, and independent things.

Cochrane v. Deener, 94 U. S. 780, 788, 24 L. ed. 139, 141; *Corning v. Burden*, 15 How. 252, 268, 14 L. ed. 683, 690; *James v. Campbell*, 104 U. S. 356, 376, 26 L. ed. 786, 793; *Heald v. Rice*, 104 U. S. 737, 753, 26 L. ed. 910, 916; *Tilghman v. Proctor*, 102 U. S. 707, 728, 26 L. ed. 279, 287; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 796, 19 L. ed. 566, 568; *Ex parte Lord*, 50 Off. Gaz. 987.

The uniform ruling of all Commissioners from the beginning has been that requirement for division is not appealable, and uniform and long-established construction of the statute by the able patent lawyers who have held the position of Commissioner is entitled to great weight.

Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 34, 39 L. ed. 601, 15 Sup. Ct. Rep. 508.

Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

1. The jurisdiction of this court to review the judgment of the court of appeals is questioned. There is no money in dispute nor anything to which a pecuniary value has been given. Jurisdiction is claimed under the clause of § 8 of the act of February 9, 1893 [27 Stat. at L. 436, chap. 74, U. S. Comp. Stat. 1901, p. 573], which gives an appeal to this court from the final judgment or decree of the court of appeals in cases in [556] which *there is drawn in question the validity of "an authority exercised under the United States."

By § 483 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 272), the Commissioner of Patents, subject to the approval of the Secretary of the Interior, is empowered to establish from time to time regulations not inconsistent with law, for the conduct of proceedings in the Patent Office. The Commissioner of Patents, exercising the power conferred, established, among other rules of practice, rule 41. It thereby became a rule of procedure, and constituted, in part, the powers of the primary examiner and Commissioner. In other words, it became an authority to those officers, and, necessarily, an authority "under the United States." Its validity was and is assailed by the plaintiff in error. We think, therefore, we have jurisdiction, and the motion to dismiss is denied.

2. The issue is well defined between the parties, both as to the right and remedy, in the Patent Office. As to right, petitioner contends that a union by an inventor of process and apparatus claims, which are essentially the same invention, is given by the patent laws, and that rule 41, so far as it takes that right away, is repugnant to [560]

those laws, and invalid. As to remedy, that the decision of the primary examiner constituted a final decision upon the case, and petitioner was entitled to an appeal under the patent laws to the board of examiners-in-chief. The latter proposition depends upon the first. Assuming the right in an inventor as expressed in the first proposition, the primary examiner denied the right. True, a distinction can be made between his ruling and one on the merits, if we regard the merits to mean invention, novelty, or the like. But in what situation would an applicant for a patent be? If he yield to the rule, he gives up his right of joinder. If he does not yield he will not be heard at all, and may subsequently be regarded as having abandoned his application. Section 4894, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3384). A ruling having such effect must be considered as final and appealable. Whether, however, to the examiners-in-chief or to the Commissioner, and *from the latter to the [557] courts, we may postpone answering until we have considered the right of an inventor to join process and apparatus claims in one application.

Section 4886 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3382), provides as follows:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

There is nothing in the language of the section which necessarily precludes the joinder of two or more inventions in the same application. But the section does distinguish inventions into arts (processes), machines, manufactures, and compositions of matter, and the earliest construction of the law denied the right of joinder. An exception, however, came to be made in cases of dependent and related inventions.

In *Hogg v. Emerson*, 6 How. 437, 12 L. ed. 505, it was said:

"The next objection is, that this description in the letters thus considered covers more than one patent and is therefore void.

"There seems to have been no good reason at first unless it be a fiscal one on the part of the government when issuing pat-

ents, why more than one in favor of the same inventor should not be embraced in one instrument, like more than one tract of land in one deed or patent for land. Phillips, Patents, 217.

"Each could be set out in separate articles or paragraphs, as different counts for different matters in libels in admiralty or declarations at common law, and the specifications could be made distinct for each, and equally clear.

[558] "But to obtain more revenue, the public officers have generally *declined to issue letters for more than one patent described in them. Renouard, *Desbrevets D'Invention*, 293; Phillips, Patents, 218. The courts have been disposed to acquiesce in the practice as conducive to clearness and certainty. And if letters issue otherwise inadvertently, to hold them, as a general rule, null. But it is a well-established exception that patents may be united, if two or more, included in one set of letters, relate to a like subject, or are, in their nature or operation, connected together. Phillips, Patents, 218, 219; *Barrett v. Hall*, 1 Mason, 447, Fed. Cas. No. 1,047; *Moody v. Fiske*, 2 Mason, 112, Fed. Cas. No. 9,745; *Wyeth v. Stone*, 1 Story, 273, Fed. Cas. No. 18,107."

This language would seem to imply that not the statute, but the practice of the Patent Office, required separate applications for inventions, but the cases cited were explicit of the meaning of the statute. Mr. Justice Story, in *Wyeth v. Stone*, said:

"For, if different inventions might be joined in the same patent for entirely different purposes and objects, the patentee would be at liberty to join as many as he might choose, at his own mere pleasure, in one patent, which seems to be inconsistent with the language of the patent acts, which speak of the thing patented, and not of the things patented, and of a patent for invention, and not of a patent for inventions; and they direct a specific sum to be paid for each patent."

But he confined the requirement to independent inventions, and his illustrations indicated that he meant by independent inventions not those which, though distinct, were "for the same common purpose and auxiliary to the same common end."

Hogg v. Emerson came to this court again, and is reported in 11 How. 587, 13 L. ed. 824. Of one of the objections to the patent the court said:

"It is that the improvement thus described is for more than one invention, and that one set of letters patent for more than one invention is not tolerated by law.

"But grant that such is the result when two or more inventions are entirely separate and independent,—though this is doubtful
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on principle,—yet it is well settled, in the cases formerly cited, that a patent for more than one invention is not void if *they are[559] connected in their design and operation. This last is clearly the case here."

Many other cases are to the same effect.

Can it be said that a process and an apparatus are inevitably so independent as never to be "connected in their design and operation?" They may be completely independent. *Cochrane v. Deener*, 94 U. S. 780, 24 L. ed. 139. But they may be related. They may approach each other so nearly that it will be difficult to distinguish the process from the function of the apparatus. In such case the apparatus would be the dominant thing. But the dominance may be reversed and the process carry an exclusive right, no matter what apparatus may be devised to perform it. There is an illustration in the *Telephone Cases*, 126 U. S. 1, 31 L. ed. 863, 8 Sup. Ct. Rep. 778. The claim passed upon in those cases was as follows:

"The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

The claim was held to refer to the art described, and the means of making it useful. The court observed:

"Other inventors may compete with him for the ways of giving effect to the discovery, but the new art he has found will belong to him and those claiming under him during the life of his patent."

A distinction between the process and the means employed for using it was recognized. It was said:

"The patent for the art does not necessarily involve a patent for the particular means employed for using it. Indeed, the mention of any means, in the specification or descriptive portion of the patent, is only necessary to show that the art can be used; for it is only useful arts—arts which may be used to advantage—that can be made the subject of a patent."

The patent was sustained. It was not attacked because it embraced independent inventions. The fact is not without *force.[560] Considering the ability of counsel engaged and the division of the court in opinion, it is a proper inference that no tenable objection to the patent was overlooked.

It is said by Robinson, in his work on Patents, that "special rules which govern the joinder of arts or processes with each other or with related inventions of a different class, are more stringent in the Patent Office than in the courts." 2 Robinson, Patents, § 473. And the author deduces the conclusion

that under the rules of the Patent Office a process cannot be "joined with the apparatus that performs it, nor either of these with the product in which they result, unless they are to such an extent inseparable that the existence of some one of them is dependent upon that of the others." But rule 41 precludes even this.

If there is a divergence of views between the courts and the Patent Office, and the divergence proceeds from a different interpretation of the statute, the views of the courts ought to prevail. If the courts, however, have only recognized and enforced the exercise of a discretion of the Patent Office, the question occurs, What is the extent of such discretion, and can it be expressed and fixed in an inflexible rule such as rule 41? In *Bennet v. Fowler*, 8 Wall. 445, 19 L. ed. 431, a discretion in the Patent Office was recognized. The question arose upon the validity of two reissued patents for improvements, which "had been embraced in one, in the original patent." The court said:

"It may be that if the improvements set forth in both specifications had been incorporated into one patent, the patentee taking care to protect himself as to all his improvements by proper and several claims, it would have been sufficient. It is difficult, perhaps impossible, to lay down any general rule by which to determine when a given invention or improvements shall be embraced in one, two, or more patents. Some discretion must necessarily be left on this subject to the head of the Patent Office. It is often a nice and perplexing question."

Some discretion is not an unlimited discretion, and if the "discretion be not unlimited it is reviewable. In other words, the statute gives the right to join inventions in one application in cases where the inventions are related, and it cannot be denied by a hard and fixed rule which prevents such joinder in all cases. Such a rule is not the exercise of discretion; it is a determination not to hear. No inventor can reach the point of invoking the discretion of the Patent Office. He is notified in advance that he will not be heard, no matter what he might be able to show. His right is denied, therefore; not regulated. Such is the necessary effect of rule 41, as amended.

Without that rule the action of the Patent Office can be accommodated to the character of inventions, and discretion can be exercised, and when exercised, we may say in passing, except in cases of clear abuse, the courts will not review it. But the rule as amended, as we have said, precludes the exercise of any judgment, and compels the separation of claims for a process and claims for its apparatus, however related or connected they may be. And the right denied

is substantial. Counsel for petitioner have explained that right by the embarrassments caused by its denial, one of which is that, by disclosing the apparatus in his application for the process, he might lose the right to and a patent for the apparatus; and to sustain that view *James v. Campbell*, 104 U. S. 356, 26 L. ed. 786, is cited. We are not prepared to admit such consequences nor that *James v. Campbell* so decides. If the classification of the statute makes a distinction between the different kinds of inventions—between a process and an apparatus—and requires or permits a separate application for each, it would seem to follow irresistibly that an application and patent for one would not preclude an application and patent for the other, and the order of the application could not affect the right which the law confers. *James v. Campbell* was a case of reissued patent, and by express provision of the statute as to reissued patents no new matter can be introduced in them. In other words, the reissue is to perfect, not to enlarge, the prior patent. Whether the principle of the case applies to "related as well as to independent inven-[562] tions is not clear from its language. The court said:

"Where a new process produces a new substance, the invention of the process is the same as the invention of the substance, and a patent for the one may be reissued so as to include both, as was done in the case of Goodyear's vulcanized rubber patent. But a process, and a machine for applying the process, are not necessarily one and the same invention."

The facts of the case did not call for a more definite ruling. The original patent was for a device for postmarking and canceling postage stamps by a single blow. The reissued patent claimed the act of marking and cancelation, and it was observed by the court:

"The process or act of making a postmark and canceling a postage stamp by a single blow or operation, as a subject of invention, is a totally different thing in the patent law from a stamp constructed for performing that process."

But without attempting to enlarge the case and extend it to more intimately related inventions, it is enough now to say that there is nothing in the case which decides that if the process had been claimed in an independent application it (the process) would have been adjudged to have been dedicated to the public by the other patent. There is language indicating the contrary. It was said:

"If he [the patentee] was the author of any other invention than that which he specifically describes and claims, though he

might have asked to have it patented at the same time and in the same patent, yet if he has not done so, and afterwards desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent."

The case, however, indicates what embarrassment and peril of rights may be caused by a hard and fixed rule regarding the separation of related inventions. See also *Mosler Safe & Lock Co. v. Mosler*, 127 U. S. 354, 32 L. ed. 182, 8 Sup. Ct. Rep. 1148, and *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 38 L. ed. 121, 14 Sup. Ct. Rep. 310.

[563] *The Patent Office has not been consistent in its views in regard to the division of inventions. At times convenience of administration has seemed to be of greatest concern; at other times more anxiety has been shown for the rights of inventors. The policy of the office has been denominated that of "battledore and shuttlecock," and rule 41 as it now exists was enacted to give simplicity and uniformity to the practice of the office. Its enactment was attempted to be justified by the assumption that the patent laws gave to the office a discretion to permit or deny a joinder of inventions. But, as we have already said, to establish a rule applicable to all cases is not to exercise discretion. Such a rule ignores the differences which invoke discretion, and which can alone justify its exercise, and we are of opinion therefore that rule 41 is an invalid regulation.

3. Having settled the right of appellant, we may now return to the consideration of his remedy. Respondent contends:

"It is fundamental that mandamus will not issue against a public officer, except to compel the performance of some plain, clear, ministerial duty, and will not issue to control his discretion."

And it is further contended that respondent has acted, and, having acted, cannot be required to refer the case to a lower tribunal in his office. To sustain the contention *Holloway v. Whiteley*, 4 Wall. 522, 18 L. ed. 335, is cited.

The unity of the inventions claimed by petitioner in the case at bar we may assume. It is not denied by respondent. Petitioner had, therefore, the right to join them in one application. The denial of this right by the primary examiner was a rejection of the application, and entitled petitioner to an appeal to the examiners-in-chief, under § 4909 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3390). That sections provides:

"Every applicant for a patent, . . . any of the claims of which have been twice rejected, . . . may appeal from the de-

cision of the primary examiner to the board of examiners-in-chief; . . ."

*The § 482 (U. S. Comp. Stat. 1901, p.[564] 272), provides:

"The examiners-in-chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents, and for reissues of patents, and in interference cases; and, when required by the Commissioner, they shall hear and report upon claims for extensions, and perform such other like duties as he may assign them."

The procedure on appeal is provided for by the rules of the Patent Office. It is taken by filing a petition praying an appeal with the primary examiner, setting forth the reasons upon which the appeal is based, and it is made the duty of the examiner, five days before the date of hearing, to furnish the appellate tribunal and the appellant with a statement of the grounds of his decision. A petition praying an appeal was filed but the primary examiner refused to answer the appeal, and the defendant in error also refused to direct him to answer it. It is manifest that if an appeal cannot be compelled from the decision of the primary examiner, an applicant is entirely without remedy. And respondent has asserted that extreme. In *Ex parte Frasch* [20 App. D. C. 298] the court of appeals of the District of Columbia was persuaded that an appeal was not the proper remedy. In the case at bar it was contended that mandamus is not the proper one. One or the other must be. A suggestion made is that the inventor must await a decision on the merits, meaning by merits "lack of invention, novelty, or utility," as expressed in rule 133. But after waiting he would encounter the arbitrary requirement of rule 41. Besides, what would there be to review if the order of the primary examiner were complied with and the claims put into separate applications? There are some observations in *Holloway v. Whiteley*, which may be quoted. Whiteley claimed to be the assignee of a patent, and filed an application for a reissue. The Commissioner declined to entertain it on the ground that Whiteley was only assignee of an interest, and not of the entire patent. He also *declined to[565] allow an appeal to be taken from his decision. The supreme court of the District of Columbia awarded a peremptory writ of mandamus commanding the Commissioner to refer the application to the proper examiner, or otherwise examine or cause it to be examined according to law. Error was prosecuted to this court. Under the act of 1836

[5 Stat. at L. p. 117, chap. 357], it was provided that if the Commissioner decided adversely to an applicant for a patent an appeal could be taken to the board of examiners, and by the act of 1837 [5 Stat. at L. 191, chap. 45], that remedy was given to an applicant for a reissue of a patent, and the question in the case was whether that remedy should have been pursued. In other words, whether the remedy was by appeal or mandamus. It was decided that appeal was the remedy. Singularly enough, the Commissioner, in answer to the rule, took the position that the application was not before him because it had not been filed. The court said if that were so "mandamus would clearly lie to compel the Commissioner to receive it. It was his first duty to receive the application, whatever he might do subsequently. Without this initial step there could be no examination, and, indeed, no rightful knowledge of the subject on his part. Examination and the exercise of judgment, with their proper fruit, were to follow, and they did follow."

And so the exercise of judgment might follow a hearing of the application under review. It was the duty of the primary examiner to accord a hearing or, refusing to do so, to grant an appeal. It was the duty of the Commissioner to compel the appeal. The Commissioner of Patents is primarily charged with granting and issuing patents. Applications for patents are made to him (§ 4888, Revised Statutes, U. S. Comp. Stat. 1901, p. 3383), and his superintendence should be exercised to secure the rights which the statutes confer on inventors. The first of those rights is a hearing. If that be denied other rights cannot accrue.

[536] The Commissioner justifies his decision by the rules of the Patent Office and a long practice under them. If there is inconsistency between the rules and statute, the latter must prevail. *But the primary examiner did not follow the rules. The rules provide that if appeal be regular *in form* (italics ours) he shall, within five days of the filing thereof, furnish the examiners-in-chief with a written statement of the grounds of his decision on all of the points involved in the appeal, with copies of the rejected claims and with the references applicable thereto. If he decide that the appeal is not regular in form, a petition from such decision may be made directly to the Commissioner. The regularity of the appeal in form is not questioned in the case at bar, and it was the duty of the examiner to answer the appeal by furnishing the examiners-in-chief the statement provided for in rule 135. A petition to the Commissioner was not necessary except to make the examiner to perform his duty.

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4. We do not think that petitioner was estopped from insisting upon his application by proceeding with the interference with Duncan after the examiner's letter of December 15, 1899. It would be pressing mere order of procedure and the convenience of the Patent Office too far to give them such result under the circumstances.

The judgment of the Court of Appeals is therefore reversed, with directions to reverse that of the Supreme Court, and direct the Supreme Court to grant the writ of mandamus as prayed for.

Ex parte HERMAN FRASCH, *Petitioner*.

(See S. C. Reporter's ed. 566-568.)

Appeal to court of appeals of District of Columbia from Commissioner of Patents —when mandamus to Commissioner is proper remedy.

No appeal lies to the court of appeals of the District of Columbia from the Commissioner of Patents to review his refusal to require the primary examiner to forward to the board of examiners-in-chief the appeal to which an inventor is entitled upon a second refusal of the primary examiner to permit the union in one application of process and apparatus claims which are related and dependent inventions. Mandamus to the Commissioner of Patents is the proper remedy.

[No. 13, Original.]

Argued December 18, 21, 1903. Decided February 23, 1904.

ON PETITION for writ of mandamus to the Court of Appeals for the District of Columbia to compel it to take jurisdiction of an appeal from the Commissioner of Patents. *Dismissed*.

The facts are stated in the opinion.

Mr. Charles J. Hedrick argued the cause and filed a brief for petitioner.

Assistant Attorney General McReynolds argued the cause, and, with **Mr. John M. Coit**, filed a brief for respondents.

Mr. Justice McKenna delivered the opinion of the court:

This is a petition for a writ of mandamus to compel the court of appeals of the District of Columbia to take jurisdiction of an appeal from the Commissioner of Patents.

The petition shows that petitioner was the first inventor of a new and useful improvement in the art of making salt by evaporation of brine, which improvement consisted of new and useful means for removing incrustation of calcium sulphate from brine heating surfaces.

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Petitioner applied for a patent for his invention in due form, and expressed his invention in six claims, three of which were for the process of removing incrustation of calcium sulphate from heating surfaces, and three of which were for an apparatus for use in the process.

The primary examiner decided that "two different subjects of invention" were presented in the specification and claims, and required a division of the claims under rule 41 of the Patent Office. A reconsideration of the decision was requested and denied. A petition for an appeal to the board of examiners-in-chief was filed. The primary examiner refused to allow the appeal. A petition was then presented to the Commissioner of Patents praying that he make such order or take such action that petitioner's appeal to the examiners-in-chief might be heard, or, if that prayer be denied, that the Commissioner himself "consider the various matters all and severally raised by the appeal." Both prayers were denied and petitioner appealed to the court of appeals of the District of Columbia. That court dismissed the appeal for want of jurisdiction. This petition was then filed and a rule to show cause issued. A return to the rule was duly made.

We have just held in *United States ex rel. Steinmetz v. Allen*, 192 U. S. 543, ante, 555, 24 Sup. Ct. Rep. 415, that rule 41 of the Patent Office, in so far as it requires a division between claims for a process and claims for an apparatus, if they are related and dependent inventions, is invalid. We, however, *held that mandamus to the Commissioner, not appeal to the court of appeals of the District, was the proper remedy. It follows, therefore, that *the rule to show cause should be discharged and the petition be dismissed, and it is so ordered.*

CENTRAL STOCK YARDS COMPANY,
Appt.,
v.
LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(See S. C. Reporter's ed. 568-572.)

Connecting carriers—duty to transfer shipments — consignments to substantially same point of delivery.

1. A railway maintaining a live-stock depot as a point of delivery for cattle having a municipality as their general destination cannot be compelled to receive live stock billed to a similar depot at substantially the same point on another railway, and to deliver the same to that railway at a point of physical connection between the two roads for ultimate delivery there, by virtue of the provision of the Interstate Commerce Act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3155), § 3, making it unlawful for common carriers subject to the act to give unreasonable preferences, and requiring them to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of property to and from their several lines and those connecting therewith.

2. The duty imposed on railway companies by Ky. Const. § 213, to receive, deliver, and transport freight from and to any point where there is a physical connection between the tracks of the railway concerned and any other, does not require a railway company maintaining a live-stock depot as a point of delivery for cattle having a municipality as their general destination to receive live stock billed to a similar depot at substantially the same point on another railway, and to deliver the same to that railway at a point of physical connection between the two roads for ultimate delivery there.

[No. 149.]

Argued January 28, 29, 1904. Decided February 23, 1904.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Kentucky dismissing a bill to compel a railway company to receive live stock billed to a depot on another road and to deliver the same at a point of physical connection between the two roads for ultimate delivery at that depot. *Affirmed.*

See same case below, 55 C. C. A. 63, 118 Fed. 113.

The facts are stated in the opinion.

Messrs. **Joseph C. Dodd** and **William D. Washburn** argued the cause, and, with Messrs. **John L. Dodd** and **W. M. Smith**, filed a brief for appellant:

The remedies provided in §§ 8 and 9 of the Interstate Commerce Act are in addition to the remedies existing at common law, and the bill being predicated also upon the Kentucky Constitution and statutes, the circuit court has jurisdiction. Any possible doubt on this question is settled by the *Elkins* law of February 19, 1903.

Thompson v. Allen County, 115 U. S. 554, 29 L. ed. 473, 6 Sup. Ct. Rep. 140; *Boyce v. Grundy*, 3 Pet. 215, 7 L. ed. 657; 1 Foster, Fed. Pr. p. 9; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 261, 47 Fed. 772; *Interstate Stock-Yards Co. v. Indianapolis U. R. Co.* 99 Fed. 483; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 563; *Davis v. Wakelce*, 156 U. S. 681, 39 L. ed. 579, 15 Sup. Ct. Rep. 555; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Rath-*

bone v. Warren, 10 Johns. 587; *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415; *American Ins. Co. v. Fisk*, 1 Paige, 90; *Teague v. Russell*, 2 Stew. (Ala.) 420; *Southampton Dock Co. v. Southampton Harbour & Pier Board*, L. R. 11 Eq. 254; *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Atty. Gen. v. Mid-Kent R. Co.* L. R. 3 Ch. App. 100; *Missouri P. R. Co. v. United States*, 189 U. S. 274, 47 L. ed. 811, 23 Sup. Ct. Rep. 507; *United States v. Michigan C. R. Co.* 122 Fed. 544.

The interest of appellant as consignee and the party injured by the discrimination complained of is sufficient to enable it to maintain the bill.

Webber v. Gage, 39 N. H. 182; *Story*, Eq. Pl. § 730; *Interstate Stock-Yards Co. v. Indianapolis Union R. Co.* 99 Fed. 472; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33.

No prayer for through billing is contained in the bill. The prayer is that the defendant be compelled to accept any and all stock tendered to it for points of connection with the Southern Railway Company, and to deliver the same to the Southern Railway with direction as to its destination, and to recognize the right of the consignor, consignee, and owner to change the destination of shipments of live stock.

Chicago, M. & St. P. R. Co. v. Becker, 32 Fed. 849; *Iowa v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 425, 33 Fed. 391; 5 Am. & Eng. Enc. Law, 2d ed. p. 166; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; 25 Am. & Eng. Enc. Law, 1st ed. p. 904; *Dorsey v. Cock*, 4 Bibb, 45; *Tibbs v. Timberlake*, 4 Litt. (Ky.) 16; *Dorsey v. Barbee*, Litt. Sel. Cas. 205, 12 Am. Dec. 296; *Stapp v. Phelps*, 7 Dana, 300; *Sandford v. Farmers Bank*, 1 Bush, 340; *Mundy v. Kean*, 5 Ky. L. Rep. 697; *Jones v. Strode*, 19 Ky. L. Rep. 1118, 41 S. W. 562.

Appellee is required, as a common carrier, to receive, transport, and deliver freight of all kinds and cars of freight tendered by shippers and consignors at any point on its line, and to deliver the same to the Southern Railway Company at its points of connection with the line of the appellee company, in every case where the consignor specifically orders that freight or cars of freight shall be so delivered to the said Southern Railway Company; and the appellee is required to carry, in accordance with such specific instructions, without discrimination and for reasonable charges.

4 Elliott, Railroads, §§ 1432, 1440; *North v. Merchants & Miners Transp. Co.* 146 Mass. 315, 15 N. E. 779; *Palmer v. Chicago, B. & Q. R. Co.* 56 Conn. 137, 13

Atl. 818; *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *Myrick v. Michigan C. R. Co.* 107 U. S. 106, 27 L. ed. 326, 1 Sup. Ct. Rep. 425; *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 39 L. ed. 176, 15 Sup. Ct. Rep. 136; *Dana v. New York C. & H. R. R. Co.* 50 How. Pr. 428; *Bosworth v. Chicago, M. & St. P. R. Co.* 30 C. C. A. 541, 56 U. S. App. 274, 87 Fed. 72; *Coe v. Louisville & N. R. Co.* 3 Fed. 778; *Vincent v. Chicago & A. R. Co.* 49 Ill. 41; *Re Petersen*, 21 Fed. 889; *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278; *Beers v. Wabash, St. L. & P. R. Co.* 34 Fed. 244; *Forsythe v. Walker*, 9 Pa. 148; *Louisville & N. R. Co. v. Odil*, 96 Tenn. 61, 54 Am. St. Rep. 820, 33 S. W. 611; *Johnson v. New York C. R. Co.* 33 N. Y. 610, 88 Am. Dec. 416; *McDonald v. Western R. Corp.* 34 N. Y. 497; *Hewett v. Chicago, B. & Q. R. Co.* 63 Iowa, 611, 19 N. W. 790; *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* 34 Fed. 481; *Inman v. St. Louis S. W. R. Co.* 14 Tex. Civ. App. 39, 37 S. W. 37; *Dinsmore v. Louisville, C. & L. R. Co.* 2 Flipp. 672, 2 Fed. 465; *McCoy v. Cincinnati, I. St. L. & C. R. Co.* 13 Fed. 3; *Missouri P. R. Co. v. Wichita Wholesale Grocery Co.* 55 Kan. 525, 40 Pac. 899; *Pecoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 135, 50 Am. Rep. 605; *Louisville & N. R. Co. v. Williams*, 95 Ky. 199, 44 Am. St. Rep. 214, 24 S. W. 1; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Chicago & G. W. R. Co. v. Armstrong*, 62 Ill. App. 228; *Worcester v. Norwich & W. R. Co.* 109 Mass. 112; *People ex rel. Green v. Duchess & C. R. Co.* 58 N. Y. 152; *People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569; *People v. New York, L. E. & A. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856.

The duty of the appellee as a common carrier is not discharged until it delivers the freight or car of freight to the point of specified connection, and furnishes to the agent of such known specified connection the instructions of the consignor or shipper as to the further carriage or delivery of the freight or car of freight.

Bosworth v. Chicago, M. & St. P. R. Co. 30 C. C. A. 541, 56 U. S. App. 274, 87 Fed. 72; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *Vincent v. Chicago & A. R. Co.* 49 Ill. 41; *Coe v. Louisville & N. R. Co.* 3 Fed. 778; *Selma & M. R. Co. v. Butts*, 43 Ala. 385, 94 Am. Dec. 694; *Little Miami R. Co. v. Washburn*,

22 Ohio St. 324; *Colfax Mountain Fruit Co. v. Southern P. Co.* (Cal.) 46 Pac. 668; *Dana v. New York C. & H. R. R. Co.* 50 How. Pr. 428; *McDonald v. Western R. Corp.* 34 N. Y. 497; *Hewett v. Chicago, B. & Q. R. Co.* 63 Iowa, 611, 19 N. W. 790.

The provisions of the Kentucky Constitution and statutes, not being in conflict with the Interstate Commerce Act, are in the nature of reasonable regulations in aid thereof, and will be enforced by the Federal courts.

Munn v. Illinois, 94 U. S. 125, 24 L. ed. 84; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378; *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. 849; *State v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 425, 33 Fed. 391; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 297, 45 L. ed. 199, 21 Sup. Ct. Rep. 115; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 135, 50 Am. Rep. 605; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Inman v. St. Louis S. W. R. Co.* 14 Tex. Civ. App. 39, 37 S. W. 37; *Louisville & N. R. Co. v. Williams*, 95 Ky. 199, 44 Am. St. Rep. 214, 24 S. W. 1; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. ed. 164; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Bagg v. Wilmington, C. & A. R. Co.* 109 N. C. 279, 14 L. R. A. 596, 3 Inters. Com. Rep. 803, 26 Am. St. Rep. 569, 14 S. E. 79; *Western U. Teleg. Co. v. Howell*, 95 Ga. 194, 30 L. R. A. 158, 5 Inters. Com. Rep. 516, 51 Am. St. Rep. 68, 22 S. E. 286; *Western U. Teleg. Co. v. Bright*, 90 Va. 778, 20 S. E. 146; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569; *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; *Olcott v. Fond Du Lac County*, 16 Wall. 678, 21 L. ed. 382; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *United States v. Joint Traffic Asso.*

171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Com. v. Alger*, 7 Cush. 53; *Cooley*, Const. Lim. 6th ed. p. 715; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 701, 40 L. ed. 859, 16 Sup. Ct. Rep. 714; *Plumley v. Massachusetts*, 155 U. S. 462, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.* 111 Ky. 960, 55 L. R. A. 601, 64 S. W. 969; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

The contract of the appellee with the Bourbon company to deliver to it all live stock brought by the defendant to the city of Louisville is contrary to public policy and void, and its operation should be prevented by the courts.

McCoy v. Cincinnati, St. L. & C. R. Co. 13 Fed. 3; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 18 L. R. A. 105, 32 N. E. 311; *Peoria & R. I. R. Co. v. Coal Valley Min. Co.* 68 Ill. 489; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 48 L. R. A. 568, 56 N. E. 822; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 641; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 382; *Rogers Locomotive & Mach. Works v. Erie R. Co.* 20 N. J. Eq. 380; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Doolin v. Ward*, 6 Johns. 194; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Hood v. New York & N. H. R. Co.* 22 Conn. 502, 58 Am. Dec. 433; *Bennett v. Dutton*, 10 N. H. 481; *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670; *Pueblo & A. Valley R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep. 512; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 608, 15 Am. Rep. 357; *Coc v. Louisville & N. R. Co.* 3 Fed. 778; *Interstate Stock-Yards Co. v. Indianapolis Union R. Co.* 99 Fed. 472; *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 45 L. R. A. 427, 74 Am. St. Rep. 274, 53 N. E. 937; *Parkinson v. Great Western*

R. Co. L. R. 6 C. P. 554; Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co. 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673; *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. 993; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

Mr. **Helm Bruce** argued the cause, and, with Messrs. Charles N. Burch, Ed. Baxter, Gibson, Marshall, & Gibson, and Helm, Bruce, & Helm, filed a brief for appellee:

A railroad company engaged in transporting live stock to a city has the right to establish a live-stock depot in that city, through the instrumentality of a stock-yards company, and to contract to deliver all live stock at that point, and cannot be required to make deliveries at any other point.

Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 561; *Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co.* 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35.

As bearing upon the question of the difference between forwarding freight by a connecting carrier, as that expression is ordinarily understood, and, on the other hand, merely turning over freight which has reached its destination, to another company, to be delivered at a particular point in a city, see—

Western & A. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 2 L. R. A. 102, 7 S. E. 916; and *Nanson v. Jacob*, 12 Mo. App. 125, Affirmed in 93 Mo. 331, 3 Am. St. Rep. 531, 6 S. W. 246.

No carrier is bound by law to accept goods for carriage farther than the terminus of his own line, and if in any case, therefore, he is to become liable as a carrier beyond such terminus, his liability must be based upon some further obligation than that created by law.

Hutchinson, Carr. § 145.

The English rule is that, if a common carrier accepts goods marked for a destination beyond his own line, this is prima facie evidence of a contract to carry to the destination as marked.

Muschamp v. Lancaster & P. Junction R. Co. 8 Mees. & W. 421.

The American rule is that from the mere acceptance of goods marked to a destination beyond the carrier's line the law will not imply an obligation to carry to this destination, but only to deliver to a connecting line for such purpose, so that the liability of the receiving company as common carrier ceases with such delivery.

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Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425.

A railroad company cannot be required to receive freight destined for a point beyond its own line, and load it into its cars, and then, after transporting the same over its line, be compelled to deliver its cars, with the freight in them, to another railroad company, to be transported to the ultimate place of destination, looking to the connecting carrier for the return of the cars and compensation for their use.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185.

The Interstate Commerce Act does not require the formation of through routes, or the interchange of cars between connecting lines.

Oregon Short-Line & U. N. R. Co. v. Northern P. R. Co. 9 C. C. A. 409, 15 U. S. App. 479, 4 Inters. Com. Rep. 718, 61 Fed. 158; *Little Rock & M. R. Co. v. St. Louis S. W. R. Co.* 26 L. R. A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. 559; *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 915.

Section 213 of the Constitution of Kentucky, when properly construed, does not purport to require railroad companies to deliver their own cars to other companies for use by the latter.

Certainly if it were intended to require a railroad company, against its consent, to give up its cars to another company, although it might be, and often is, in great need of them itself, such a requirement ought to be expressed in unequivocal language.

Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 475, 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 914; *Little Rock & M. R. Co. v. St. Louis S. W. R. Co.* 26 L. R. A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 779.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of appeals affirming a decree of the circuit court which dismissed the plaintiff's bill. (55 C. C. A. 63, 118 Fed. 113.)

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The bill was brought by the appellant, a Delaware corporation, against a Kentucky corporation, to compel it to receive live stock tendered to it outside the state of Kentucky for the Central Stock Yards *station, and to deliver the same at a point of physical connection between its road and the Southern Railway, for ultimate delivery to or at the Central Stock Yards. The Central Stock Yards station is at the Central Stock Yards, just outside the boundary line of Louisville, Kentucky, on the Southern Railway Company's line, and by agreement between the two companies the Central Stock Yards are the "live-stock depot for the purpose of handling live stock to and from Louisville" on the Southern Railway. The defendant, by a similar arrangement, has made the Bourbon Stock Yards its live-stock depot for Louisville, and declines to receive live stock billed to the Central Stock Yards, or to deliver live stock destined to Louisville elsewhere than at the Bourbon yards. There are physical connections between the Louisville & Nashville and the Southern tracks at a point between the two stock yards, which is passed by the greater portion of the live stock carried by the Louisville & Nashville Company, and at another point which would be more convenient for delivery a little further to the northward. The details are unimportant, except that in order to deliver, as prayed, the defendant would be compelled either to build chutes or to hand over its cars to the Southern Railroad, after having made some contract for their return. The right is claimed by the plaintiff, under the Interstate Commerce Act of February 4, 1887, chap. 104, § 3 (24 Stat. at L. 379 [U. S. Comp. Stat. 1901, p. 3155]), making it unlawful for common carriers subject to the act to give unreasonable preferences, and requiring them to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of property to and from their several lines and those connecting therewith. The right is claimed also under the Constitution of Kentucky, especially § 213, requiring Kentucky railroad companies to receive, deliver, transfer, and transport freight from and to any point where there is a physical connection between the tracks, as we understand it, of the railroad concerned and any other.

For the purposes of decision we assume, without expressing an opinion, that if the act of Congress and the Kentucky Constitution apply to the case, they both confer [570] rights upon *the plaintiff. As to the former, compare §§ 8, 9, and the act of February 19, 1903, chap. 708, § 2 (32 Stat. at L. 847, 848); *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 192 U. S.

461; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567, 610, 620. The rights under the latter which are relied upon especially could not be established without discussion. Compare *Atkinson v. Newcastle Waterworks Co.* L. R. 2 Exch. Div. 441; *Johnston v. Consumers' Gas Co.* [1898] A. C. 447. For the same purpose we further assume that such rights as the plaintiff has may be enforced by bill in equity. See *Interstate Stock-Yards Co. v. Indianapolis U. R. Co.* 99 Fed. 472. We also lay on one side the question whether the section of the Constitution of Kentucky is or is not invalid as an attempt to regulate commerce among the states. For we are of opinion that the defendant's conduct is not within the prohibitions or requirements of either the act of Congress or the Constitution of Kentucky, as those provisions fairly should be construed.

The Bourbon Stock Yards are the defendant's depot. They are its depot none the less that they are so by contract, and not by virtue of a title in fee. Unless a preference of its own depot to that of another road is forbidden, the defendant is not within the act of Congress. Suppose that the Southern Railway station and the Louisville & Nashville station were side by side, and that their tracks were connected within or just outside the limits of the station grounds. It could not be said that the defendant was giving an undue or unreasonable preference to itself or subjecting its neighbor to an undue or unreasonable disadvantage if it insisted on delivering live stock which it had carried to the end of the transit at its own yard. These views are sanctioned by what was said in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461. The fact that the plaintiff's stock yards are public does not change the case. See further *Butchers' & D. Stock-Yards Co. v. Louisville & Nashville R. Co.* 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35.

If the cattle are to be unloaded, then, as was said in *Covington Stock-Yards Co. v. Keith*, the defendant has a right to unload them where its appliances for unloading are, and *cannot be required to establish another [571] set hard by. On the other hand, if the cattle are to remain in the defendants' cars it cannot be required to hand those cars over to another railroad without a contract, and the courts have no authority to dictate a contract to the defendant or to require it to make one. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 680, 28 L. ed. 291, 296, 4 Sup. Ct. Rep. 185. The consensus of the circuit courts is to the same effect. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2

Inters. Com. Rep. 351, 37 Fed. 567, 629, 630; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. 559; *Chicago & N. W. R. Co. v. Osborne*, 3 C. C. A. 347, 4 Inters. Com. Rep. 257, 52 Fed. 915; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158, Affirming 4 Inters. Com. Rep. 249, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis S. W. R. Co.* 26 L. R. A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 280, 63 Fed. 775; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39; *Allen v. Oregon R. & Nav. Co.* 98 Fed. 16. All that was decided in *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, was that by statute two railroad companies might be required to make track connections. So much of the statute as undertook to regulate rates was not passed upon. See *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 263, 46 L. ed. 1151, 1156, 22 Sup. Ct. Rep. 900. There is no act of Congress that attempts to give courts the power to require contracts to be made in a case like this.

What we have said applies, in our opinion, to the Constitution of Kentucky with little additional argument. The requirement to deliver, transfer, and transport freight to any point where there is a physical connection between the tracks of the railroad companies, must be taken to refer to cases where the freight is destined to some further point by transportation over a connecting line. It cannot be intended to sanction the snatching of the freight from the transporting company at the moment and for the purpose of delivery. It seems to us that this would be so unreasonable an interpretation of the section that we do not find it necessary to consider whether, under any interpretation, it can be sustained. In view of the course taken by the argument we may add that we

[572] do not find a requirement that the railroad company shall deliver its own cars to another road. The earlier part of § 213 provides that all railroads "shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load, or unload all the freight in carloads or less quantities, coming to or going from any railroad, . . . with equal promptness and dispatch, and without any discrimination. . . ." Promptness and the absence of discrimination are the point, and that shows that the words "coming to or going from any railroad," qualify the words "empty or loaded cars" as well as "freight," and therefore that the cars referred to are cars from other roads. The same thing is shown by the word "receive," which is the

starting point of all that relates to cars. See *Louisville & N. R. Co. v. Com.* 108 Ky. 628, 633, 57 S. W. 508. The other sections of the Constitution need no special remark.

We have discussed the case as if the two stock yards were side by side. They were not, but they both were points of delivery for cattle having Louisville as their general destination. They both were Louisville stations in effect. It may be that a case could be imagined in which carriage to another station in the same city by another road fairly might be regarded as bona fide further transportation over a connecting road and within the requirements of the Kentucky Constitution. However that may be, we are of opinion that the court below was entirely right, so far as appears, in treating this as an ordinary case of stations at substantially the same point of delivery, and, therefore, as one to be dealt with as if they were side by side. As the defendant would not be bound to deliver at the Central Stock Yards if they were by the side of its track, its obligation is no greater because of the intervention of a short piece of the track of another railroad. As we have said, the delivery would have to be made either by unloading or by the surrender of the defendants' cars.

Decree affirmed.

Mr. Justice **McKenna** concurs in the result.

*CHARLES L. WEDDING and Louis I. [573]
Ahlering, *Plffs. in Err.*,

v.

ROMANZA JEROME MEYLER.

(See S. C. Reporter's ed. 573-585.)

Error to state court—to what court directed—Federal question—jurisdiction of Indiana courts over Ohio river—effect of Virginia compact.

1. A writ of error issued from the Federal Supreme Court for the purpose of reviewing the decision of a state court is properly directed to the inferior state court where the judgment of the highest state court was ordered to be entered, and where the record remained.
2. A decision of the Kentucky court of appeals denying any force or effect to an Indiana judgment, which is based on a denial of the jurisdiction of the Indiana court because of the place of service, presents a Federal question for review in the Supreme Court of the United States, where such denial can be justified only on the ground that the Virginia

NOTE.—On writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

compact of 1789 and the act of Congress of February 4, 1791 (1 Stat. at L. 189, chap. 4), admitting Kentucky to the Union, did not confer the right of jurisdiction which the Indiana court attempted to exercise, and which the state of Indiana claims.

3. Jurisdiction is acquired by an Indiana court by service of process on the Ohio river on the Kentucky side of the low-water mark on the Indiana shore, in view of the condition contained in the Virginia compact of 1789, § 11, that the jurisdiction of the proposed state of Kentucky on the Ohio river should be "concurrent only with the states which may possess the opposite shores of the said river," which condition Congress necessarily assented to and adopted when it consented to the Virginia compact by the act of February 4, 1791 (1 Stat. at L. 189, chap. 4), admitting Kentucky to the Union.

[No. 125.]

Argued January 14, 15, 1904. Decided February 23, 1904.

IN ERROR to the Warren Circuit Court of the State of Kentucky to review a judgment dismissing an action on an Indiana judgment, entered in pursuance of a mandate of the Court of Appeals of that State, which sustained the exceptions to a judgment of the trial court in favor of plaintiffs. *Reversed.*

See same case below, 107 Ky. 310, 53 S. W. 809, 107 Ky. 685, 60 S. W. 20.

The facts are stated in the opinion.

Mr. Merrill Moores argued the cause, and, with *Messrs. Charles W. Miller* and *Cassius C. Hadley*, filed a brief for plaintiffs in error:

The Federal questions were necessarily involved in this case, and, as the Kentucky court decided them, it is not material whether that court stated them as Federal questions or not.

Green v. Van Buskirk, 5 Wall. 307, 314, 18 L. ed. 599, 601; *Green v. Van Buskirk*, 7 Wall. 139, 145, 19 L. ed. 109, 111; *Carpenter v. Strange*, 141 U. S. 87, 103, 35 L. ed. 640, 647, 11 Sup. Ct. Rep. 960; *Huntington v. Attrill*, 146 U. S. 657, 683, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224; *Mills v. Duryee*, 7 Cranch, 481, 484, 3 L. ed. 411, 413; *Christmas v. Russell*, 5 Wall. 290, 302, 18 L. ed. 475, 478; *Cooper v. Reynolds*, 10 Wall. 308, 316, 19 L. ed. 931, 932; *Maxwell v. Stewart*, 22 Wall. 77, 81, 22 L. ed. 564, 566; *Mutual L. Ins. Co. v. Harris*, 97 U. S. 331, 336, 24 L. ed. 959, 962; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Wiseconsin v. Pelican Ins. Co.* 127 U. S. 265, 292, 32 L. ed. 239, 244, 8 Sup. Ct. Rep. 1370; *Atherton v. Atherton*, 181 U. S. 155, 160, 45 L. ed. 794, 797, 21 Sup. Ct. Rep. 544; *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Jacobs v. Marks*, 182 U. S. 583, 587, 45 L. 192 U. S.

ed. 1241, 1244, 21 Sup. Ct. Rep. 865; *McCullough v. Virginia*, 172 U. S. 102, 116, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 487, 43 L. ed. 521, 525, 19 Sup. Ct. Rep. 247; *Douglas v. Kentucky*, 168 U. S. 488, 502, 42 L. ed. 553, 558, 18 Sup. Ct. Rep. 199; *Walsh v. Columbus, H. V. & A. R. Co.* 176 U. S. 469, 475, 44 L. ed. 548, 551, 20 Sup. Ct. Rep. 393; *Stearns v. Minnesota*, 179 U. S. 223, 233, 45 L. ed. 162, 170, 21 Sup. Ct. Rep. 73; *Wilson v. Standefer*, 184 U. S. 399, 411, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384.

Where the state court has granted a petition for a rehearing, which states a Federal question, and has considered it, the question is saved.

Mallett v. North Carolina, 181 U. S. 589, 592, 45 L. ed. 1015, 1018, 21 Sup. Ct. Rep. 730.

Under the rule requiring opinions to be sent up with the record, it is a sufficient compliance with the words "specially set up and claimed," if it appear that the right was fully considered in the opinion, and ruled against the plaintiff in error.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 179, 47 L. ed. 765, 768, 23 Sup. Ct. Rep. 487.

The Virginia compact with Kentucky is valid.

Handly v. Anthony, 5 Wheat. 374, 385, 5 L. ed. 113, 115; *Green v. Biddle*, 8 Wheat. 1, 86, 5 L. ed. 547, 568; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 565, 566, 14 L. ed. 249, 268, 269; *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 430, 15 L. ed. 435, 437; *Hawkins v. Barney*, 5 Pet. 457, 465, 8 L. ed. 190, 193; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 582, 9 L. ed. 773, 838; *M'Kinney v. Carroll*, 12 Pet. 66, 69, 9 L. ed. 1002, 1003; *Pollard v. Kibbe*, 14 Pet. 353, 413, 10 L. ed. 490, 519; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 610, 43 L. ed. 823, 830, 19 Sup. Ct. Rep. 553; *Stearns v. Minnesota*, 179 U. S. 223, 245, 45 L. ed. 162, 175, 21 Sup. Ct. Rep. 73; *United States ex rel. Gaines v. New Orleans*, 17 Fed. 483; *Griswold v. Bragg*, 18 Blatchf. 202, 48 Fed. 519; *Poole v. Fleeger*, 11 Pet. 185, 209, 9 L. ed. 680, 690; *Virginia v. Tennessee*, 148 U. S. 503, 525, 37 L. ed. 537, 545, 13 Sup. Ct. Rep. 728; *Wharton v. Wise*, 153 U. S. 155; 168, 38 L. ed. 669, 675, 14 Sup. Ct. Rep. 783; *New Jersey v. Wilson*, 7 Cranch, 164, 167, 3 L. ed. 303; *Providence Bank v. Billings*, 4 Pet. 514, 560, 7 L. ed. 939, 955; *Woodruff v. Trapnall*, 10 How. 190, 207, 13 L. ed. 383, 390; *Wolff v. New Orleans*, 103 U. S. 358, 365, 26 L. ed. 395, 398; *New Orleans Gaslight Co. v. Louisiana Light & H.*

P. & Mfg. Co. 115 U. S. 650, 672, 29 L. ed. 516, 524, 6 Sup. Ct. Rep. 252; *Fowler v. Halbert*, 4 Bibb, 52; *Church v. Chambers*, 3 Dana, 274; *Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 669; *McFall v. Com.* 2 Met. (Ky.) 394; *Louisville Bridge Co. v. Louisville*, 81 Ky. 189; *Com. v. Garner*, 3 Gratt. 655; *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211.

Compacts between the states, sanctioned by Congress, are laws of the United States, and are also treaties made under the authority of the United States, and are protected as such by the Constitution, art. 6.

Green v. Biddle, 8 Wheat. 1, 86, 5 L. ed. 547, 568; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 566, 14 L. ed. 249, 269; *South Carolina v. Georgia*, 93 U. S. 4, 9, 23 L. ed. 782, 783; *Aitcheson v. Endless Chain Dredge*, 40 Fed. 253; *Ex parte Marsh*, 57 Fed. 719; *Stearns v. Minnesota*, 179 U. S. 223, 245, 45 L. ed. 162, 175, 21 Sup. Ct. Rep. 73.

There is a distinction between ownership and jurisdiction, and there may be jurisdiction without ownership.

1 Vattel, Law of Nations, §§ 203, 295; *Com. v. Garner*, 3 Gratt. 655; *Re Devoe Mfg. Co.* 108 U. S. 401, 411, 412, 27 L. ed. 764, 767, 2 Sup. Ct. Rep. 894; *The Norma*, 32 Fed. 411; *Falmouth v. Watson*, 5 Bush, 660; *Lutz v. Crawfordsville*, 109 Ind. 466, 10 N. E. 411, *Emerich v. Indianapolis*, 118 Ind. 279, 20 N. E. 795; *Kaufle v. Delaney*, 25 W. Va. 410; *Flack v. Fry*, 32 W. Va. 364, 9 S. E. 240; *Neal v. Com.* 17 Serg. & R. 67; *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Albia v. O'Harra*, 64 Iowa, 297, 20 N. W. 444; *State ex rel. Humphrey v. Franklin*, 40 Kan. 410, 19 Pac. 801; *Hagood v. Hutton*, 33 Mo. 244.

Respecting contemporaneous construction, usage, and acquiescence, see—

Stuart v. Laird, 1 Cranch, 299, 309, 2 L. ed. 115, 118; *Prigg v. Pennsylvania*, 16 Pet. 539, 621, 10 L. ed. 1060, 1091; *Cooley v. Port Wardens*, 12 How. 299, 315, 13 L. ed. 996, 1003; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 28 L. ed. 1137, 1139, 5 Sup. Ct. Rep. 739; *The Laura*, 114 U. S. 411, 416, sub nom. *Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 148, 5 Sup. Ct. Rep. 881; *Auffmordt v. Hedden*, 137 U. S. 310, 329, 34 L. ed. 674, 681, 11 Sup. Ct. Rep. 103; *Schell v. Fauche*, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 691, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495; *McPherson v. Blacker*, 146 U. S. 1, 27, 36 L. ed. 869, 874, 13 Sup. Ct. Rep. 3;

Fairbank v. United States, 181 U. S. 283, 309, 45 L. ed. 862, 873, 21 Sup. Ct. Rep. 648; *Carlisle v. State*, 32 Ind. 55; *Sherlock v. Alling*, 44 Ind. 184; *Dugan v. State*, 125 Ind. 130, 9 L. R. A. 321, 25 N. E. 171; *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883; *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527; *Church v. Chambers*, 3 Dana, 274; *Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 669; *McFall v. Com.* 2 Met. (Ky.) 394; *Com. v. Garner*, 3 Gratt. 655; *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211; *State v. Faudre* (W. Va.) 46 S. E. 269.

The Federal courts of Ohio and Indiana have always exercised admiralty jurisdiction over the Ohio river.

McGinnis v. The Pontiac, 5 McLean, 359, Fed. Cas. No. 8,801; *Seven Coal Barges*, 2 Biss. 297, Fed. Cas. No. 12,677; *The Lewellen*, 4 Biss. 156, Fed. Cas. No. 8,307; *Longstreet v. The R. R. Springer*, 4 Fed. 671; *The Liberty No. 4*, 7 Fed. 226; *The Guiding Star*, 9 Fed. 521; *The Guiding Star*, 18 Fed. 263; *The Cherokee*, 15 Fed. 119; *The Thomas Sherlock*, 22 Fed. 253; *Baumgartner v. The W. B. Cole*, 49 Fed. 587; *Memphis & C. Packet Co. v. Overman Carriage Co.* 93 Fed. 246; *The City of Clarksville*, 94 Fed. 201; *Bennitt v. The Guiding Star*, 53 Fed. 936; *Wilbour v. Hegler*, 62 Fed. 407; *Kineon v. The New Mary Houston*, 69 Fed. 362.

For definition of territorial concurrent jurisdiction see—

12 Am. & Eng. Enc. Law, 1st ed. p. 296; Rapalje & L. Law Diet.; Bouvier, Law Diet.; Rorer, Interstate Law, 2d ed. p. 438; *Wiggins Ferry Co. v. Reddig*, 24 Ill. App. 260; *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 3 L. R. A. 390, 10 S. W. 595; *Swearingen v. The Lynx*, 13 Mo. 519; *State v. Metcalf*, 65 Mo. App. 681; *Cooley v. Golden*, 52 Mo. App. 229; *State v. Mullen*, 35 Iowa, 199; *Buck v. Ellenbolt*, 84 Iowa, 394, 15 L. R. A. 187, 51 N. W. 22; *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575; *State v. George*, 60 Minn. 503, 63 N. W. 100; *State v. Cameron*, 2 Pinney (Wis.) 490; *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529; *Roberts v. Fullerton*, 117 Wis. 222, 93 N. W. 1111; *State v. Davis*, 25 N. J. L. 386; *Com. v. Frazee*, 2 Phila. 191; *Neal v. Com.* 17 Serg. & R. 67; *Com. v. Shaw*, 22 Pa. Co. Ct. 414, 8 Pa. Dist. R. 509; *Aitcheson v. Endless Chain Dredge*, 40 Fed. 253; Gardner, Inst. of International Law, 209, 210.

Mr. D. W. Sanders argued the cause and filed a brief for defendant in error:

This court is without power to review the judgment of the Warren circuit court, for the reason that the judgment rendered in that court was not final.

Hillerich v. Franklin Ins. Co. 23 Ky. L. Rep. 631, 63 S. W. 592; *Hord v. Chandler*, 13 B. Mon. 403; *Fisher v. Perkins*, 122 U. S. 527, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227; *Downham v. Alexandria*, 9 Wall. 659, 19 L. ed. 807; *Gregory v. McVeigh*, 23 Wall. 294, 23 L. ed. 156; *Mullen v. Western Union Beef Co.* 173 U. S. 116, 43 L. ed. 635, 19 Sup. Ct. Rep. 404; *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52.

The record presents no title, right, privilege, or immunity that was specially set up or claimed by the plaintiffs in error, and which was passed upon by the court of appeals of Kentucky.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 653, 41 L. ed. 1151, 17 Sup. Ct. Rep. 709; *Louisville & N. R. Co. v. Louisville*, 166 U. S. 714, 715, 41 L. ed. 1175, 17 Sup. Ct. Rep. 725; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

The provision of the United States Constitution, that "full faith and credit shall be given in each state to the judgments of another state," does not prevent an inquiry into the jurisdiction of the court rendering the judgment over the parties and subject-matter, or as to whether the judgment is impeachable for fraud.

Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269.

This compact between Virginia and Kentucky in relation to the navigation of the Ohio was one of the articles of agreement under which Virginia consented that Kentucky should become a separate state. Kentucky could not become a separate state without the consent of Congress, but the act of Congress which gave the consent makes no reference whatever to the terms of the agreement between the states. It does not make the United States a party to them, or guarantee their execution.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 583, 14 L. ed. 276.

The territorial limits of Kentucky are to low-water mark on the north side of the Ohio river.

Handly v. Anthony, 5 Wheat. 374, 5 L. ed. 113; *Com. v. Garner*, 3 Gratt. 565; *Fleming v. Kenney*, 4 J. J. Marsh. 158; *McFall v. Com.* 2 Met. (Ky.) 394; *Louisville Bridge Co. v. Louisville*, 81 Ky. 194; *Indiana v. Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; *Stinson v. Butler*, 4 Blackf. 285; *Cowden v. Kerr*, 6 Blackf. 280; *Carlisle v. State*, 32 Ind. 56; *Sherlock v. Alling*, 44 Ind. 191.

The claim of concurrent jurisdiction by two sovereign states over the same territory, where the territorial limits of each is de-

finied, is a thing wholly unknown to the laws of nations, as we usually understand their terms, and has grown up under what has been termed in the United States "interstate law."

Rorer, Interstate Law, 3.

Concurrent jurisdiction does not apply to objects of a permanent nature, such as islands, bridges, docks, and the like; for their position with reference to the true line of boundary can always be ascertained, and therefore the reason for concurrent jurisdiction fails as to them.

Rorer, Interstate Law, 337; *Gilbert v. Moline Water Power & Mfg. Co.* 19 Iowa, 319.

Such permanent objects are taxable only in the state in which they are situated; and when the object is a bridge, the part of the bridge and the abutments which are in each state are there taxable.

State, Delaware & E. Bridge Co., Prosecutor, v. Metz, 29 N. J. L. 122; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error to a circuit court of the state of Kentucky on a judgment entered there in pursuance of a mandate of the court of appeals of that state (107 Ky. 310, 53 S. W. 809, 107 Ky. 685, 60 S. W. 20). The action was brought upon an Indiana judgment. The answer denied the jurisdiction of the Indiana court. It was not disputed that the service in that suit was on a steamboat in the Ohio river on the Indiana side. At the trial two questions were left to the jury,—one whether the person purporting to act as the attorney of the defendant in the Indiana suit was authorized to represent him, and the other whether the summons in that suit was served on the Indiana or Kentucky side of the low-water mark of the Ohio river where it touches the Indiana shore. The jury found against the authority of the alleged attorney, and found that the service was on the Kentucky side of the low-water mark, and therefore, it is assumed, within the boundaries of Kentucky. Thereupon the plaintiffs in error (the original plaintiffs) moved for judgment notwithstanding the findings of the jury, and [581] judgment was ordered. The defendant excepted and appealed. The court of appeals sustained the exceptions and ordered a judgment on the verdict dismissing the action. A judgment was entered, as ordered, in the court below,—the above mentioned circuit court,—and this writ of error was brought.

It is suggested that the writ of error should have been directed to the court of appeals. But it appears from the form of

the order of that court that the record remained in the lower court, where judgment was ordered to be entered, and the writ properly ran to the court where the judgment had to be rendered. *Rothschild v. Knight*, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391. It is suggested further, that the record does not show a Federal question. But the jurisdiction of the Indiana court was put in issue by the pleadings and it is apparent from what has been said that the decision went on a denial of that jurisdiction because of the place of service. That denial could be justified only on the ground that the compact of Virginia and the act of Congress of February 4, 1791 [1 Stat. at L. 189, chap. 4], admitting Kentucky to the Union, did not confer the right of jurisdiction which the Indiana court attempted to exercise and which the state of Indiana claims. The judgment and the opinion of the court of appeals both disclose that the decision was against the right under the statutes referred to, and that it was on that ground only that the Indiana judgment was denied any force or effect. The question as to the right of jurisdiction sufficiently appears. *San José Land & Water Co. v. San José Rancho Co.* 189 U. S. 177, 180, 47 L. ed. 765, 768, 23 Sup. Ct. Rep. 487. It is not denied that that question is one which can be taken to this court. *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 566, 14 L. ed. 249, 269.

We pass to the question decided by the court of appeals. In 1789 the state of Virginia passed a statute known as the Virginia compact. This statute proposed the erection of the district of Kentucky into an independent state upon certain conditions. One of these was: § 11. "Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, [582] shall be *free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth and of the proposed state on the river as aforesaid shall be concurrent only with the states which may possess the opposite shores of the said river." 13 Hening, Stat. at L. 17. (The previous cession by Virginia of its rights in the territory northwest of the Ohio had been on condition that the territory so ceded should be laid out and formed into states. Act of December 20, 1783, 11 Hening, Stat. at L. 326). The act of Congress of February 4, 1791, chap. 4 (1 Stat. at L. 189), consents and enacts that the "district of Kentucky, within the jurisdiction of the said commonwealth" of Virginia, shall be formed into a new state, and admitted into the Union. As a preliminary it recites the consent of the

Virginia legislature by the above act of 1789.

Under article 4, § 3, of the Constitution, a new state could not be formed in this way within the jurisdiction of Virginia, within which Kentucky was recognized as being by the words last quoted, without the consent of the legislature of Virginia as well as of Congress. The need of such consent also was recognized by the recital in the act of Congress. But as the consent given by Virginia was conditioned upon the jurisdiction of Kentucky on the Ohio river being concurrent only with the states to be formed on the other side, Congress necessarily assented to and adopted this condition when it assented to the act in which it was contained. *Green v. Biddle*, 8 Wheat. 1, 87, 5 L. ed. 547, 569. Thus, after the passage of the two acts, it stood absolutely enacted by the powers which between them had absolute sovereignty over all the territory concerned, that when states should be formed on the opposite shores of the river they should have concurrent jurisdiction on the river with Kentucky. "This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?" *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 566, 14 L. ed. 249, 269.

It hardly is necessary to be curious or technical when dealing with law-making power, in inquiring precisely what legal conceptions shall be invoked in order to bring to pass what the legislature enacts. If the law-making power says that a *matter with-[583] in its competence shall be so, so it will be, so far as legal theory is concerned, without regard to the *elegantia juris*, or whether it fits that theory or not. But there is no trouble in giving the subsequently formed states the benefit of this legislation. In the case of Kentucky the "compact" which the Virginia statute has been treated by this court as creating (*Green v. Biddle*, 8 Wheat. 1, 16, 90, 92, 5 L. ed. 547, 551, 569) may be regarded as having been, in the first stage, not only a law but a continuing offer to the expected new state when it should come into being, which was accepted by that state when it came into being on the terms prescribed. And so as to the new states to be formed thereafter on the other side of the river. It is true that they were strangers to the most immediate purposes of the transaction. But it must be remembered that this was legislation, and when it is enacted by the sovereign power that new states, when formed by that power, shall have a certain jurisdiction, those states as they come into existence fall within the range of the enactment, and have the jurisdiction. Whether they be said to have it by way of

acceptance of an offer, or on the theory of a trust for them, or on the ground that jurisdiction was attached to the land, subject to the condition that states should be formed, or by simple legislative fiat, is not a material question, so far as this case is concerned. With that legislation in force there was no need to refer to it or to re-enact it in the act which made Indiana a state. That the states opposite to Kentucky have the jurisdiction, whatever it is, over the Ohio river, which the Virginia compact provided for, was not disputed by the majority of the Kentucky court of appeals, and has been recognized by this court and elsewhere whenever the question has come up. *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 621, 43 L. ed. 823, 833, 19 Sup. Ct. Rep. 553; *Arnold v. Shields*, 5 Dana, 18, 22, 30 Am. Dec. 669; *Com. v. Garner*, 3 Gratt. 655, 661, 710, 724, 735, 744; *State v. Faudre* (W. Va.) 46 S. E. 269; *Carlisle v. State*, 32 Ind. 55; *Sherlock v. Alling*, 44 Ind. 184, 93 U. S. 99, 23 L. ed. 819; *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 309, 310, 40 N. E. 527; *Blanchard v. Porter*, 11 Ohio, 138, 142.

[584] The question that remains, then, is the construction of the *Virginia compact. It was suggested by one of the judges below that the words "the respective jurisdiction . . . shall be concurrent only with the states which may possess the oppositeshore" did not import a future grant, but only a restriction; that they excluded the United States or other states, but left the jurisdiction of the states on the two sides to be determined by boundary, and therefore that the jurisdiction of Kentucky was exclusive up to its boundary line of low-water mark on the Indiana side. This interpretation seems to be without sufficient warrant to require discussion. A different one has been assumed hitherto, and is required by an accurate reading. The several jurisdictions of two states respectively over adjoining portions of a river separated by a boundary line is no more concurrent than is a similar jurisdiction over adjoining counties or strips of land. Concurrent jurisdiction, properly so-called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 30, 3 L. R. A. 390, 10 S. W. 595; *Opsahl v. Judd*, 30 Minn. 126, 129, 130, 14 N. W. 575; *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 38 N. W. 529, and the cases last cited.

The construction adopted by the majority of the court of appeals seems to us at least equally untenable. It was held that the words "meant only that the states should

have legislative jurisdiction." But jurisdiction, whatever else or more it may mean, is *jurisdictio*, in its popular sense of authority to apply the law to the acts of men. *Vieat*, *Vocab. sub v.* See *Rhode Island v. Massachusetts*, 12 Pet. 657, 718, 9 L. ed. 1233, 1258. What the Virginia compact most certainly conferred on the states north of the Ohio was the right to administer the law below low-water mark on the river, and as part of that right, the right to serve process there with effect. *State v. Mullen*, 35 Iowa, 199, 205, 206. What more jurisdiction, as used in the statute, may embrace, or what law or laws properly would determine the civil or criminal effects of acts done upon the river, we have no occasion to decide in this case. But so far as applicable we adopt the statement of Chief Justice Robertson in *Arnold v. *Shields*, 5 Dana, 18, 22, 30 Am. [585] Dec. 669, 673: "Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial, and executive—as that possessed by Kentucky over so much of the Ohio river as flows between them."

The conveniences and inconveniences of concurrent jurisdiction both are obvious, and do not need to be stated. We have nothing to do with them when the law-making power has spoken. To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction "on" the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state. Therefore, such cases as *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311, do not apply. *State v. Mullen*, 35 Iowa, 199, 206, 207.

Judgment reversed.

ALBERT J. ADAMS, *Plff. in Err.*,
v.

PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 585-599.)

Evidence — admissibility not affected by manner obtained — self-incrimination of

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On the validity of a statute making it criminal to have possession of property which is capable of criminal use—see note to *State v. Lewis*, 20 L. R. A. 52.

accused — due process of law — validity of state statute making possession of gambling paraphernalia prima facie evidence of knowing possession — effect of exception in favor of public officers.

1. The admissibility of documentary evidence tending to establish the guilt of an accused of the offense charged is not affected because it was secured in violation of the constitutional prohibition against unreasonable searches and seizures.
2. The self-incrimination of an accused is not effected by the introduction in evidence against him of certain private papers found in the execution of a search warrant, where he did not take the witness stand in his own behalf, as was his privilege, and was not compelled to testify concerning the papers, or make any admission about them.
3. Due process of law is not denied by the provision of N. Y. Pen. Code, § 344b, which makes possession of the record of chances or slips in the game of policy, or the possession of any paper, print, or writing commonly used in playing or promoting that game prima facie evidence of "possession thereof knowingly," in violation of § 344a, making the knowing possession of such papers a crime.
4. The exception of public officers from the provision of N. Y. Pen. Code, § 344b, which makes the possession of the record of chances or slips in the game of policy, or the possession of any paper, print, or writing commonly used in playing or promoting that game prima facie evidence of "possession thereof knowingly," in violation of § 344a, making the knowing possession of such papers a crime, does not render the former section unconstitutional, since this provision manifestly is for the purpose of excluding the presumption raised by possession, where such documents are seized and are in the custody of officers of the law.

[No. 504.]

Argued January 27, 1904. Decided February 23, 1904.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered in pursuance of an affirmance by the Court of Appeals of that State of a judgment of the Appellate Division, First Department of the Supreme Court, which had affirmed a conviction in the Supreme Court in and for the County of New York of the crime of having knowingly in one's possession gambling paraphernalia used in the game of policy. *Affirmed.*

See same case below in Appellate Division of the Supreme Court, 85 App. Div. 390, 83 N. Y. Supp. 481, and in the Court of Appeals, 176 N. Y. 351, 68 N. E. 636.

The facts are stated in the opinion.

Mr. L. Lafin Kellogg argued the cause, and, with Mr. Alfred C. Petté, filed a brief for plaintiff in error:

By the reception in evidence of the de-

fendant's private papers seized in the raid, which had no relation whatsoever to the game of policy, his constitutional right to be secure in his person, papers, and effects against unreasonable searches and seizures was violated, and he was also thereby compelled to be a witness against himself.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *State v. Sheridan* (Iowa) 96 N. W. 730; *State v. Slamon*, 73 Vt. 212, 87 Am. St. Rep. 711, 50 Atl. 1097; *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *Re Pacific Railway Commission*, 32 Fed. 241; *Hoover v. McChesney*, 81 Fed. 472; *United States v. Wong Quong Wong*, 94 Fed. 832.

A trial and conviction in an unconstitutional way is as violative of a defendant's constitutional rights as a trial and conviction under an unconstitutional law.

Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672.

The statute is wholly arbitrary, because it makes an entirely innocent act a highly penal offense. This the legislature has not the power to do.

People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Arensberg*, 103 N. Y. 388, 57 Am. Rep. 741, 8 N. E. 736; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976.

The artificial presumption of guilt, created by N. Y. Pen. Code, § 344b, takes away from a person accused his right to be presumed innocent until he is proved guilty, and deprives him of his liberty and property without due process of law.

State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26; *Wynehamer v. People*, 13 N. Y. 378; *State v. Kartz*, 13 R. I. 528.

Where the language of a criminal act is plain and unambiguous, there is no room for construction, and the court is not justified in departing from the plain language of the statute in search of an intention which the words themselves do not suggest.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37.

Giving the statute the meaning which its plain words require, it is clearly class legislation, and denies to the defendant equal protection of the laws, as it makes an act presumptive evidence of his guilt, which would not be so considered in the case of a person holding a public office and accused of a similar offense.

Cooley, Const. Lim. 6th ed. 481-483.

Mr. Howard S. Gans argued the cause, and, with Mr. William Travers Jerome, filed a brief for defendant in error:

It was lawful to seize and introduce in evidence against the defendant the manifold

sheets themselves; and this neither constituted an unreasonable search nor compelled the defendant to be a witness against himself.

Boyd v. United States, 116 U. S. 616, 623, 29 L. ed. 746, 748, 6 Sup. Ct. Rep. 524; *Lawton v. Steele*, 152 U. S. 133, 140, 38 L. ed. 385, 390, 14 Sup. Ct. Rep. 499.

The constitutional provision which exempts a person from the obligation of becoming a witness against himself in a criminal case is not to be extended so as to prevent the use of papers or documents forcibly taken from his possession, which may tend to assist in his conviction of crime.

People v. Gardner, 144 N. Y. 119, 28 L. R. A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003; *People v. Van Wormer*, 175 N. Y. 188, 67 N. E. 299.

The law does not concern itself with the method whereby a criminal is brought to the bar, or, with some slight exceptions, with the means whereby evidence against him has been obtained.

1 Greenl. Ev. § 254a; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *State v. Van Tassel*, 103 Iowa, 6, 72 N. W. 497; *Chastang v. State*, 83 Ala. 29, 3 So. 304; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940; *State v. Flynn*, 36 N. H. 64; *Shields v. State*, 104 Ala. 35, 53 Am. St. Rep. 17, 16 So. 85; *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; *Williams v. State*, 100 Ga. 511, 39 L. R. A. 269, 28 S. E. 624; *State v. Kaub*, 15 Mo. App. 433; *Ruloff v. People*, 45 N. Y. 213; *Com. v. Brown*, 121 Mass. 69.

The object of the statute is a public one, such as to justify the exercise of the police powers in their broadest interpretation.

Lottery Case, 188 U. S. 321, 356, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321.

The power of the state, in furtherance of a public purpose, to declare criminal even that which in itself is innocent, and to prohibit the possession of even a useful article, is settled beyond question.

Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140; *People v. Buffalo Fish Co.* 164 N. Y. 93, 52 L. R. A. 803, 79 Am. St. Rep. 622, 58 N. E. 34; *Lawton v. Steele*, 152 U. S. 133, 143, 38 L. ed. 385, 391, 14 Sup. Ct. Rep. 499; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600.

A fortiori as to the power of the state to prohibit the possession of instrumentalities of gambling, or other noxious pursuits. Such a prohibition does not invade any right of property, since there can be no property in that which endangers the public morals.

Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

It does not invade any right of liberty,
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since that right, though embracing the privilege of pursuing any useful or harmless calling, does not embrace the privilege of dealing in that which is confessedly injurious to public morals.

Lottery Case, 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321.

And so this court has sustained, as an exercise of the police power incidental to the interstate commerce powers of the Federal government, the act of 1895 making it criminal to transport a lottery policy, or even the advertisement of a lottery policy, from one state to another.

Lottery Case, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

The provision making proof of possession prima facie proof that the possession was conscious is constitutional.

People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; *Cooley*, Const. Lim. 367-369; *State v. Cunningham*, 25 Conn. 195; *Wooten v. Florida*, 24 Fla. 335, 1 L. R. A. 819, 5 So. 39; *Com. v. Williams*, 6 Gray, 1; *State v. Hurley*, 54 Me. 562; *State v. Higgins*, 13 R. I. 330; *State v. Mellor*, 13 R. I. 666; *Com. v. Kelly*, 10 Cush. 69; *Com. v. Tuttle*, 12 Cush. 502; *Meadowcroft v. People*, 163 Ill. 56, 35 L. R. A. 176, 54 Am. St. Rep. 447, 54 N. E. 303; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *State v. Beach*, 147 Ind. 74, 36 L. R. A. 179, 46 N. E. 145; *Morgan v. State*, 117 Ind. 569, 19 N. E. 154.

It is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.

Fong Yue Ting v. United States, 149 U. S. 698, 729, 37 L. ed. 905, 918, 13 Sup. Ct. Rep. 1016; *Marx v. Hanthorn*, 148 U. S. 172, 182, 37 L. ed. 410, 413, 13 Sup. Ct. Rep. 508; *Pillow v. Roberts*, 13 How. 472, 476, 14 L. ed. 228, 230; *Ogden v. Saunders*, 12 Wheat. 212, 348, 6 L. ed. 606, 652.

The statute has been construed by the highest court of the state to exempt public officers, only when their possession is by virtue of their office and in the performance of official duties. So construed, it is simply a recognition of the rule of law which would, in any event, exempt an officer from liability for the possession of the article, because his possession would be without the element of criminal intent.

People v. Noelke, 29 Hun, 461; *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the supreme court of the state of New York. The plaintiff in error at the April term, 1903, of the

supreme court of the state of New York, was tried before one of the justices of that court and a jury, and convicted of the crime of having in his possession, knowingly, certain gambling paraphernalia used in the game commonly known as policy, in violation of § 344a of the Penal Code of the state of New York. This section and the one following, § 344b, relating to the offense in question, are as follows:

Sec. 344a. Keeping Place to Play Policy.—“A person who keeps, occupies, or uses, or permits to be kept, occupied, or used, a place, building, room, table, establishment, or apparatus for policy playing, or for the sale of what are commonly called ‘lottery policies,’ or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a ‘lottery policy,’ or for any writing, paper, or document in the nature of a bet, wager, or insurance upon the drawing or drawn numbers of any public or private lottery; or who shall have in his possession, knowingly, any writing, paper, or document, representing or being a record of any chance, share, or interest in numbers sold, drawn, or to be drawn, or in what is commonly called ‘policy,’ or in the nature of a bet, wager, or insurance, upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers, device, policy slip, or article of any kind such as is commonly used in carrying on, promoting, or playing the game commonly called ‘policy;’ or who is the owner, agent, superintendent, janitor, or caretaker of any place, [587] building, or room where policy playing *or the sale of what are commonly called ‘lottery policies’ is carried on with his knowledge, or, after notification that the premises are so used, permits such use to be continued, or who aids, assists, or abets in any manner, in any of the offenses, acts, or matters herein named, is a common gambler and punishable by imprisonment for not more than two years, and in the discretion of the court, by a fine not exceeding \$1,000, or both.”

Sec. 344b. Possession of Policy Slip, etc., Presumptive Evidence.—“The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share, or interest in numbers sold, drawn, or to be drawn, or in what is commonly called ‘policy,’ or in the nature of a bet, wager, or insurance upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers, or device, policy slip, or article of any kind, such as is commonly used in carrying on, promoting, or playing the game commonly called

‘policy,’ is presumptive evidence of possession thereof knowingly and in violation of the provisions of § 344a.”

The assignments of error in this court are:

“First. That the court erred in holding that by the reception in evidence of the defendant’s private papers seized in the raid of his premises, against his protest and without his consent, which had no relation whatsoever to the game of policy, for the possession of papers used in connection with which said game he was convicted, his constitutional right to be secure in his person, papers, and effects against unreasonable searches and seizures was not violated, and that he was also thereby not compelled to be a witness against himself, in contravention of the 4th, 5th, and 14th Articles of Amendment to the Constitution of the United States.

“Second. That the court erred in holding that the statute, §§ 344a, 344b, of the Penal Code of the state of New York, under which the indictment against the plaintiff in error was found, and his conviction was had, did not deprive him of rights, privileges, and immunities secured to other citizens of *the United States and of said state of New[588] York, nor of liberty or property, without due process of law, nor of the equal protection of the laws, in violation of § 1 of the 14th Article of Amendment to the Constitution of the United States.

“Third. That the court erred in affirming the judgment of conviction, and in refusing to discharge the plaintiff in error from custody.”

The game of policy referred to in the sections of the statute quoted is a lottery scheme carried on, as shown in the testimony, by means of certain numbers procured at the shop or place where the game is played, and consists in an attempt to guess whether one or more of the series held by the player will be included in a list of twelve or at times thirteen of the numbers between one and seventy-eight, which are supposed to be drawn daily at the headquarters of the operators of the game. A person desiring to play the game causes the numbers to be entered on series of slips or manifold sheets. One of these pieces of paper containing the combination played by the person entering the game is kept by him and is known as a policy slip. Drawings are held twice a day, and the holder of the successful combination receives the money which goes to the winner of the game. About 3,500 of these slips were found in the office occupied by the plaintiff in error, which was searched by certain police officers holding a search warrant. The officers took not only the policy slips, but certain other papers, which were

received in evidence against the plaintiff in error at the trial, against his objection, for the purpose of identifying certain handwriting of the defendant upon the slips, and also to show that the papers belonged to the defendant, and were in the same custody as the policy slips.

So far as the case presents a Federal question, the court of appeals of the state of New York held (176 N. Y. 351, 68 N. E. 636) that the 4th and 5th Amendments to the Constitution of the United States do not contain limitations upon the power of the states, and proceeded to examine the case in the light of similar provisions in the Constitution and Bill of Rights of that state.

We do not feel called upon to discuss the contention that the 14th Amendment has made the provisions of the 4th and 5th Amendments to the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the states. An examination of this record convinces us that there has been no violation of these constitutional restrictions, either in an unreasonable search or seizure, or in compelling the plaintiff in error to testify against himself.

No objection was taken at the trial to the introduction of the testimony of the officers holding the search warrant as to the seizure of the policy slips; the objection raised was to receiving in evidence certain private papers. These papers became important as tending to show the custody by the plaintiff in error, with knowledge, of the policy slips. The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained. The rule is thus laid down in Greenleaf (vol. 1, § 254a):

[595] *"It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor

will it form an issue to determine that question."

The author is supported by numerous cases. Of them, perhaps, the leading one is *Com. v. Dana*, 2 Met. 329, in which the opinion was given by Mr. Justice Wilde, in the course of which he said:

"There is another conclusive answer to all these objections. Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt v. Tollervey*, 14 East, 302, and *Jordan v. Lewis*, 14 East, 306, note, and we are entirely satisfied that the principle on which these cases were decided is sound and well established."

This principle has been repeatedly affirmed in subsequent cases by the supreme judicial court of Massachusetts; among others, *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910. In that case a police officer, armed with a search warrant calling for a search for intoxicating liquors upon the premises of the defendant's husband, took two letters which he found at the time. Of the competency of this testimony the court said:

"But two points have been argued. The first is that the criminatory articles and letters found by the officer in the defendant's possession were not admissible in evidence because *the officer had no warrant to search [596] for them, and his only authority was under a warrant to search her husband's premises for intoxicating liquors. The defendant contends that under such circumstances the finding of criminatory articles or papers can only be proved when, by express provision of statute, the possession of them is itself made criminal. This ground of distinction is untenable. Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even in an illegal, manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally, but his testimony is not thereby rendered incompetent." *Com.*

v. Acton, 165 Mass. 11, 42 N. E. 329; *Com. v. Smith*, 166 Mass. 370, 44 N. E. 503.

To the same effect are *Chastang v. State*, 83 Ala. 29, 3 So. 304; *State v. Flynn*, 36 N. H. 64. In the latter case it was held:

"Evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued."

State v. Edwards, 51 W. Va. 220, 59 L. R. A. 465, 41 S. E. 429; *Shields v. State*, 104 Ala. 35, 16 So. 85; *Bacon v. United States*, 38 C. C. A. 31, 97 Fed. 35; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021; *Williams v. State*, 100 Ga. 511, 39 L. R. A. 269, 28 S. E. 624; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Trask v. People*, 151 Ill. 523, 38 N. E. 248; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940.

In this court it has been held that if a person is brought within the jurisdiction of one state from another, or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action or in a criminal proceeding because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the state wherein he had committed an offense. *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204. The case most relied upon in argument by plaintiff in error is the leading one

[597] of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. In that case a section of the customs and revenue laws of the United States authorized the court in revenue cases, on motion of the government's attorney, to require the production by the defendant of certain books, records, and papers in court, otherwise the allegation of the government's attorney as to their contents to be taken as true. It was held that the act was unconstitutional and void as applied to a suit for a penalty or a forfeiture of the party's goods. The case has been frequently cited by this court and we have no wish to detract from its authority. That case presents the question whether one can be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on pain of having the statements of government's counsel as to the contents thereof taken as true and used as testimony for the government. The court held, in an opinion by Mr. Justice Bradley, that such procedure was in violation of both the 4th and 5th Amendments; the Chief Justice

and Justice Miller held that the compulsory production of such documents did not come within the terms of the 4th Amendment as an unreasonable search or seizure, but concurred with the majority in holding that the law was in violation of the 5th Amendment. This case has been cited and distinguished in many of the cases from the state courts which we have had occasion to examine.

The supreme court of the state of New York, before which the defendant was tried, was not called upon to issue process or make any order calling for the production of the private papers of the accused, nor was there any question presented as to the liability of the officer for the wrongful seizure, or of the plaintiff in error's right to resist with force the unlawful conduct of the officer, but the question solely was, Were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused? We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his *own behalf, as was his [598] privilege under the laws of the state of New York. He was not compelled to testify concerning the papers or make any admission about them.

The origin of these amendments is elaborately considered in Mr. Justice Bradley's opinion in the *Boyd Case*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. The security intended to be guaranteed by the 4th Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English, and nearly all of the American, cases, have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent. In *Boyd's Case* the law held unconstitutional virtually compelled the defendant to furnish testimony against himself in a suit to forfeit his estate, and ran counter to both the 4th and 5th Amendments. The right to issue a search warrant to discover stolen property or the means of committing crimes is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if, in the search for the instruments of

crime, other papers are taken, the same may not be given in evidence. As an illustration, —if a search warrant is issued for stolen property, and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.

[599] It is further urged that the law of the state of New York (§ 344b) which makes the possession by persons other than a public officer of papers or documents, being the record of chances or slips in what is commonly known as *policy, or policy slips, or the possession of any paper, print, or writing commonly used in playing or promoting the game of policy, presumption of possession thereof knowingly, in violation of § 344a, is a violation of the 14th Amendment to the Constitution of the United States in that it deprives a citizen of his liberty and property without due process of law. We fail to perceive any force in this argument. The policy slips are property of an unusual character, and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their pos-

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essor, in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the state to prescribe the evidence which is to be received in the courts of its own government. *Hong Yue Ting v. United States*, 149 U. S. 698-729, 37 L. ed. 905-918, 13 Sup. Ct. Rep. 1016.

It is argued, lastly, that § 344b is unconstitutional because the possession of the policy tickets is presumptive evidence against all except public officers, and it is urged that public officials, from the governor to notaries public, would thus be excluded from the terms of the law which apply to all non-official persons. This provision was evidently put into the statute for the purpose of excluding the presumption raised by possession where such tickets or slips are seized and are in the custody of officers of the law. This was the construction given to the act by the New York courts, and is the only one consistent with its purposes. The construction suggested would lead to a manifest absurdity, which has not received, and is not likely to receive, judicial sanction. We find nothing in the record before us to warrant a reversal of the conclusions reached in the New York Court of Appeals, and its judgment will be affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[601]*RICHARD H. LUFKIN *et al.*, Plaintiffs in Error, v. MARY A. LUFKIN. [No. 268.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

See same case below, 182 Mass. 476, 65 N. E. 840.

Messrs. Frank H. Stewart and Albert P. Worthen for plaintiffs in error.

Mr. Charles T. Gallagher for defendant in error.

January 4, 1904. Dismissed for the want of jurisdiction, on the authority of *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Miller v. Cornwall R. Co.* 168 U. S. 134, 42 L. ed. 411, 18 Sup. Ct. Rep. 34; *Porter v. Folcy*, 24 How. 415, 16 L. ed. 740; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

UNITED STATES, Appellant, v. JOHN M. SOMERVELL. [No. 354.]

Appeal from the Court of Claims.

The Attorney General, Assistant Attorney General Pradt, and Mr. Philip M. Ashford for appellant.

Mr. F. B. Crosthwaite for appellee.

January 18, 1904. Judgment affirmed on the authority of *United States v. Finnell*, 185 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. Rep. 633.

JAMES E. WAKEFIELD, Plaintiff in Error, v. ROBERT W. VAN TASSELL. [No. 410.]

In Error to the Supreme Court of the State of Illinois.

See same case below, 202 Ill. 41, 95 Am. St. Rep. 207, 66 N. E. 830.

Mr. Joseph V. Graff for plaintiff in error.

Mr. Arthur Keithley for defendant in error.

January 18, 1904. Dismissed for the want of jurisdiction. *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 308, 47 L. ed. 485, 23 Sup. Ct. Rep. 375; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187. See 202 Ill. 41, 66 N. E. 830.

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*HENRY C. PAYNE, Postmaster-General,[602]

Plaintiff in Error and Petitioner, v.

UNITED STATES *ex rel.* NATIONAL RAILWAY PUBLICATION COMPANY [No. 231];

HENRY C. PAYNE, Postmaster-General, Plaintiff in Error and Petitioner, v.

UNITED STATES *ex rel.* RAILWAY LIST COMPANY. [No. 232.]

In Error to and on Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 20 App. D. C. 581.

The Attorney General and Solicitor General Hoyt for plaintiff in error and petitioner.

Messrs. J. H. McGowan, Nathaniel Wilson, and Clarence R. Wilson for defendant in error and respondent in No. 231.

Mr. Chas. W. Ncedham for defendant in error and respondent in No. 232.

January 4, 1904. Dismissed, with costs, on motion of Mr. Solicitor General Hoyt for the plaintiff in error and petitioner.

GREEN ETHERIDGE, Plaintiff in Error, v. STATE OF ALABAMA. [No. 534.]

In Error to the Circuit Court of the United States for the Northern District of Alabama.

No counsel for plaintiff in error.

Mr. Massey Wilson for defendant in error.

January 4, 1904. Docketed and dismissed, with costs, on motion of Mr. Massey Wilson for the defendant in error.

GEORGE WELLINGTON STREETER, Appellant, v. THOMAS E. BARRETT, Sheriff of Cook County, Illinois. [No. 545.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

No counsel for appellant.

Mr. Henry M. Hoyt for appellee.

January 13, 1904. Docketed and dismissed, with costs, on motion of Mr. Henry M. Hoyt for appellee.

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POSTAL TELEGRAPH COMPANY, *Plaintiff in Error*, v. MARY E. SHEVALIER [No. 377];
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In Error to the Superior Court of the State of Pennsylvania.

Messrs. Wm. C. Strawbridge and F. R. Shattuck for plaintiff in error.

No counsel for defendants in error.

[603] January 4, 1904. *Dismissed*, *with costs, on motion of counsel for the plaintiff in error.

JOHN L. HENNING, *Appellant*, v. MORTON TRUST COMPANY *et al.* [No. 133.]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Mr. Frank E. Smith for appellant.

No counsel for appellee.

January 13, 1904. *Dismissed*, with costs, pursuant to the tenth rule.

RAINWATER-BRADFORD HAT COMPANY *et al.*, *Appellants*, v. W. A. MCBRIDE *et al.* [No. 137.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. N. B. Macey for appellants.

Mr. Melven Cornish for appellees.

January 14, 1904. *Dismissed*, with costs, pursuant to the tenth rule.

LO SING, *alias* LOW SING, *alias* LUE SING, *Appellant*, v. UNITED STATES [No. 548];
 LI CHUNG HONG, *alias* LEE GIN HONG, *Appellant*, v. UNITED STATES [No. 549].
 Appeals from the District Court of the United States for the Eastern District of New York.

No counsel for appellants.

The Attorney General and Solicitor General Hoyt for appellee.

January 15, 1904. Docketed and *dismissed*.

[604] JOHN L. HENNING, *Appellant*, v. MORTON TRUST *COMPANY *et al.* [No. 140.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Frank E. Smith for appellant.

No counsel for appellees.

January 15, 1904. *Dismissed*, with costs, pursuant to the tenth rule.

ADOLPH OTTINGER, *Plaintiff in Error*, v.

PEOPLE OF THE STATE OF CALIFORNIA. [Nos. 555, 556.]

In Error to the Superior Court of the City and County of San Francisco, State of California.

No counsel for plaintiff in error.

Mr. Wm. A. Maury for defendant in error.

January 18, 1904. Docketed and *dismissed*, with costs, on motion of Mr. William A. Maury for the defendant in error.

UNION FIRE INSURANCE COMPANY OF LINCOLN, NEBRASKA, *Plaintiff in Error*, v. ELIZA MCCULLOUGH. [No. 144.]

In Error to the Supreme Court of the State of Nebraska.

Mr. Andrew E. Harvey for plaintiff in error.

No counsel for defendant in error.

January 19, 1904. *Dismissed*, with costs, pursuant to the tenth rule.

LOGANSPOUT RAILWAY COMPANY, *Appellant*, v. CITY OF LOGANSPOUT *et al.* [No. 164.]

Appeal from the Circuit Court of the United States for the District of Indiana.

See same case below, 114 Fed. 688.

Mr. W. H. H. Miller for appellant.

Mr. John G. Williams for appellees.

February 1, 1904. *Dismissed*, with costs, on authority of counsel for appellant.

BOSTON DRY GOODS COMPANY, *Petitioner*, v. JEREMIAH SMITH, JR., *et al.* [No. 511.]

Petition for a Writ of Certiorari to the United States Circuit Court of *Appeals for [605] the First Circuit.

Mr. Frank H. Stewart for petitioner.

Mr. Arthur Dehon Hill for respondents.

January 4, 1904. *Denied*.

HOWE SCALE COMPANY OF 1886 *et al.*, *Petitioners*, v. WYCKOFF, SEAMANS, & BENEDICT. [No. 445.]

Petition for Cross Writ of Certiorari.

Messrs. Edmund Wetmore and Henry D. Donnelly for cross petitioner.

Messrs. Austen G. Fox, James H. Peirce, George P. Fisher, Jr., and Wm. Henry Dennis for cross respondent.

January 11, 1904. *Granted*.

MARTIN H. SULLIVAN, *Petitioner*, v. WILLIAM A. MILLIKEN. [No. 517.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Thomas H. Watts for petitioner.

Mr. W. A. Blount for respondent.

January 11, 1904. *Denied*.

AMERICAN CREDIT INDEMNITY COMPANY OF NEW YORK, *Petitioner*, v. CARROLLTON FURNITURE MANUFACTURING COMPANY. [No. 522.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Albert Stickney for petitioner.

No counsel for respondent.

January 11, 1904. *Denied*.

WILLIAM A. CHAPMAN *et al.*, *Petitioners*, v. MONTGOMERY WATER POWER COMPANY. [No. 526.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. W. A. Gunter and *G. L. Smith* for petitioners.

Messrs. Edward A. Graham, *Robert E. Steiner*, and *Horace Stringfellow* for respondent.

January 11, 1904. *Denied*.

[606] MONTGOMERY WATER POWER COMPANY, *Petitioner*, v. *WILLIAM A. CHAPMAN & CO. [No. 533.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Thomas H. Clark, *Edward A. Graham*, *Robert E. Steiner*, and *Horace Stringfellow* for petitioner.

Messrs. W. A. Gunter and *G. L. Smith* for respondents.

January 11, 1904. *Denied*.

H. HACKFELD & Co., Limited, *Petitioner*, v. UNITED STATES. [No. 527.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Maxwell Evarts for petitioner.

The Attorney General and *Mr. Solicitor General Hoyt* for respondent.

January 11, 1904. *Granted*.

PERRY F. DUNTON, Master, etc., *Petitioner*, v. ALLAN STEAMSHIP COMPANY, Limited, Owner, etc. [No. 361.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 55 C. C. A. 541, 119 Fed. 590.

Mr. Robert H. Smith for petitioner.

Mr. Henry R. Edmunds for respondent.

January 18, 1904. *Denied*.

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THOMAS H. PHILLIPS, *Petitioner*, v. IOLA PORTLAND CEMENT COMPANY. [No. 539.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. John Charles Harris and *Edward F. Harris* for petitioner.

Mr. G. B. Webster for respondent.

January 18, 1904. *Denied*.

BANK OF BRITISH COLUMBIA, *Petitioner*, v. PERCY P. MOORE, Administrator, etc. [No. 518.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. John F. Dillon, *Harry Hubbard*, *John M. Dillon*, *Fisher A. *Baker*, and *Sidney T. Smith* for petitioner.

Mr. Charles S. Wheeler for respondent.

January 25, 1904. *Denied*.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Petitioner*, v. J. M. SUMMERS, Administrator, etc. [No. 531.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. J. W. Judd for petitioner.

No counsel for respondent.

January 25, 1904. *Denied*.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF KEARNY, KANSAS, *Petitioner*, v. LOUISE M. IRVINE [No. 551]; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF KEARNY, KANSAS, *Petitioner*, v. WILLIAM EDWARD COFFIN *et al.* [No. 552].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Milton Brown, *George Getty*, and *Chester I. Long* for petitioner.

No counsel for respondents.

January 25, 1904. *Denied*.

J. EDWARD ADDICKS, *Petitioner*, v. SAMUEL L. KENT. [No. 530.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. John G. Johnson for petitioner.

Mr. Silas W. Pettit for respondent.

February 1, 1904. *Denied*.

CASES

ARGUED AND DECIDED

IN THE

S U P R E M E C O U R T

OF THE

U N I T E D S T A T E S

A T

OCTOBER TERM, 1903.

Vol. 193.

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THE DECISIONS
OF THE
Supreme Court of the United States
AT
OCTOBER TERM, 1903.

[1] *UNITED STATES, *Petitioner,*
v.

NORTHERN PACIFIC RAILROAD COMPANY and the Northern Pacific Railway Company.

(See S. C. Reporter's ed. 1-10.)

Railroad land grants — overlap — effect of filing maps of general route.

No such reservation of lands within that portion of the grant to the Northern Pacific Railroad Company under the act of July 2, 1864, (13 Stat. at L. 365, chap. 217), which was forfeited to the United States by the act of September 29, 1890 (26 Stat. at L. 496, chap. 1040, U. S. Comp. Stat. 1901, p. 1598), as to except from the grant made to that company by the joint resolution of May 31, 1870 (16 Stat. at L. 378), the lands common to both grants, was effected by the transmission to the Secretary of the Interior in 1865 by the president of the company of a map of the general line of the road, which was not authorized by the company, and which was not accepted by the Land Department, and the filing, two months after the date of such resolution, of two maps of general route, which included the line authorized by the resolution.

[No. 145.]

Argued January 5, 1904. Decided February 23, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, bringing up for consideration a cause pending in that court on an appeal from a decree of the Circuit Court for the District of Washington, Western Division, dismissing a bill to cancel certain patents issued by the United States to the

Northern Pacific Railroad Company. *Decree of the Circuit Court affirmed.*

Statement by Mr. Chief Justice **Fuller**:

This was a suit brought by the United States against the Northern Pacific Railroad Company and the Northern Pacific Railway Company to cancel patents issued in May, 1895, by the United States to the railroad company, to whose rights the railway company had succeeded. The lands are situated in the state of Washington, north of Portland, in the state of Oregon. The case was heard in the circuit court on facts stipulated, and the bill dismissed, whereupon it was carried to the circuit court of appeals for the ninth circuit, and that *court certified [2] to this court certain questions on which it desired instructions. The whole record and cause were then required to be sent up for consideration.

Mr. Charles W. Russell argued the cause and filed a brief for petitioner.

Mr. C. W. Bunn argued the cause, and, with **Mr. James B. Kerr**, filed a brief for respondents.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the act of Congress of July 2, 1864 (13 Stat. at L. 365, chap. 217), a grant was made to the Northern Pacific Railroad Company in aid of the construction of a railway from Lake Superior to some point on Puget sound, with a branch *via* the Columbia river to a point at or near Portland, Oregon, of lands to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

the Commissioner of the General Land Office."

On May 31, 1870, Congress passed a joint resolution making an additional grant to [6] the same company for the location and *construction of "its main road to some point on Puget sound *via* the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound." 16 Stat. at L. 378.

The line east of Portland provided for in the act of 1864 formed nearly a right angle at Portland with the line from there to Puget sound provided for in the joint resolution, and thus the two grants overlapped, and the lands in suit fell within the overlap.

But the line down the Columbia from Wallula to Portland was never built, and the grant was forfeited September 29, 1890 (26 Stat. at L. 496, chap. 1040, U. S. Comp. Stat. 1901, p. 1598), while the line from Portland to Puget sound and east across the Cascade mountains was built and the grants earned.

Holding that the lands in the overlap passed to the company under the resolution of 1870, the Interior Department patented those in question to the railroad company; but afterwards, and on July 18, 1895, it was held that the lands did not pass under that grant, because at its date they were reserved or appropriated under the grant of 1864 to the same company. 21 Land Dec. 57.

That grant did not in terms reserve the lands, and the question would seem to be whether the line down the Columbia from Wallula to Portland had been definitely located May 31, 1870, since it is settled that the act of 1864 did not take any lands out of the power of disposition of Congress until the line of road was definitely located by maps duly filed as required. *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; *United States v. Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261. The argument that the topography of the country between Wallula and Portland was such that the lands necessarily fell within the boundaries of that grant is without merit, for it cannot be assumed that Congress intended itself to definitely locate that part of the line, in view of the language used and the settled law on the subject.

And it does not appear that any portion of the line from Wallula to Portland was [7] ever definitely located, but it does *appear that the line from Portland to Puget sound was definitely located under the resolution of May 31, 1870, in part September 13, 1873, and the remainder September 22, 1882; that

the road was completed as located, and was accepted by the government.

It is true that, March 6, 1865, Josiah Perham, then president of the Northern Pacific Company, transmitted to the Secretary of the Interior a map of the general line of the road, which the Secretary transmitted to the Commissioner of the General Land Office, with the recommendation that the lands along the line indicated be withdrawn. But the Commissioner protested against the acceptance of the map, and his letter to the Secretary, giving his reasons, bears an indorsement in pencil to the effect that the refusal to accept was sustained by the Secretary.

The by laws of the company showed no authority in its president to locate the line, and its records, up to May 18, 1865, showed no action conferring such authority. No withdrawals were made under the alleged map.

In *United States v. Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261, it was held that if the Perham map were valid as a map of general route, it did not operate as a reservation, and in *Doherty v. Northern P. R. Co.* 177 U. S. 421, 44 L. ed. 830, 20 Sup. Ct. Rep. 677, it was referred to as if not constituting a location even of the general route. It was not authorized by the company, was not accepted by the Department, and was practically worthless.

It is also true that on July 30, 1870, two maps of general route were transmitted to the Secretary, one of them showing a line extending from the mouth of the Montreal river, Wisconsin, to a point at the mouth of the Walla Walla river in Washington; and the other from the mouth of the Walla Walla, extending down the valley of the Columbia river to a point near Portland, and thence northerly to a point on Puget sound. Withdrawals along the route so designated were directed, and so far as the line from Portland to Puget sound was concerned the withdrawals must have been under the resolution. And the lands in suit are opposite to that part of the line.

*The circuit court of appeals in its certifi- [8] cate states that it appears to that court "that the case presents issues and facts identical with those which were involved in the case of the *United States v. Oregon & C. R. Co.* decided by the Supreme Court of the United States and reported in 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261, with this difference,—that the defendant, the Northern Pacific Railroad Company, is the grantee of both the grants of land, the overlapping portions of which are the subject of the controversy herein, and that this case is ruled by the decision of the Supreme Court in the case above referred to, unless

the fact that the Northern Pacific Railroad Company, by reason of being the grantee of both said land grants, is estopped to question the sufficiency of its own maps to designate the boundaries of its grant by virtue of the act of July 2, 1864."

The contention in the case thus referred to was that the lands there in controversy, which had been patented to the Oregon & California Railroad Company, were reserved and appropriated for the benefit of the Northern Pacific Railroad Company under the act of July 2, 1864, and by reason of the filing of the Perham map. By the act of July 25, 1866 [14 Stat. at L. 239, chap. 242], Congress made a grant of lands in aid of the construction of a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California. That grant was in the usual terms employed in such acts. Subsequently the benefit of the grant as to that part of the road to be constructed in Oregon was conferred upon the Oregon Central Railroad Company. The lands in dispute, whether place or indemnity, were within the limits of the grant of 1866. The entire line of road of the Oregon & California Railroad Company, which was the successor of the Oregon Central Railroad Company, was fully constructed and duly accepted by the president, and, at the time the suit was begun, was being operated and had been continuously operated by that company. The Oregon company filed its map of definite location in 1870, and it was accepted by the Land Department. There was no withdrawal of indemnity lands on the proposed line of the Northern Pacific Railroad Company between Wallula and Port-

[9]land, nor was *there any definite location or construction of its road opposite to the lands in suit. The forfeiture act was passed September 29, 1890. It was held that nothing in the act of 1864 stood in the way of Congress subsequently granting to other railroad corporations the privilege of earning any lands that might be embraced within the general route of the Northern Pacific Railroad; and that, as the grant contained in that act did not include any lands that had been reserved or appropriated at the time the line of the Northern Pacific Railroad was definitely fixed, which it had not been at the time the act of July 25, 1866, was passed or when the line of the Oregon company was definitely located; as the lands in dispute were within the limits of the grant contained in the act of 1866, and the road of the Oregon railroad was definitely fixed at least as early as January 29, 1870, the Northern Pacific Railroad Company having done nothing prior to the latter date, except to file the Perham map of 1865, which map was not one of definite location, and was not accepted;

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and as, prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there was no escape from the conclusion that the lands were lawfully earned by the Oregon company, and were rightfully patented to it.

We do not think the fact that the Northern Pacific Company was the grantee in both grants limits the force of this decision. The resolution of 1870 and the act of July 2, 1864, were *in pari materia*, and no reason is perceived for holding that the act operated to exclude from the subsequent grant by the resolution.

In *Wisconsin C. R. Co. v. Forsythe*, 159 U. S. 46, 40 L. ed. 71, 15 Sup. Ct. Rep. 1020, two grants had been made to the state of Wisconsin, in 1856 and 1864, for the benefit of two railroad companies, and there had been a withdrawal of indemnity lands of the one grant, which conflicted with the subsequent place grant, and we held that as both grants were to the state, although one grant had been conferred on one company, and the other on another, the lands in dispute were not excepted from the later grant; and Mr. Justice Brewer, speaking for the court, said: "For whose *benefit was the withdrawal of [10] the lands within the indemnity limits of the Bayfield road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: We do not know whether, along the line of road, when you finally locate it, there will be six alternate sections free from any pre-emption or other claim, and, therefore, so situated that you may take title thereto, and so we will hold from sale or disposal to anyone else an additional territory of 9 miles on either side, that within those 9 miles you may select whatever lands may be necessary to make the full quota of six sections per mile. When Congress, by a subsequent act, makes a new and absolute grant to the same grantee of lands thus held by the government for the benefit of such grantee, upon what reasoning can it be said that such grant does not operate upon those lands?"

As to the maps of general route of July 30, 1870, they were filed two months after the date of the resolution, were not maps of definite location, and included the line authorized by the resolution. These lands were opposite to part of that line, and all the unappropriated odd sections so situated, within the prescribed limits, were granted.

The decree of the Circuit Court is affirmed.

Mr. Justice McKenna took no part in the decision of this case.

DANIEL H. CARSTAIRS and John H. Carstairs, Copartners, Trading as Carstairs Brothers, *Plffs. in Err.*,
v.

WILLIE B. COCHRAN, Treasurer and Collector of Baltimore County.

(See S. C. Reporter's ed. 10-17.)

Error to state court—conclusiveness of state decisions—state taxation of liquor in bonded warehouses.

1. The decision of the highest court of a state, that statutes of that state do not conflict with its Constitution, is conclusive on the Federal Supreme Court on writ of error to the state court.
2. The taxation of liquors in bonded warehouses within the state, provided for by Md. Laws 1892, chap. 704, as amended by laws 1900, chap. 320, under which the proprietors of such warehouses were required to pay the taxes, and were given a lien on the property therefor, is within the powers of the state, despite the facts that there is no specific provision giving the proprietor who pays the taxes a right to recover interest thereon, that, under Federal legislation, distilled spirits may be left in a warehouse for several years, and that for spirits so in bond negotiable warehouse receipts have been issued.

[No. 122.]

Argued January 13, 14, 1904. Decided February 23, 1904.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment sustaining the validity of state legislation for the taxation of liquors in bonded warehouses. *Affirmed.*

See same case below, 95 Md. 488, 52 Atl. 601.

Statement by Mr. Justice **Brewer**:

By chap. 704 of the Laws of Maryland, 1892, as amended by chap. 320, Laws 1900, the general assembly of that state provided for the assessment and collection of taxes on liquors in bonded warehouses within the state. The proprietors of such warehouses were required to pay the taxes, and given a lien on the property therefor. This legislation was sustained by the court of appeals of the state (95 Md. 488, 52 Atl. 601), to review whose judgment this writ of error was sued out.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblyn v. Western Land Co.* 37 L. ed. U. S. 267; *Klpley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

Mr. D. K. Este Fisher argued the cause, and, with Mr. W. Cabell Bruce, filed a brief for plaintiffs in error:

It is a principle of every system of law that every man shall be protected in the enjoyment of his property, and that it shall not be taken from him without just compensation. It finds expression in the earliest constitutions, and in Magna Charta the guaranty is that no freeman shall be dispossessed of his freehold but by the judgment of his peers or by the law of the land.

10 Am. & Eng. Enc. Law, 2d ed. p. 290.

One of the privileges of everyone, recognized in the 14th Amendment, is the enjoyment of one's property with immunity from seizure under color of a law essentially repugnant to the Constitution.

Thistle v. Frostburg Coal Co. 10 Md. 144; *Hartman v. Greenhow*, 102 U. S. 684, 26 L. ed. 276; *Camp v. Rogers*, 44 Conn. 291.

No general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with the freedom of contract.

People v. Budd, 117 N. Y. 15, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; *Frisbie v. United States*, 157 U. S. 165, 39 L. ed. 659, 15 Sup. Ct. Rep. 586.

Mr. D. G. McIntosh argued the cause and filed a brief for defendant in error:

Distilled spirits are goods and commodities, and form a proper subject for taxation; and a state has the power to tax all property having a situs within its territorial limits.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Picklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; *Myers v. Baltimore County*, 83 Md. 385, 34 E. R. A. 309, 55 Am. St. Rep. 349, 35 Atl. 144; *Hopkins v. Baker*, 78 Md. 363, 22 Atl. 477, 28 Atl. 284; *Howell v. State*, 3 Gill, 23.

Having the power, it becomes the duty, of the state to impose taxes so that they bear equally upon all persons, and this can only be done by subjecting to taxation all property not legally exempt. Every properly devised revenue system must be framed along these lines. It is only necessary that the tax be laid for a public purpose, and bear equally upon those similarly situated.

This was the object aimed at in the 15th Article of the Declaration of Rights in the Constitution of Maryland; and such is the rule, approved alike by economists and jurists.

5 Smith, *Wealth of Nations*, chap. 2, pt. 2, p. 651; 1 Vattel, *Law of Nations*, chap. 20, § 240; Cooley, *Const. Lim.* 6th ed. chap. 14, p. 607; *People ex rel. Manhattan F. Ins. Co. v. Tax & A. Comrs.* 76 N. Y. 64.

It is for the law-making power to determine all questions of discretion or policy in ordering and apportioning taxes, and to make all necessary rules and regulations, and decide upon the mode by which the taxes shall be collected.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Story, *Confl. L.* § 550; *Jennings v. Cold Ridge Improv. & Coal Co.* 147 U. S. 148, 37 L. ed. 118, 13 Sup. Ct. Rep. 282; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

The construction given by the Maryland court, in *Monticello Distilling Co. v. Baltimore*, 90 Md. 416, 45 Atl. 210; *Fowble v. Kemp*, 92 Md. 630, 48 Atl. 379, and *Carstairs v. Cochran*, 95 Md. 488, 52 Atl. 601, to the act of 1892, chap. 704, providing for the collection of taxes on distilled spirits, is in entire harmony with its previous rulings upon similar questions.

United States Electric Power & Light Co. v. State, 79 Md. 63, 28 Atl. 768; *American Casualty Ins. Co.'s Case*, 82 Md. 564, *sub nom. Boston & A. R. Co. v. Mercantile Trust & D. Co.* 38 L. R. A. 97, 34 Atl. 778; *American Coal Co. v. Allegany County*, 59 Md. 194.

The most recent decision in Maryland is the case of *Corry v. Baltimore*, 96 Md. 310, 53 Atl. 942, where the subject underwent an elaborate discussion at the hands of counsel and court. The views expressed by the court in that case were held to be in harmony with the following Federal decisions:

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Bristol v. Washington County*, 177 U. S. 139, 44 L. ed. 704, 20 Sup. Ct. Rep. 585.

Mr. Osborne I. Yellott also argued the cause for defendant in error.

Mr. Justice Brewer delivered the opinion of the court:

That the statutes in question do not conflict with the Constitution of Maryland is settled by the decision of its highest court.
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Merchants' & Mfrs. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, and cases cited; *Backus v. Ft. Street Union Depot Co.* 169 U. S. 557-566, 42 L. ed. 853-858, 18 Sup. Ct. Rep. 445; *Rasmussen v. Idaho*, 181 U. S. 198-200, 45 L. ed. 820, 821, 21 Sup. Ct. Rep. 594.

A state has the undoubted power to tax private property having a situs within its territorial limits; and may require the party in possession of the property to pay the taxes thereon. "Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319, 21 L. ed. 179, 186. "Statutes sometimes provide that tangible personal property shall be assessed wherever in the state it may be, either to the owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this, whether the owner is resident in the state or not." 1 Cooley, *Taxn.* 3d ed. p. 653. See also *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117-123, 32 L. ed. 94-96, 8 Sup. Ct. Rep. 1037; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 22, 36 L. ed. 601, 606, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421-427, 42 L. ed. 803-805, 18 Sup. Ct. Rep. 392; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *State Board v. Comptoir National D'Escompte*, 191 U. S. 388, ante, 232, 24 Sup. Ct. Rep. 109; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

That under Federal legislation distilled spirits may be left in a warehouse for several years, that there is no specific provision in the statutes in question giving to the proprietor who pays the taxes a right to recover interest thereon, and that for spirits so in bond negotiable warehouse receipts have been issued, *do not affect the question of the [17] power of the state. The state is under no obligations to make its legislation conformable to the contracts which the proprietors of bonded warehouses may make with those who store spirits therein, but it is their business, if they wish further protection than the lien given by the statute, to make their contracts accordingly.

We see no error in the judgment of the Court of Appeals, and it is affirmed.

GRAND RAPIDS & INDIANA RAILWAY
COMPANY, *Plff. in Err.*,

v.

CHASE S. OSBORN, Commissioner of Rail-
roads of the State of Michigan.

(See S. C. Reporter's ed. 17-30.)

Error to state court—decision of Federal question—impairment of contract obligation—reduction of rates of reorganized railroad company—estoppel by incorporation to contest constitutionality of incorporation act.

1. The affirmance by the highest state court of an order awarding a peremptory writ of mandamus to compel the reduction of railroad rates to conform to the schedule made by the act under which the railroad was incorporated, on the ground that by its incorporation under that act the company became subject to its provisions, is not based on non-Federal grounds so as to preclude a review in the Federal supreme court, where the company relied upon the provisions of a prior act authorizing the incorporation of the purchasers of a railroad after a sale in foreclosure proceedings, with the rights and privileges of the original company as a contract right, protected from impairment by the Constitution of the United States.
2. The provision of Mich. Acts 1873, act No. 198, for the creation of a new corporation upon the reorganization of a railroad by the purchasers at foreclosure sale, with all the rights, powers, and privileges of the original company, did not create a contract right protected by the Federal Constitution against the enforcement of subsequent statutory regulations respecting railroad rates, existing when the new company was incorporated, though not in force when the mortgage was executed.
3. A railroad company, by incorporating under a general act, is estopped to contest the validity, under the Federal Constitution, of the provisions of that act regulating railroad rates, which formed one of the burdens attached by the statute to the privilege of becoming an incorporated body.

[No. 61.]

Argued November 6, 1903. Decided February 23, 1904.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed an order of the Circuit Court of Kent County in that State, awarding a

peremptory writ of mandamus to compel a reduction of railroad rates in conformity with the state law. *Affirmed.*

See same case below, 130 Mich. 248, 89 N. W. 967.

Statement by Mr. Justice **White**:

This is a writ of error to review a judgment of the supreme court of the state of Michigan, which affirmed an order of the circuit court of Kent county, Michigan, awarding a peremptory writ of mandamus. By the writ the plaintiff in error was, in effect, commanded to reduce its rates for the transportation of passengers over its lines of railroad from 3 *cents per mile to 2½ cents[18] per mile, as required by an act of the legislature of Michigan known as act 202 of the session of 1889.

The Grand Rapids & Indiana Railroad Company was the original owner of the road in question. That company was incorporated under the laws of Michigan and Indiana in 1870, and its line of railroad was constructed and put into operation before January 1, 1873. It also owned and operated in Michigan a number of short branch lines and several leased lines; and its mileage in Michigan exceeded 300 miles. During the period between the incorporation of the company and the construction of its road, railroad companies which were operating in Michigan were authorized to regulate the tolls and compensation to be paid for the transportation in that state of persons and their baggage, but the charge which might be made for such transportation was limited to 3 cents per mile on roads over 25 miles in length. The Michigan statutes also contained provisions authorizing the execution of mortgage and the issue of bonds by railroad corporations. By act 198 of the session of 1873, the laws relating to railroads were revised, and such revision with amendments is still in force. Mich. Comp. Laws 1897, chap. 164 pp. 1937-2000. It was therein provided that corporations organized under a prior general railroad law "shall be deemed and taken to be organizations under this act." By subdivision 9 of § 9 of article 2 the maximum charge which railroad corporations might make for the transportation of passengers and their ordinary baggage on roads exceeding 25 miles in length was fixed at 3 cents

NOTE.—On writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised

and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On contract exemptions from legislative power to fix rates, tolls, and prices—see note to *Detroit v. Detroit Citizens' Street R. Co.* 46 L. ed. U. S. 592.

On estoppel by accepting benefits—see notes to *Katz v. Bedford*, 1 L. R. A. 827; and *Michigan v. Flint & P. M. R. Co.* 38 L. ed. U. S. 478.

per mile. Power was also conferred upon railroad companies to borrow money, issue bonds or other obligations therefor, and to mortgage their corporate property and franchises, and the income thereof, or any part thereof, as security. Section 2 of article 1 of the act was as follows:

[19] "In case of the foreclosure and sale of any railroad, or part of any railroad, under any trust deed, or mortgage given to secure the payment of bonds sold to aid in its construction and equipment, or for other cause authorized by law, it shall *be competent and lawful for the parties who may become the purchasers, and such others as they may associate with themselves, to organize a corporation for the management of the same, and issue stock in the same in shares of \$100 each, to represent the property in said railroad; and such corporation, when organized, shall have the same rights, powers, and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed. Such organization may be formed by virtue of a declaration or certificate of the purchasers at the sale under said mortgage or trust deed, which shall set forth the description of the property sold, and the date of the deed under which it was sold, or the decree of the proper court, if it shall have been sold by virtue of a decree of any court; and with such description of the parties to the deed or suit as may identify the one or the other, or both; the time of the sale, and the name of the officer who sold the same; and also the purchasers, and the amount paid, and the stockholders to whom stock is to be issued, and the amount of the capital stock and the name of the new corporation, and such other statements as may be found requisite to make definite the corporation whose property may have been sold, and the property sold, as well as the extents and rights and property of the new company; which said certificate or declaration shall be signed by all of the said purchasers, and shall be addressed to the secretary of state; and being filed and recorded in his office, the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, to all the provisions of which, and amendments thereto, it shall be subject, and a certified copy of the said certificate or declaration shall be prima facie evidence of the due organization of said company."

There was also a general provision that the act might be altered, amended, or repealed, but that such alteration, amendment, or repeal "shall not affect the rights of property of companies organized under it."

In 1884 the Grand Rapids & Indiana Railroad Company executed a second mort-

gage upon its railroad property to *secure[20] an issue of \$3,000,000 of bonds. While this mortgage was in force, and in the year 1889, subdivision 9th of § 9 of article 2 of the general railroad law of 1873—the section containing an enumeration of powers conferred upon railroad corporations—was amended to read as follows:

"Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed the following prices, viz.: for a distance not exceeding 5 miles, 3 cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year 1888, equalled or exceeded the sum of \$3,000 for each mile of road operated by said company, 2 cents per mile, and for all companies, the earnings of whose passenger trains reported as aforesaid were over \$2,000 and less than \$3,000 per mile of road operated by said company, 2½ cents per mile, and for all companies whose earnings reported as aforesaid were less than \$2,000 per mile of road operated by said company, 3 cents per mile: *Provided*, That in future, whenever the earnings of any company doing business in this state, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of \$2,000 or \$3,000 per mile of road operated by said company, then in such case companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, a rate of 2½ cents, or 2 cents per mile, as hereinbefore provided: *Provided*, That roads in the Upper Peninsula which report as above provided passenger earnings exceeding \$3,000 per mile, shall not charge to exceed 3 cents per mile, and roads reporting *less than \$3,000 per mile shall be[21] allowed to charge not to exceed 4 cents per mile. . . ."

The mortgage of 1884 was foreclosed; and, in 1896, under decrees of circuit courts of the United States, the property covered by such mortgage was sold to John C. Sims, subject to a prior mortgage securing a large issue of outstanding bonds. Sims and his associates subsequently executed the certificate authorized by, and complied with all the requirements mentioned in, § 2 of article 1 of the general railroad law of 1873 aforesaid, and by virtue thereof the plaintiff in error came

into existence and took control of the railroad property in question. It continued to exact a charge for the transportation of passengers and their ordinary baggage of 3 cents per mile.

In a statutory report made in 1891 by the plaintiff in error to the commissioner of railroads of Michigan it was represented that the gross earnings in Michigan of the passenger trains on its lines of railroad exceeded \$2,000 per mile of road operated. Thereupon said commissioner notified plaintiff in error to reduce its rates on passenger traffic to 2 cents per mile for distances exceeding 5 miles. The order not being obeyed, a proceeding in mandamus was instituted to compel compliance. In its answer to the rule to show cause the company specially set up the claim that, so far as it was concerned, the statute was repugnant to the due process and equal protection clauses of the 14th Amendment, and also violated the commerce clause of the Constitution of the United States. It recited the cost to the plaintiff in error of the property indirectly acquired by it under the foreclosure, the amount of outstanding capital stock, the bonded indebtedness of the road, and the annual interest on such bonded debt; and represented that the income from passenger traffic which would be received if it put in force the reduced rates would leave but a trifling surplus after deduction of reasonable operating expenses, interest on debt, and other fixed charges. It was also averred in support of the charge that the act was repugnant to the commerce clause of the Constitution of the United States, that the gross receipts from passenger traffic in Michigan forming the [22] basis of the *proposed reduction in rates included receipts from interstate traffic, and that if such interstate traffic receipts were not included the gross receipts would be less than \$2,000 per mile, and hence the reduced rates would not be enforceable.

On the hearing of the order to show cause it was contended on behalf of the relator that the railroad company, by incorporating under the law which embodied the provisions complained of, thereby entered into a contract with the state to carry passengers at the rate fixed in the statute. By leave a demurrer was filed to the answer, the single ground stated in support thereof being the following:

"That upon its incorporation in 1896 under the general railroad law, the said respondent entered into and became a party, to a contract with the state of Michigan, one of the conditions of which is the agreement on the part of said respondent to carry all passengers at the rates fixed by subdivision 9th, § 9 of article 2 of said general railroad law, under which it is incorporated."

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The circuit court sustained the demurrer, and awarded a peremptory mandamus commanding the railway company to "forthwith and hereafter issue and cause to be issued tickets to all persons applying therefor and desiring to travel over its line of road in the state of Michigan, and to accept tolls or compensation for transporting any person and his or her ordinary baggage, not exceeding in weight 150 pounds, at the rate of 2 cents per mile for all distances exceeding 5 miles." The record by writ of certiorari was removed to the supreme court of Michigan. In that court leave was given to add to the demurrer the following additional ground, *viz.*: "2. That upon its incorporation in 1896 under the general railroad law, the said respondent became subject to that law and the provision therein requiring it to carry passengers at the rates fixed in subdivision 9th, § 9 of article 2 of that law, said provision in regard to rates being one of the conditions of the existence of respondent." Waiting a decision of the first ground of demurrer, the order awarding a peremptory writ of mandamus was affirmed upon the second ground just recited. 130 Mich. 248, 89 N. W. 967. *By [23] writ of error the judgment of affirmance has been brought here for review.

Mr. T. J. O'Brien argued the cause, and, with *Mr. James H. Campbell*, filed a brief for plaintiff in error:

The rate in question will, upon this hearing, be held to be unreasonable as matter of fact. It is admitted by the demurrer to the answer.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 592, 41 L. ed. 560, 565, 17 Sup. Ct. Rep. 198.

The enforcement of that rate upon the plaintiff in error would deprive it of its property without due process of law, and deny to it the equal protection of the laws, in violation of the 14th Amendment, § 1.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Minneapolis Eastern R. Co. v. Minnesota*, 134 U. S. 467, 33 L. ed. 985, 3 Inters. Com. Rep. 224, 10 Sup. Ct. Rep. 473; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Reagan v. Mercantile Trust Co.* 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; *Reagan v. Mercantile Trust Co.* 154 U. S. 418, 38 L. ed. 1030, 4 Inters. Com. Rep. 577, 14 Sup. Ct. Rep. 1062; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 420, 38 L. ed. 1031, 4 Inters. Com. Rep. 572, 14 Sup. Ct. Rep. 1062; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L.

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ed. 819, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

The question whether rates of fares prescribed by a statute of a state are in any case reasonable or not is one for judicial inquiry and determination.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 457, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 397, 399, 38 L. ed. 1014, 1023, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 657, 39 L. ed. 567, 570, 15 Sup. Ct. Rep. 484; *Smyth v. Ames*, 169 U. S. 466, 527, 528, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418.

In determining what rate for domestic fares shall be charged by any railroad company, it is not competent to include in the gross earnings of its passenger trains the amount of interstate fares earned by that portion of the road lying within the state of Michigan.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214.

Decisions relating to taxation of interstate business, or of the receipts therefrom, are in point.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Fargo v. Michigan*, 121 U. S. 230, 30 L. ed. 888, 7 Sup. Ct. Rep. 857; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

Commerce between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 204, 29 L. ed. 162, 1 Inters. Com. Rep. 193 U. S. U. S., Book 48.

382, 5 Sup. Ct. Rep. 826; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

If Congress has not made any express regulations with regard to interstate commerce, its inaction is equivalent to a declaration that it shall be free in all cases where its power is exclusive.

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

Provisions in a state law, which impose upon foreign corporations conditions which are in conflict with the Constitution, cannot be enforced against a corporation which avails itself of the law, even after the enactment of such a provision.

Barrow v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

The power of the legislatures of the states to establish rates of fare is not absolute or arbitrary. It exists and can be exercised only within well-defined limitations. A carrier has the right to fix its rates for passengers and freight, subject to the common-law rule that they must be reasonable. The power of the legislature is to protect the public against unreasonable rates, and in the exercise of that power the legislature cannot impose upon the carrier unreasonable rates.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 698, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; *Smyth v. Ames*, 169 U. S. 466, 527, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418.

The provision in the section of the statute under which the respondent company is incorporated, that corporations organized by purchasers of railroad property at sales under mortgage shall be "subject" to all the provisions of the law and amendments thereto, does not add anything to the force or authority of the law.

Ruggles v. Illinois, 108 U. S. 536, 27 L. ed. 816, 2 Sup. Ct. Rep. 832.

The reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put the rates into operation.

Smyth v. Ames, 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. Rep. 888.

Rights under the Constitution of the United States, and objections to the constitutionality of the statute, having been expressly and in due time asserted, and the effect of the judgment being to deny those rights and overrule the objections, this court has jurisdiction to review the judgment al-

though the state court did not, in express terms, pass upon the Federal constitutionality of the law.

Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; *Detroit, Ft. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540, 541; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616.

The present case falls within decisions of this court in which its jurisdiction has been sustained.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44.

Mr. **Horace M. Oren** argued the cause, and, with Mr. **Charles A. Blair**, filed a brief for defendant in error:

They who incorporate are bound by the terms of their charter or incorporation law.

San Diego Land & Town Co. v. National City, 74 Fed. 79; *Dow v. Electric Co.* 68 N. H. 59, 31 Atl. 22, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645.

A state is not bound to extend the same terms to each and every corporation that it may see fit to create.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 300, 302, 42 L. ed. 1038, 1045, 18 Sup. Ct. Rep. 594.

The graduation of passenger fares by the amount of passenger earnings is both just and reasonable. The classification rests upon a difference which bears a reasonable and just relation to the act in respect to which the classification is made. There is equality between the classes created.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1038, 18 Sup. Ct. Rep. 594; *Camden & A. R. & Transp. Co. v. Briggs*, 22 N. J. L. 623; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 473, 22 L. ed. 678, 684; *Corvinton & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 223, 38 L. ed. 962, 970, 14 Sup. Ct. Rep. 1087.

Incident to the power to create corporations is the power to prescribe the terms and conditions upon which they shall exist.

The right to be a corporation, or the corporate organization and the power to control it, is not, strictly speaking, a corporate franchise.

Meyer v. Johnston, 53 Ala. 237; *Eldridge v. Smith*, 34 Vt. 484.

The right to invoke the protection of the 14th Amendment of the Constitution of the United States is not a franchise or right originating in laws permitting incorpora-

tion, and hence cannot be claimed to have been assigned or transferred by the operation of such laws.

Chesapeake & O. R. Co. v. Miller, 114 U. S. 181, 29 L. ed. 122, 5 Sup. Ct. Rep. 813; *Wilson v. Gaines*, 103 U. S. 417, 26 L. ed. 401.

A Mississippi case seems to be almost identical with the case at bar.

Alabama & V. R. Co. v. Odneal, 73 Miss. 34, 19 So. 202.

The judgment of the supreme court of Michigan in the case at bar was not based upon any Federal question, and this court is without jurisdiction to review it.

Electric Co. v. Dow, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; *Clay v. Smith*, 3 Pet. 411, 7 L. ed. 723; *Beaupre v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

Mr. **Charles A. Blair** also filed a separate brief for defendant in error:

The decision of a state court upon questions of local law has always been regarded by this court as conclusive and binding upon it.

Luther v. Borden, 7 How. 40, 12 L. ed. 598; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; *Miller v. Swann*, 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52.

In cases of this character, this court determines, not what the Michigan law is, or what effect is to be given to it, but whether, as construed, applied, and given effect by the state court, it violates any of the principles of the Federal Constitution.

Northern C. R. Co. v. Maryland, 187 U. S. 258, 261, 47 L. ed. 167, 168, 23 Sup. Ct. Rep. 62.

A corporation is subject to, and cannot question the validity of, the statute under which it has voluntarily incorporated.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 512, 513, 46 L. ed. 298, 22 Sup. Ct. Rep. 95, 161 U. S. 703, 40 L. ed. 860, 16 Sup. Ct. Rep. 714; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 409, 411, 38 L. ed. 1014, 1027, 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Ashley v. Ryan*, 153 U. S. 436, 443, 38 L. ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

The action of the state does not impair the obligation of a contract.

New York ex rel. Schurz v. Cook, 148 U. S. 397, 37 L. ed. 498, 13 Sup. Ct. Rep. 645; *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299.

Interstate commerce is not, directly or indirectly, interfered with.

Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163.

The statute fixing the maximum rate of charge is not unconstitutional because declared by the state supreme court to be conclusive upon the courts, and to allow no judicial investigation as to the reasonableness of the rates fixed.

Venice v. Murdock, 92 U. S. 494, 23 L. ed. 583; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. ed. 585; *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Southern P. Co. v. Railway Comrs.* 78 Fed. 236.

Though the decision of the state supreme court gives the state statute an unconstitutional operation, the questions presented in that decision are subject to a reconsideration, and when the decision is altered so far as is necessary to effect a constitutional operation, the statute will be valid. In other words, the action of the courts in preventing or refusing an investigation as to the reasonableness of the rates fixed, and not the statute fixing the rates, may be regarded as unconstitutional.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The statute is not void by reason of not providing for a judicial investigation as to the reasonableness of the rates fixed.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

The classification by fixing a graduated rate based upon earnings per mile has been passed upon by this court, and held valid.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, 83 Mich. 606, 47 N. W. 489; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. 193 U. S.

ed. 94; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Clark v. Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

A jurisdictional question which was raised by the defendant in error requires first to be disposed of. It was objected that the judgment of the supreme court of Michigan in the case at bar was not based upon a Federal question, and hence this court is, it is urged, without jurisdiction to entertain this writ of error. The objection, however, is not well founded. It is plain from the averments of the answer of the railroad company to the petition in mandamus, that the company relied upon the provisions of the general railroad law of 1873, authorizing the incorporation of the purchasers of a railroad after sale in the foreclosure proceedings, as constituting a contract protected by the Constitution of the United States. The determination of the alleged estoppel embodied in the ground *of demurrer to the answer of the[28] railroad company and which was sustained by the supreme court of Michigan, necessarily involved a consideration of this claim of a contract right, protected from impairment by the Constitution of the United States. In substance, if not in express terms, such question was passed upon by the court below. A Federal question which gives this court jurisdiction therefore arises on the record.

That the section of the general railroad law of 1873, making provision for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, did not constitute a contract protected by the Constitution of the United States, is concluded by the decision in *New York ex rel. Schurz v. Cook*, 148 U. S. 397, 37 L. ed. 498, 13 Sup. Ct. Rep. 645. There the purchasers of railroad property in the state of New York under a sale upon foreclosure of a mortgage sought to escape the payment of an incorporation fee laid by the authority of certain statutes of the state of New York enacted after the execution of the mortgage. The claim was made that the statutes of the state of New York authorizing the purchasers of railroads sold upon foreclosure to incorporate, which were in force when the mortgage was executed, constituted a contract between the state of New York and the bondholders and their privies, and that the enforcement of the subsequent statute providing for the payment of an incorporation fee violated the obligation of the alleged contract. The court of appeals of New York held to the contrary, and its judgment was affirmed by this court. In the

course of the opinion of this court it was said (p. 410, L. ed. p. 503, Sup. Ct. Rep. p. 649) :

"The plaintiffs in error acquired the properties and franchises of these corporations, which were subject to the taxing power of the state, after the act of 1886 was passed and went into effect. There is no provision of the law under which they made their purchase requiring them to become incorporated. but desiring corporate capacity they demanded the grant of a new charter under which to exercise the franchises so acquired without compliance with the law of the state existing at the time their application for incorporation was made. We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by [29] them, does not sustain such a *claim. The provisions of that act do not constitute a contract on the part of the state with either the corporations or the mortgagees, bondholders, or purchasers at foreclosure sale. They are merely matters of law instead of contract, and the right therein conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a *new corporation*, is subject to the laws of the state existing or in force at the time of such reorganization and the grant of a new charter of incorporation. *Memphis & L. R. Co. v. Railroad Commissioners*, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299.

It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187, and cases cited. That a railroad corporation may contract with a municipality or with a state to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have been procured upon stipulated conditions, and re-

pudiate performance of the latter at will. Whether, if a condition in a statute is couched in ambiguous language, and is susceptible of two constructions, as it is claimed is the case before us in respect to the basis upon which the gross receipts per mile of operated road was to be calculated, a construction should be *adopted which will not [30] render the condition repugnant to the Constitution of the United States, we need not determine. The statute in question, in its entirety, has been construed by the supreme court of Michigan, and held valid, and its decision as to the proper interpretation of the language of the act in respect to the mode of ascertaining the gross receipts per mile does not render the statute repugnant to the Constitution of the United States, within the ruling recently made by this court in *Wisconsin & M. R. Co. v. Povers*, 191 U. S. 379, ante, 229, 24 Sup. Ct. Rep. 107.

Judgment affirmed.

CINCINNATI STREET RAILWAY COMPANY, *Plff. in Err.*,

v.

CHARLES B. SNELL.

(See S. C. Reporter's ed. 30-38.)

Equal protection of the laws—change of venue for local prejudice.

The provision for a change of venue for local prejudice, which is made by Ohio Rev. Stat. § 5030, where the opposite party is a corporation with more than fifty stockholders, having its principal office or transacting its principal business in the county in which the action is pending, without conferring an equivalent right on the corporation, does not violate the constitutional guaranty of the equal protection of the laws, where in both forums equality of law governs and equality of administration prevails.

[No. 124.]

Argued January 14, 1904. Decided February 23, 1904.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Clermont County in that state, which had in turn affirmed the judgment of the Court of Common Pleas of that County in favor of

NOTE.—As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note; *State v. Loomis*, 21 L. R. A. 789, and note.

As to the constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

plaintiff in an action to recover damages for personal injuries. *Affirmed.*

See same case below on first writ of error, 60 Ohio St. 256, 54 N. E. 270, on second writ of error, 66 Ohio St. 670, 65 N. E. 1134.

The facts are stated in the opinion.

Mr. John W. Warrington argued the cause, and with **Mr. E. W. Kittredge** filed a brief for plaintiff in error:

Corporations are persons within the meaning of the 14th Amendment.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Plaintiff in error is a domestic corporation. It was therefore entitled in the court where this suit was brought, to privileges equal to those of its adversary, touching the right to change of venue, unless, at least, the corporation was eliminated in this regard from the category of natural persons through some rational, and not arbitrary, statutory classification.

Blake v. McClung, 172 U. S. 239, 260, 261, 43 L. ed. 432, 440, 19 Sup. Ct. Rep. 165; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The administration of justice is a subject which, as much as any other conceivable subject, demands the recognition and enforcement of equality of right.

Cotting v. Kansas City Stock Yards Co. 183 U. S. 110, 46 L. ed. 109, 22 Sup. Ct. Rep. 30.

It is beyond the legislative power, either Federal or state, to accord rights or privileges to one class of litigants which are denied to others under like or similar circumstances; or, in short, to deny them the right to stand equal before the law.

Equal protection and security should be given to all under like circumstances; they should have like access to the courts of the country for the protection of their persons and property, and the prevention and redress of wrongs.

Barbier v. Connolly, 113 U. S. 30, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 560, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641.

The statute under review cannot be upheld under the rule laid down by this court touching the right of states to establish police regulations (*Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609), or to classify the subjects of taxation (*American Sugar Ref. Co.* 193 U. S.

v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272), or to classify the contracts of certain corporations, like insurance companies (*Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 326, 46 L. ed. 922, 932, 22 Sup. Ct. Rep. 662).

Nor can the present statute be confounded, as our adversaries unwittingly confuse it, with state legislation limiting the right of trial by jury as to the whole number of a natural and distinct class (*Walker v. Sauvignet*, 92 U. S. 90, 23 L. ed. 678), or with a statute prohibiting all foreign corporations violating the enactment from doing business within the state (*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518), or with a state law vesting in the courts power to change the place of trial as to all persons alike who are prosecuted for criminal violations (*Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573).

In respect of such objects as the one now under review, this court is not concluded by the opinion of the supreme court of the state.

Yick Wo v. Hopkins, 118 U. S. 356, 366, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 100, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

Mr. John W. Wolfe argued the cause, and, with **Mr. Thomas L. Michie**, filed a brief for defendant in error:

This court has always leaned to the construction of state statutes adopted by the courts of last resort of the state.

Sweet v. Rechel, 159 U. S. 380, 392, 40 L. ed. 188, 193, 16 Sup. Ct. Rep. 43; *Presser v. Illinois*, 116 U. S. 252, 269, 29 L. ed. 615, 620, 6 Sup. Ct. Rep. 580.

The 14th Amendment does not enlarge the privileges or immunities of a citizen of the United States, but furnishes a guaranty for existing privileges and immunities, and prohibits the state from abridging them.

Bradwell v. Illinois, 16 Wall. 130, 21 L. ed. 442; *Re Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082.

The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversity in these respects may exist in two states separated by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding.

Missouri v. Lewis sub nom. Bowman v. Lewis, 101 U. S. 22, 31, 25 L. ed. 989, 992.

There is no constitutional objection to legislation that is special in its character. A statute abolishing the defense of co-servant

in railway injuries does not deny to railroads the equal protection of the laws.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 209, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beekwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; *Atehison, T. & S. F. R. Co. v. Mathews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Waters-Pieree Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

The states may regulate trials in their own courts in their own way.

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; *Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

Mr. Justice **White** delivered the opinion of the court:

Snell, the defendant in error, sued the railway company, the plaintiff in error, in the [33] common pleas court of Hamilton county, Ohio, to recover for alleged personal injuries. Availing of a section of the Ohio statutes, Snell moved that the cause be transferred for trial to the court of common pleas of an adjoining county, and reserved an exception to a denial of such request. The trial resulted in a verdict in favor of the railway company.

Error was prosecuted by Snell to the circuit court of Hamilton county, and the judgment being affirmed in that court the case was taken to the supreme court of Ohio. The error complained of was the refusal of the trial court to grant a transfer of the cause. The railway company insisted in both courts that the transfer had been rightly refused on technical grounds, and because the state statute upon which the transfer was asked was repugnant to the 14th Amendment to the Constitution of the United States. The supreme court of Ohio decided that under the state statute the court should have transferred the cause, and that the statute which required this transfer was not repugnant to the 14th Amendment. 60 Ohio St. 256, 54 N. E. 270. The case was then brought to this court by the railway company and was dismissed because the judgment of the supreme court of the state was not final. *Cincinnati Street R. Co. v. Snell*, 179 U. S. 395, 45 L. ed. 248, 21 Sup. Ct. Rep. 205. The

cause thereupon proceeded in the state court and was transferred from Hamilton county to the common pleas court of an adjoining county, where a trial was had which resulted in a verdict and judgment in favor of Snell. The railway company prosecuted error to the circuit court of the county, and, failing to secure a reversal in that tribunal, carried the case to the supreme court of Ohio, by which court the judgment of the trial court was affirmed. In all the courts the railway company reiterated its contention concerning the repugnancy to the Constitution of the United States of the statute providing for the transfer of the cause, and its claims on this subject were expressly overruled. This writ of error was thereupon allowed.

Section 5030 of the Revised Statutes of Ohio, upon which the application for the transfer of the cause was allowed, is as follows:

"When a corporation having more than [34] fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

The supreme court of Ohio, in disposing of the objection that the statute was repugnant to the equal protection and the due process clauses of the 14th Amendment, among other things, said:

"We are unable to adopt that view. It has never been regarded as essential to the validity of remedial procedure that it should be applicable in all of its provisions to all persons or parties alike. Different situations and conditions often render appropriate and necessary different provisions, the necessity or propriety of which rests largely in the legislative discretion.

"Generally, actions against individuals must be brought in the county where the defendant resides or may be personally served with process; and generally, actions against corporations are required to be brought in the county in which the corporation is situated, or has its principal office or place of business, or an office or agent; while insurance companies may be sued in any county where the cause of action or any part of it arose, a mining corporation in any county in which it owns or operates a mine, and a railroad company in any county into which the road runs. Of a like nature are regulations for changes of venue. They are designed to secure to parties a fair and impartial trial of their

causes, which is the ultimate and highest purpose of judicial proceedings; and the extent to which such regulations may go, for the accomplishment of that purpose, is addressed to a sound legislative discretion, in view of the nature of the case to be provided for, and the probable conditions likely to arise."

[35] And in further commenting upon the effect of the remedy *which the statute afforded upon the substantial rights of the parties, the court observed:

"In neither case, however, is any party deprived of the equal protection of the law, for each is assured of a fair trial, with equal opportunities to establish and enforce his rights; nor is the remedy by due course of law denied, because in the forum to which the cause is removed, the trial is conducted in the same way, under the same mode of procedure, as in that from which it was changed, with all remedial rights of the parties unimpaired. The only complaint is that the trial will be attended with some inconvenience and additional expense; but in that respect both parties are equally affected, and must necessarily be so in any change of venue for any cause; and the objection is, we think, insufficient to annul a statute, otherwise unobjectionable, which, in the legislative estimation, was demanded in order to secure the impartial administration of justice."

None of the errors assigned or arguments advanced to sustain them pretend that any unequal law governed the trial of the cause in the courts below or that the result of such trial was a denial of the equal protection of the laws. The sole contention is that the equal protection of the laws was denied because an equal opportunity was not afforded to secure a transfer of the cause from the court in which it was originally brought to the court in which it was ultimately tried. Thus, it is argued that the plaintiff Snell under the statute was given the right to have the cause transferred whilst a like right was not conferred on the corporation; that the existence of prejudice justifying the transfer was made by the statute to depend upon the domicile and number of stockholders in the corporation, while no equivalent right was given the corporation growing out of any prejudice which might have existed against the corporation, it being moreover asserted that the causes stated in the statute as basis for the transfer furnish no just ground for the classification made by the statute. The entire ground, therefore, relied on to show that the statute is repugnant to the 14th Amendment rests upon the assumption that

such amendment not only secures that the *rights and obligations of persons shall be [36] measured by equal laws, but also that the provisions of the Amendment control the states in the creation of courts and in the provisions made for the trial of causes in the courts which are created.

This proposition, however, was long since decided to be untenable. *Missouri v. Lewis*, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.* 172 U. S. 474, 43 L. ed. 520, 19 Sup. Ct. Rep. 268. In the first of these cases it was directly held that the 14th Amendment did not operate to deprive the several states of the complete power to create such courts as were deemed essential, and to endow them with such jurisdiction as was considered appropriate. This being true, it follows, as the lesser is contained in the greater power, that the state law which authorized under enumerated circumstances and conditions the transfer of the cause from one court to another, was equally unaffected by the provisions of the 14th Amendment. But conceding, *arguendo*, the contrary, this case is without merit.

As previously shown, the supreme court of the state of Ohio pointed out in its opinion that the rights of the parties were governed in the court to which the case was transferred by the same law and the same rules which would have prevailed had the case been tried in the court in which it was originally brought. And this has not been challenged either by the assignments of error or any of the arguments made to sustain them. The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the 14th Amendment, only because the state has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered. But it is fundamental rights which the 14th Amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition *where fundamental rights are [37] equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into

which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail.

It follows that the mere direction of the state law that a cause, under given circumstances, shall be tried in one forum instead of another, or may be transferred when brought from one forum to another, can have no tendency to violate the guaranty of the equal protection of the laws where in both the forums equality of law governs and equality of administration prevails. In *Iowa C. R. Co. v. Iowa*, 160 U. S. 393, 40 L. ed. 469, 16 Sup. Ct. Rep. 360, this court said:

"But it is clear that the 14th Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another."

And the same principle was reiterated in *Backus v. Ft. Street Union Depot Co.* 169 U. S. 557, 569, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445, and in *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435. It was further expressed in *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617, and in *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620. The cases decided in this court, which are relied upon at bar to sustain the contrary contention, are not apposite. They are *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, and *Connolly v. Union Seiver Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. Each of these cases involved

[38] determining whether the provisions of particular state laws were so unequal in their operation upon the rights of parties as to engender the inequality prohibited by the 14th Amendment. None of the cases, therefore, lend support to the proposition upon which this case depends; that is, that, although there has been no denial of the equal protection of the laws, nevertheless such denial must be held to exist only because the state has seen fit to direct under particular conditions a trial of a cause in one forum instead of in another, when in both forums

equal laws are applicable and an equal administration of justice obtained.

Affirmed.

W. W. MONTAGUE & CO., a Corporation,
et al., Plffs. in Err.

v.

EDWARD S. LOWRY *et al.*

(See S. C. Reporter's ed. 38-48.)

Anti-trust act—combination in restraint of trade—association of manufacturers and wholesalers—attorney's fee.

1. An association of wholesale dealers in tiles, mantels, and grates in San Francisco and vicinity, and nonresident manufacturers of tiles and fireplace fixtures, in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to nonmembers for less than list prices, which are more than 50 per cent higher than prices to members, while the manufacturers agree not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership, is an agreement or combination in restraint of trade within the meaning of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202).
2. The discretion of the trial court under the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, to allow a reasonable attorney's fee to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, is not abused by an allowance of \$750, although the verdict was for but \$500, where the trial took five days, and from the proof offered it appeared that from \$750 to \$1,000 would be a reasonable sum.

[No. 46.]

Submitted October 27, 1903. Decided February 23, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of California entered upon a ver-

NOTE.—On contracts in restraint of trade; monopolies—see notes to *Leslie v. Lorrillard*, 1 L. R. A. 486; *People v. North River Sugar Ref. Co.* 2 L. R. A. 33; *Bowman v. Phillips*, 3 L. R. A. 632; *Richardson v. Buhl*, 6 L. R. A. 457; *People ex rel. Peabody v. Chicago Gas Trust Co.* 8 L. R. A. 500; *People v. North River Sugar Ref. Co.* 9 L. R. A. 37; *National Benefit Co. v. Union Hospital Co.* 11 L. R. A. 437; *Lovejoy v. Michels*, 13 L. R. A. 770; *Fowle v. Park*, 33 L. ed. U. S. 67; *United States v. Trans-Missouri Freight Asso.* 41 L. ed. U. S. 1007; and *Cravens v. Carter-Crume Co.* 34 C. C. A. 486.

dict in favor of plaintiffs in an action to recover damages for the violation of the provisions of the anti-trust act against combinations in restraint of trade. *Affirmed.*

See same case below, 52 C. C. A. 621, 115 Fed. 27.

Statement by Mr. Justice Peckham:

This action was brought under § 7 of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), commonly called the anti-trust act. The section reads as follows:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Plaintiffs in error (defendants below) seek to review the judgment of the circuit court of appeals for the ninth circuit (52 C. C. A. 621, 115 Fed. 27), affirming a judgment for plaintiffs, entered in the circuit court for the northern district of California, upon a verdict of a jury. 106 Fed. 38.

It appeared in evidence on the trial in the United States circuit court that the plaintiffs for many years prior to the commencement of this action had been copartners, doing business as such in the city of San Francisco in the state of California, and dealing in tiles, mantels, and grates, and that the Tile, Mantel, & Grate Association of California, and the officers and members thereof, had since on or about the — day of January, 1898, constituted under that name an unincorporated organization composed of wholesale dealers in tiles, mantels, and grates, who were citizens and residents of the city and county of San Francisco, or the city of Sacramento, or the city of San José in the state of California, and such organization was also composed of the manufac-
[40]urers of tiles, mantels, *and grates, who were residents of other states, and engaged in the sale of their manufactured articles (among others) to the various other defendants in the state of California. There were no manufacturers of tiles within the state of California, and all the defendants who were residents of that state and who were also dealers in tiles, in the prosecution of their business, procured the tiles from outside the state of California and from among those manufacturers who were made defendants herein. The manufacturers and dealers were thus engaged in the prosecution of a business which, with reference to the sales of

tiles, amounted to commerce between the states. Under these circumstances the dealers in tiles, living in San Francisco, or within a radius of 200 miles thereof, and being some of the defendants in this action, together with the eastern manufacturers of tile, who are named as defendants herein, formed an association called The Tile, Mantel, & Grate Association of California. The objects of the association, as stated in the constitution thereof, were to unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles) and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members.

By its constitution, article I., § 1, it was provided that any individual, corporation, or firm engaged in or contemplating engaging in the tile, mantel, or grate business in San Francisco, or within a radius of 200 miles thereof (not manufacturers), having an established business and carrying not less than \$3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fireplace fixtures throughout the United States might become nonresident members of the association upon the payment of an entrance fee as provided, and after having signed the constitution and by-laws governing *the association. The initia-[41]tion fee was, for active members, \$25, and for nonresident members \$10, and each active member of the association was to pay \$10 per year as dues, but no dues were charged against nonresidents.

An executive committee was to be appointed whose duty it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous consent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of \$3,000.

The by-laws, after providing for the settlement of disputes between the members and

their customers, by reason of liens, foreclosure proceedings, etc., enacted as follows, in article III.:

"Sec. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

"Sec. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel, & Grate Association of California, shall forfeit their membership in the association."

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "unset" tile were sold by a member to any one not a member, they were sold at the [42] list prices so adopted, which *were more than 50 per cent higher than when sold to a member of the association.

The plaintiffs had established a profitable business and were competing with all the defendants who were dealers, and engaged in the business of purchasing and selling tiles, grates, and mantels in San Francisco prior to the formation of this association. The plaintiffs had also before that time been accustomed to purchase all their tile from tile manufacturers in eastern states (who were also named as parties defendant in this action), and all of those manufacturers subsequently joined the association. The plaintiffs were not members of the association and had never been, and had never applied for membership therein, and had never been invited to join the same.

The proof shows that by reason of the formation of this association the plaintiffs have been injured in their business, because they were unable to procure tile from the manufacturers at any price, or from the dealers in San Francisco, at less than the price set forth in the price list mentioned in the seventh section of the by-laws, *supra*, which was more than 50 per cent over the price at which members of the association could purchase the same. Before the formation of the association the plaintiffs could and did procure their tile from the manufacturers at much less cost than it was possible for them to do from the dealers in San Francisco after its formation.

There was proof on the part of the defendants below that the condition of carrying

\$3,000 worth of stock, as mentioned in the constitution, had not always been enforced, but there was no averment or proof that the article of the constitution on that subject had ever been altered or repealed.

The jury rendered a verdict for \$500 for the plaintiffs, and, pursuant to the provisions of the seventh section of the act, judgment for treble that sum, together with what the trial court decided to be a reasonable attorney's fee, was entered for the plaintiffs.

Mr. William M. Pierson submitted the cause for plaintiffs in error:

It is lawful for a man to decline to work for another man or class of men, or to do business with another man or class of men, as he sees fit; and what is lawful for one man to do in this regard, several men may agree to act jointly in doing, and may make express and simultaneous declaration of their purpose.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *United States v. Greenhut*, 51 Fed. 205; *Re Greene*, 52 Fed. 104; *United States v. Nelson*, 52 Fed. 646; *Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co.* 55 Fed. 851, 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; *Gibbs v. McNeeley*, 102 Fed. 594; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. 598; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119.

The transactions in unset tile at list prices, being purely local, are not within the purview of the act of Congress.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Transactions which are related to interstate trade or commerce only in a trifling, incidental, or remote way will not operate to bring an agreement or association within the interdict of the act of Congress.

United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

Mr. Joseph C. Campbell submitted the cause for defendants in error. *Messrs. Campbell, Metson & Campbell* were on his brief:

The anti-trust act was designed to solve an economic problem which industrial combination had produced, and to maintain an economic condition of free competition,

which the spirit of our laws has always jealously guarded.

United States v. Trans-Missouri Freight Asso. 166 U. S. 280, 323, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 244, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96.

Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, because they form a part of interstate trade or commerce.

United States v. E. C. Knight Co. 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 241, 44 L. ed. 136, 148, 20 Sup. Ct. Rep. 96; *Hopkins v. United States*, 171 U. S. 578, 597, 43 L. ed. 290, 298, 19 Sup. Ct. Rep. 40.

The Tile, Mantel, & Grate Association of California is in restraint of trade or commerce among the several states, and was formed to, and does, monopolize such trade or commerce.

United States v. Coal Dealers' Asso. 85 Fed. 252.

In order to vitiate a contract or combination, it is not essential that its results should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.

United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 331, 15 Sup. Ct. Rep. 249.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The question raised by the plaintiffs in error in this case is, whether this association, described in the foregoing statement of facts, constituted or amounted to an agreement or combination in restraint of trade within the meaning of the so-called anti-trust act of July 2, 1890?

The result of the agreement when carried out was to prevent the dealer in tiles in San Francisco, who was not a member of the association, from purchasing or procuring the same upon any terms from any of the manufacturers who were such members, and all of those manufacturers who had been accustomed to sell to the plaintiffs [45] were members. The nonmember *dealer was also prevented by the agreement from buying tiles of a dealer in San Francisco who was a member, excepting at a greatly enhanced price over what he would have paid to the manufacturer or to any San Francis-

co dealer who was a member, if he, the purchaser, were also a member of the association. The agreement, therefore, restrained trade, for it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other states, so that they could only be sold to the members of the association, and it enhanced prices to the nonmember as already stated.

The plaintiffs endeavored in vain to procure tile for the purposes of their business from these tile manufacturers, but the latter refused to deal with them because plaintiffs were not members of the association. It is not the simple case of manufacturers of an article of commerce between the several states refusing to sell to certain other persons. The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to anyone not a member of the association for less than list prices, which are more than 50 per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to anyone not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tile is, as we have said, not only narrowed, but the prices charged by the San Francisco dealers for the unset tile to those not members of the association are more than doubled. It is urged that the sale of unset tile, provided for in the seventh section of the by-laws, is a transaction wholly within the state of California and is not in any event a violation of the act of Congress which applies only to commerce between the states. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as *one piece, in [46] which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tile by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tile ceases to be a mere transaction in the state of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

Again, it is contended the sale of unset tile is so small in San Francisco as to be

a negligible quantity; that it does not amount to 1 per cent of the business of the dealers in tile in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tile from the manufacturers are shut out by reason of the association and their nonmembership therein from purchasing their tile from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tile would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce.

It is also contended that, as the expressed object of the association was to unite therein all the dealers in San Francisco and vicinity, the plaintiffs had nothing more to do than join the association, pay their fees and dues, and become like one of the other members. It was not, however, a matter of course to permit any dealer to join. The constitution only provided for "all acceptable dealers" joining the association. As plaintiffs were not invited to be among its founders, it would look as if they were not regarded as acceptable. However that may be, they never subsequently to its formation applied for admission. It is plain that the question of their admission, if they had [47] so applied, was one to be arbitrarily *determined by the association. The constitution provided for the appointment of an executive committee, whose duty it was to examine all applications for membership in and to report on the same to the association, after which it was to decide whether the applicants should be admitted or not. If they were not acceptable, the applicant would not be admitted, and whether they were or not was a matter for the arbitrary decision of the association. Its decision that they were not acceptable was sufficient to bar their entrance.

Again, it appears that plaintiffs were not eligible under the constitution because they did not always carry stock worth \$3,000, which, by § 1 of article I., was made a condition of eligibility to membership. True, it was stated in evidence that this provision had not been enforced, but there was no averment or proof that it had been repealed, and there was nothing to prevent its enforcement at any time that an application was made by anyone who could not come up to the condition. The case stands, therefore, that the plaintiffs had not been asked

to join the association at its formation; that they did not fill the condition provided for in its constitution as to eligibility, and that if they had applied their application was subject to arbitrary rejection.

The plaintiffs, however, could not, by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done, and to purchase tile as they had been accustomed to do before the association was formed.

The consequences of nonmembership were grave, if not disastrous, to the plaintiffs. It has already been shown how the prices of tile were enhanced so far as plaintiffs were concerned, and how, by means of this combination, interstate commerce was affected.

The purchase and sale of tile between the manufacturers in one state and dealers therein in California was interstate commerce within the *Addystone Pipe Case*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, *which was an article of commerce [48] between the states. *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, did not, therefore, cover it. It is not brought within either *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, or *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50. In the first case it was held that the occupation of the members of the association was not interstate commerce, and in the other that the subject-matter of the agreement did not directly relate to, embrace, or act upon interstate commerce, for the reasons which are therein stated at length. Upon examination we think it is entirely clear that the facts in the case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

The case we regard as a plain one and it is unnecessary to further enlarge upon it.

There is one other question which, although of secondary importance, is raised by the plaintiffs in error. After the rendition of the verdict the plaintiffs below claimed a reasonable attorney's fee under the seventh section of the act, and made proof of what would be a reasonable sum therefor, from which it appeared that it would be from \$750 to \$1,000. The trial court awarded to the plaintiffs \$750. The verdict being only for \$500, the plaintiffs in error claimed that the allowance was an improper and unreasonable one. The trial took

some five days. The judgment in effect pronounced the association illegal. The amount of the attorney's fee was within the discretion of the trial court, reasonably exercised, and we do not think that in this case such discretion was abused.

The judgment is affirmed.

[49]*AMERICAN BOOK COMPANY, *Plff. in Err.*,
v.

STATE OF KANSAS *ex rel.* GALEN NICHOLS, County Attorney of Shawnee County.

(See S. C. Reporter's ed. 49-52.)

Error to state court—moot question.

Compliance by a foreign corporation with a judgment of the highest state court ousting it from doing business in the state until it should satisfy the requirements which the state laws exact of foreign corporations precludes any review of such judgment in the Federal Supreme Court, although, in another similar suit pending in the state courts, such judgment is pleaded as decisive of all or some of the issues.

[No. 126.]

Argued January 15, 18, 1904. Decided February 23, 1904.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment in quo warranto proceedings ousting a foreign corporation from doing business in the state until it should comply with the requirements of the state laws respecting foreign corporations. *Dismissed.*

See same case below, 65 Kan. 847, 69 Pac. 563.

The facts are stated in the opinion.

Mr. W. H. Rossington argued the cause, and, with *Messrs. Charles Blood Smith and Clifford Histed*, filed a brief for plaintiff in error.

Messrs. A. B. Quinton and G. C. Clemens argued the cause, and, with *Messrs. C. C. Coleman, Otis E. Hungate, and E. S. Quinton*, filed a brief for defendant in error.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Klpley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States on writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

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Mr. Justice McKenna delivered the opinion of the court:

This is a proceeding in quo warranto, brought in the supreme court of the state of Kansas by the county attorney of Shawnee county of said state, to oust plaintiff in error from doing business in the state, and to declare void certain contracts entered into by the plaintiff in error with the State Text Book Commission.

A preliminary injunction was granted restraining plaintiff in error from entering into any contract with any person in the state, and from furnishing school books to its agents in the state.

*Passing finally on the relief prayed for [50] the supreme court, awarding judgment, said:

"The plaintiff cannot, in this action, have an annulment of the contract already made. It may be that there are equitable circumstances forbidding the cancellation of such contract. It may be that compliance with the law by the defendant hereafter will retroactively validate the contract in the event that it should now be invalid. However, independently of such consideration, we do not have jurisdiction over that branch of the case. Our jurisdiction is in quo warranto alone. A grant of that jurisdiction does not authorize the joinder to a cause of action for ouster of another one for the annulment of a contract, merely because the subject-matter of the latter possesses incidental connection with the subject-matter of the former.

"The defendant will be ousted of its claimed rights to do business in this state until it complies with the requirements of the law, but the prayer of the petition for the annulment of the contract will be denied." [65 Kan. 847, 69 Pac. 563.]

Plaintiff in error is a New Jersey corporation engaged in the publishing and selling of school books, and the charge of the defendant in error is that plaintiff in error was doing business in the state without having complied with the laws of the state in regard to foreign corporations.

The laws of the state require a foreign corporation, as a condition of the right to do business in the state, to make an application to the charter board of the state to do such business and to file a certified copy of its charter or articles of incorporation, and to furnish certain information to such board. The statute also required the payment of a charter fee graduated upon the amount of the capital stock of the corporation. Laws 1896, chap. 10; Gen. Stat. 1901.

The court held that plaintiff in error had "complied, although irregularly, informally, and out of time, with the law, except as to § 2 of chapter 10 of the Laws of 1898," and

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the requirements of that section were necessary to give plaintiff in error "the status of a foreign corporation authorized to do business" in the state.

[51] The defense of plaintiff in error was, and its contention is *here, that its business was solely that of interstate commerce, and that the statute of Kansas alleged to have been violated could have no application to such business, and the court had no power to exclude plaintiff in error from transacting interstate commerce in the state. It was and is further contended that plaintiff in error had entered into contracts with certain persons and corporations in the state for the sale and delivery of its publications, which contracts were still in force and effect, and under which plaintiff in error had incurred liability; and if the statutes be construed as applicable to it they would impair the obligations of those contracts and be in violation of § 10 of article 1 of the Constitution of the United States.

A motion is made to dismiss on the ground that the judgment of the supreme court has been complied with. The compliance is not denied, but it is attempted to be justified on the ground that plaintiff in error had only to the 15th of September "to supply the wants of the public schools in Kansas with the books it had contracted to deliver, and under the stress of this public necessity, and under the sanction and penalties of its contract, it felt coerced to make a payment aforesaid (the charter fee) and otherwise to comply with the statute as interpreted by the supreme court in the case at bar."

It also urged that another suit has been brought by the same law officer of the state in the name of the state, in the district court of Shawnee county, which suit is pending in the supreme court on appeal from the ruling of the district court denying a temporary injunction, and that it is contended by the state the judgment of the supreme court in the case at bar was an adjudication of a noncompliance of plaintiff in error with the statutes of the state. And it is alleged that the same defenses were made as in the case at bar. It is hence contended that "there still exists a controversy, undetermined and unsettled," involving the right of the state to enforce the statute against a corporation engaged in interstate commerce.

The motion to dismiss must be granted. We said in *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132:

[52] *"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which

cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs, which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

The principle was discussed at some length and many illustrations of its enforcement were given. It has had illustrations since. *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; *Codlin v. Kohlhausen*, 181 U. S. 151, 45 L. ed. 793, 21 Sup. Ct. Rep. 584.

The case at bar is certainly within the principle. The judgment has been complied with. It makes no difference that plaintiff in error "felt coerced" into compliance. A judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation. After compliance there is nothing to litigate.

It is further urged that another suit has been brought, and, as decisive of its issues or some of its issues, the judgment in the case at bar is pleaded. But that suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over, and is limited by, the conditions of the case now before us.

Writ of error dismissed.

*MINNEAPOLIS & ST. LOUIS RAILROAD[53]
COMPANY, *Plff. in Err.*,

v.

STATE OF MINNESOTA *ex rel.* RAILROAD & WAREHOUSE COMMISSION.

(See S. C. Reporter's ed. 53-65.)

Constitutional law — validity of statute imposing on railway company the burden of proving proposed station unnecessary — error to state court — conclusiveness of finding of fact.

1. A railway company is not deprived of its right reasonably to manage or control its

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655; and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On the location and establishment of rail-

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property, nor is its property arbitrarily taken without compensation or due process of law, by Minn. Gen. Laws 1901, chap. 270, under which is imposed upon it the burden of showing, in proceedings to compel it to provide a station at an incorporated village on its line, that the establishment of a station there is unreasonable and unnecessary.

2. A finding of fact by an inferior state court, affirmed in the highest court of that state by a divided court, is conclusive on the Federal Supreme Court in reviewing a judgment of the highest state court.

[No. 138.]

*Argued and submitted January 21, 1904.
Decided February 23, 1904.*

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment affirming, by a divided court, a judgment of the District Court of Freeborn County in that State granting a writ of mandamus to compel a railway company to provide a station at a village on its line. *Affirmed.*

See same case below, 87 Minn. 195, 91 N. W. 465.

The facts are stated in the opinion.

Mr. **Albert E. Clarke** submitted the cause for plaintiff in error:

An affirmance by a divided court does not operate to settle the principles of law involved, or have the effect of an opinion or decision.

Hanifan v. Armitage, 117 Fed. 845; *Ettling v. Bank of United States* 11 Wheat. 78, 6 L. ed. 423; *Benton v. Woolsey*, 12 Pet. 27, 9 L. ed. 987; *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579; *Morse v. Gould*, 11 N. Y. 285, 62 Am. Dec. 103; *Re Griel*, 171 Pa. 412, 33 Atl. 375.

Any change in the line whereby the company is enabled to maintain the line at less expense, or operate it with greater safety and convenience and more economy, is necessarily a benefit to the public.

Fletcher v. Chicago, St. P. M. & O. R. Co. 67 Minn. 345, 69 N. W. 1085.

The police power of the state does not extend to cases of public convenience; it is limited to cases of public necessity.

Cooley, Const. Lim. 5th ed. pp. 707, 713; *Black*, Const. Prohibitions, § 62; *Cooley*, Const. Lim. § 577; *State v. Noyes*, 47 Me. 212.

Whether a law is necessary and reasonable as applied to each case is a judicial question for the court; and, if it is unnecessary or unreasonable, the court may declare it void.

way stations—see note to *Willson v. Winchester & P. R. Co.* 41 C. C. A. 219.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. 193 U. S.

Tiedeman, Limitations of Pol. Power, p. 593, § 194; *Evison v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 373, 11 L. R. A. 434, 48 N. W. 6.

The power of the legislature, as well as of the courts, is limited to the requirements of the community. When property is taken unnecessarily and without reason, the taking is not due process of law. That the taking is under form of law does not render the act less a violation of the Constitution.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Cooley*, Const. Lim. 5th ed. 435 {356}; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722; *Foule v. Mann*, 53 Iowa, 42, 3 N. W. 814.

The act of 1901 (Gen. Laws 1901, chap. 270) is absolutely void. It does not make the establishment and maintenance of the proposed station dependent upon the reasonableness of the requirement or the necessity for the station. It is not due process of law. Its enforcement takes the appellant's property without due process of law, and deprives it of the equal protection of the laws, and is therefore violative of the 14th Amendment to the Constitution of the United States.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The enforcement of such requirements as the one embodied in the order of the commission, by which stations may be located by compulsion less than a mile apart, is destructive of the value of the franchise of plaintiff in error, and diminishes the value of its charter contract.

Planters' Bank v. Sharp, 6 How. 327, 12 L. ed. 458.

Mr. **Howard H. Dunn** argued the cause, and, with Messrs. *W. B. Douglas* and *Lafayette French*, filed a brief for defendant in error:

The construction of this statute by the supreme court of Minnesota could not deprive the railroad company proceeded against of its property without due process of law; nor did its construction raise a Federal question.

Phoenix Ins. Co. v. The Treasurer, 11 Wall. 204, 20 L. ed. 112.

The construction given to a statute of a state by the highest judicial tribunal of such

U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what questions the Federal Supreme Court will consider in reviewing judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

state is regarded as a part of the statute, and is binding upon the courts of the United States as to its proper construction; and as to what should be regarded as among its terms no Federal question can arise.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54.

The plaintiff in error has no interest to assert that Gen. Laws 1901, chap. 270, is unconstitutional because it might be construed so as to cause it to violate the Constitution. Its right is limited solely to the inquiry whether, in the case which it presents, the effect of applying the statute is to deprive it of its constitutional rights.

Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

As the decision of the supreme court of Minnesota was upon a question not of a Federal character, and one broad enough to sustain the judgment, the writ of error should be dismissed.

Miller v. Swann, 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52; *Marrow v. Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Hale v. Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

The holding of the supreme court of Minnesota that, upon all of the evidence before it, the plaintiff in error did not overcome the prima facie case arising by virtue of the statute, does not present a Federal question; and this court will not re-examine the evidence to ascertain whether the evidence justified this finding of the court below.

Egen v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Beatty v. Benton*, 135 U. S. 244, 34 L. ed. 124, 10 Sup. Ct. Rep. 747; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

If there is a Federal question involved in the judgment, the decision of the court below is so clearly right that the writ of error should be dismissed or the judgment affirmed.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Connecticut ex rel. New York & N. E. R. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 74, 42 L. ed. 954, 18 Sup. Ct. Rep. 513.

Subject to the authority of Congress within the sphere of its rightful powers, and

subject to any restriction imposed by the Constitution, the legislature of each state possesses full power to enact police regulations of railways.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 296, 45 L. ed. 194, 199, 21 Sup. Ct. Rep. 115.

The supreme court of Minnesota has held that there is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require railroad companies to provide suitable passenger waiting rooms and depots at any place, incorporated or unincorporated, where the public necessity or convenience reasonably requires it to be done.

State ex rel. Railroad & Warehouse Comrs. v. Minneapolis & St. L. R. Co. 76 Minn. 469, 79 N. W. 510.

And under a similar statute the supreme court of South Dakota held that the railroad commissioners of that state had authority to require a railroad to construct a suitable station house at a regular station used by it for the receipt and discharge of passengers and freight, where the only existing accommodation was a platform and side track, and there was a public necessity for such building.

State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co. 12 S. D. 305, 47 L. R. A. 569, 81 N. W. 503.

In many jurisdictions, statutory regulations as to the establishment and erection of depots at proper places along the route of the road have been sustained as a proper exercise of the police power.

Com. v. Eastern R. Co. 103 Mass. 254, 4 Am. Rep. 555; *Railroad Comrs. v. Portland & O. C. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *State v. New Haven & N. Co.* 37 Conn. 153; *State use of School Funds v. Wabash, St. L. & P. R. Co.* 83 Mo. 144; *San Antonio & A. P. R. Co. v. State*, 79 Tex. 264, 14 S. W. 1063; *State ex rel. Barton County v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. 722.

A statute, or a regulation provided for therein, is frequently valid or the reverse, according as it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115.

It is the duty of the railroad company to furnish reasonable depot facilities. The number and location of the depots so as to constitute reasonable depot facilities vary with the changes and amount of population and business. A contract to leave a certain distance along the line of road destitute of depots is in contravention of public policy.

St. Joseph & D. C. R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357.

The location of railroad depots has much to do with the accommodation of the wants of the public. And when once established, a change of affairs may require a change of location in order to suit public convenience. Railroad companies in order to fulfil one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require.

Marsh v. Fairbury, P. & N. W. R. Co. 64 Ill. 414, 16 Am. Rep. 564; *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122.

The location of stations for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the railroad company; and its interest can be better determined by an administrative board intrusted by the legislature with that duty, than by the ordinary judicial tribunal.

Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; *Northern P. R. Co. v. Washington*, 142 U. S. 492, 499, 35 L. ed. 1092, 1095, 12 Sup. Ct. Rep. 283.

Mr. Justice **McKenna** delivered the opinion of the court:

This is a proceeding in mandamus to compel plaintiff in error to build and maintain a station house on the line of its road at the village of Emmons, in compliance with an order of the Railroad & Warehouse Commission of the state of Minnesota.

The order of the commission was made upon petition and upon hearing after due notice to plaintiff in error. The writ was granted by the district court of Freeborn county, where the proceedings were commenced.

The railroad company in its answer attacks the statute under which the commission acted as follows:

"This respondent says further, that chapter 270, General Laws 1901, approved April 13, 1901, which was enacted by the legislature of said state at its thirty-second session, which arbitrarily requires railroad carriers to provide freight and passenger rooms and depots at all villages and boroughs upon their respective roads, without regard

to the necessity therefor and without regard to the location or situation of such village or boroughs, or to existing conditions, is unjust, unreasonable, contrary to public policy, and void.

"It denies to the respondent the right to reasonably manage or control its own business; it takes its property without its consent.

"It takes the property of this respondent arbitrarily and unnecessarily, *for public use[60] without just compensation, and is, therefore, violative of the 5th Amendment to the Constitution of the United States.

"It deprives the respondent of its property without due process of law, and denies it the equal protection of the laws, and thus violates the 14th Amendment to the Constitution of the United States."

The supreme court of the state affirmed the judgment of the district court, the members of the court equally dividing on the facts.

This is the second attempt of the village of Emmons to secure a depot. The first was unsuccessful (76 Minn. 469, 79 N. W. 510, "wherein the facts are stated"), the supreme court observed; and it further observed, passing on the case at bar:

"Mr. Associate Justice Lovely having been of counsel for the village in the former proceeding, was disqualified from sitting at the hearing of this appeal, and the cause was necessarily argued and submitted to the four remaining members of the court. We assume that Laws 1901, chapter 270, which, in express terms, requires railway companies to build and maintain depots or station houses in all villages through which their roads may pass, is in itself valid legislation, and not open to the objection that it is not within the legislative power to enact such a law. With this assumption no dispute has arisen over a construction of the act, to the effect that all incorporated villages within this state located on railway lines are *prima facie* entitled to depots. The commissioners have the power to order the erection and maintenance of depot buildings unless it is made to appear that such an order would be so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law. The change made by the statute of 1901 simply affects or shifts the burden of proof; for, prior to its enactment, the burden was on the municipality to establish the reasonableness and necessity of a depot therein, while now a railway company appearing before the commissioners, or trying its case on appeal to the district court, bears the burden of showing that such a requirement is not called for, and that the *building and maintenance of a depot in[61] the village is unnecessary and unreasonable.

"But, while agreeing as to this interpretation of the law, we fail to reach the same conclusion in respect to the facts. We do not question the correctness of the conclusion reached when considering the former appeal. But two members of the court, Chief Justice Start and Associate Justice Brown, are of the opinion that, from the evidence, it appears that there has since been a substantial growth in the village,—a growth which makes an altogether different showing,—and that the company did not overcome the prima facie case arising by virtue of the statute, and therefore that the judgment appealed from should be affirmed. Associate Justices Collins and Lewis are unable to agree to this. Their conclusion is that the testimony fails to show that there has been a real or substantial change in the village, its needs or necessities, that the situation is practically as it was when the former proceeding was considered, and that the prima facie case made by the village has been wholly overcome by the defendant company.

"With this difference of opinion the judgment appealed from must be, and hereby is, affirmed." [87 Minn. 195, 91 N. W. 465.]

The defendant in error contends by those observations the court only decided, following its former decision (76 Minn. 469, 79 N. W. 510), that under chapter 6, § 388, General Statutes of 1894, the commission had the power to order the erection and maintenance of depots where public necessity or convenience reasonably required it to be done, and that the only change made by the act of 1901 was to shift the burden of proof from the municipality to the railroad company, and therefore the court, in deciding that the railroad company had not overcome the prima facie case arising from the statute, did not decide a Federal question.

It is difficult to deal with the motion on account of the uncertainty of the contentions of plaintiff in error. In its answer in the district court it directly attacks the statute. In this court its contentions are not so sweeping and we are left in doubt by its opening and reply briefs whether the statute as construed by the supreme court [62] is objected to or only its application *under the facts of the case. However, as the statute was directly attacked in the answer the motion to dismiss is denied, and we will consider whether the grounds of objection to the statute are substantial and sufficient.

(1) The act of 1897 provided as follows:

"That all railroad corporations or companies operating any railroad in this state shall . . . provide at all villages and boroughs on their respective roads depots with suitable waiting rooms for the protec-

tion and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight. . . . Such railroad corporations or companies shall, at such depots or stations, stop their trains regularly as at other stations, to receive and discharge passengers, and, for at least one half hour before the arrival, and one half hour after the arrival, of any passenger train, cause their respective depots or waiting rooms to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid."

In its first opinion (76 Minn. 469, 79 N. W. 510), the court held that the word "villages," in the act meant incorporated villages, and that Emmons was not incorporated. The court, however, proceeded further, and said:

"But there is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot and passenger waiting room at any place, incorporated or unincorporated, where public necessity or convenience reasonably requires it to be done. But this power is neither absolute nor arbitrary. The facts must be such, having regard to the interests, not only of the particular locality, but also of the public at large and of the railroad company itself, as to justify the commissioners, in the exercise of a reasonable discretion and judgment, in ordering the railway company to provide a depot and passenger station at the place in question. Counsel for the relators admit this. The only evidence being the report of the commissioners themselves, we must refer to it to ascertain whether the facts therein stated reasonably justified their order requiring the railroad company to provide and *maintain a depot and station at Em-[63]mons. The statute provides that, 'upon the trial of said cause [before the court, as in this case, to enforce the order of the commissioners], the findings of fact of said commission as set forth in its report shall be prima facie evidence of the matters therein stated.' (Gen. Stat. 1894, § 399.)"

The court then reviewed the facts, and decided that the order of the commission establishing a station at Emmons was unreasonable. The act was amended in 1901, and the court in the case at bar has decided, as we have seen, the amendment has only shifted the burden of proof. In other words, to quote from the opinion of the court, "incorporated villages within this state (Minnesota) located on railway lines are prima facie entitled to depots," and at a hearing before the commissioners and in the district court the railroad has the burden of showing that

the establishment of a depot is unreasonable and unnecessary.

The statute, as thus construed, does not transcend the power of the state. In other words, and meeting exactly the contention of plaintiff in error, the statute does not deny plaintiff in error the right to reasonably manage or control its property or arbitrarily take its property without its consent or without compensation or due process of law. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. To establish stations at proper places is the first duty of a railroad company. The state can certainly provide for the enforcement of that duty. An incorporated village might be said to be such a place without an express declaration of the statute. To make it prima facie so by statute and to impose the burden of meeting the presumption thence arising, certainly does not amount to an invasion of the rights of property or an unreasonable control of property. This seems to be conceded in the reply brief of plaintiff in error. Counsel say:

[64] "The power of the state to require the construction and maintenance of stations at proper points is not questioned. We concede it. The power to require an unnecessary and wholly useless expenditure of money, in the construction *and maintenance of stations where they are not needed, is denied. That is the whole case."

And stating the decision of the court in 76 Minn. counsel quotes as follows:

"The commissioners have the power to order the erection and maintenance of depot buildings, unless it is made to appear that such an order is so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law."

And counsel adds: "This is, of necessity, a Federal question."

Whether it is or not, and whether it is so dependent on the facts of the case as not to be open to our review, is the next ground to be considered.

(2) The charge is that the property of plaintiff in error is taken without due process of law; but whether so taken is made to depend upon a question of fact,—the requirement of "an unnecessary and wholly useless expenditure of money." It is well established that on error to a state court this court cannot re-examine the evidence, and when the facts are found we are concluded by such finding. *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. But in the case at bar we are met by the circumstance that the supreme court equally divided on the question whether the facts distinguish this case from 76 Minn.

193 U. S.

The plaintiff in error, therefore, contends that there has been no judgment of the supreme court on the facts, and they are open to review here. The contention is not tenable. There is no statement of facts by the supreme court, and its decision, though by a divided court, constituted an affirmance of the finding of the district court. The finding was as follows:

"That the respondent railroad company has no depot or station house whatever for the accommodation of the public upon its line of railroad at the village of Emmons, and that its line of road is the only railroad reaching such village.

"That there is a suitable location for a depot or station house upon respondent's right of way at the point referred to and described in the order of the board of railroad and warehouse *commissioners herein[65] which order is hereto attached. That it is necessary for the accommodation of the citizens of Emmons and vicinity, and the public at large, and public necessity requires that the respondent railroad company build and maintain a suitable station house at the said village of Emmons for the accommodation of the public transacting business with the respondent at that point."

The finding, like the verdict of a jury, is conclusive in this court. *Dover v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452. It follows that the order of the Warehouse Commission was not an unreasonable requirement, and the judgment is affirmed.

AH HOW, alias Louie Ah How, *Appt.*,

v.

UNITED STATES. (No. 307.)

CHU DO, alias Chu Gee, *Appt.*,

v.

UNITED STATES. (No. 308.)

LEW GUEY, *Appt.*,

v.

UNITED STATES. (No. 309.)

YUNG LEE, *Appt.*,

v.

UNITED STATES. (No. 312.)

(See S. C. Reporter's ed. 65-78.)

Statutes—Chinese exclusion act—repeal—formal pleadings unnecessary in deportation proceedings—evidence of prior adjudication—sufficiency of evidence.

1. No repeal of the provisions of the act of May 5, 1892 (27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319), § 3, imposing on Chinese the burden of establishing their right to remain in the United States, was ef-

fectured by the act of April 29, 1902 (32 Stat. at L. 176, chap. 641), § 1, continuing all laws then in force so far as not inconsistent with treaty obligations, on the theory that the former section was inconsistent with the treaty with China of December 8, 1894 (28 Stat. at L. 1210), art. 4, giving the Chinese the rights of citizens of the most favored nation, since the treaty itself in art. 5 expressly refers to the act of 1892, as amended by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 1322), and states that the Chinese government will not object to the enforcement of those acts.

2. The provisions for Chinese registration made by the act of May 5, 1892 (27 Stat. at L. 25, chap. 60 U. S. Comp. Stat. 1901, p. 1319), § 6, as amended by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 1322), were not repealed by the act of April 29, 1902 (32 Stat. at L. 176, chap. 641), § 1, continuing all laws then in force so far as not inconsistent with treaty obligations, on the theory that such section was inconsistent with the treaty with China of December 8, 1894 (28 Stat. at L. 1210), since art. 5 of that treaty contains an express reference to the requirement of registration of the acts of 1892 and 1893, and states that the Chinese government will not object to the enforcement of those acts.
3. No formal complaint or pleadings are required in the proceedings under the act of May 5, 1892 (27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319), as amended by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 1322), for the determination of the right of Chinese laborers to remain in the United States.
4. The written statement by a United States commissioner that a Chinaman was brought before him charged with being unlawfully within the United States, and was adjudged to have the right to remain in the United States by reason of being a citizen thereof, is not evidence of such adjudication.
5. A United States commissioner is not, as a matter of law, bound to be satisfied by the testimony of a Chinese laborer that he was disabled by sickness from obtaining the certificate of residence required by the act of May 5, 1892 (27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319), § 6, as amended by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 1322), in order to entitle him to remain in the United States.

[Nos. 307, 308, 309, 312.]

Argued January 12, 1904. Decided February 23, 1904.

A PPEALS from the District Court of the United States for the Eastern District of New York to review judgments confirming decisions of a United States commissioner, and adjudging that the appellants be removed from the United States to China. *Affirmed.*

The facts are stated in the opinion.

Mr. Terence J. McManus argued the cause, and, with Messrs. Frank S. Black and

Russell H. Landale, filed a brief for appellants:

Earlier legislation on the subject of Chinese exclusion was concededly in violation of treaty obligations with China.

Chae Chang Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *United States v. Gue Lim*, 176 U. S. 459, 464, 44 L. ed. 544, 546, 20 Sup. Ct. Rep. 415.

A construction which seeks to effectuate treaty obligations should be sought after rather than the contrary.

Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *United States v. Gue Lim*, 176 U. S. 459, 465, 44 L. ed. 544, 547, 20 Sup. Ct. Rep. 415; *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456.

The act of 1892 is repealed to the extent of its repugnance to the treaty.

Wood v. United States, 16 Pet. 342, 363, 10 L. ed. 987, 995; *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153; *South Carolina v. Stoll*, 17 Wall. 425, 21 L. ed. 650.

The courts have drawn a distinction between an alien who remains here and one who has left here and seeks to return.

Lem Moon Sing v. United States, 158 U. S. 547, 548, 39 L. ed. 1085, 1086, 15 Sup. Ct. Rep. 967; *United States v. Wong Kim Ark*, 169 U. S. 700, 42 L. ed. 908, 18 Sup. Ct. Rep. 456.

These Chinese residents have been deprived of due process of law.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance.

Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524.

The objection as to the sufficiency of these complaints is not affected by the decision in the case of *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891.

Where the other requirements of the statute are met, the phrase requiring that the "business be conducted in his own (the merchant's) name" should be so broadly construed as practically to eliminate this requirement.

Lee Kan v. United States, 10 C. C. A. 669, 15 U. S. App. 516, 62 Fed. 914.

A court is not at liberty, arbitrarily and without reason, to reject or discredit the testimony of a witness upon the ground that he is a Chinaman.

Woey Ho v. United States, 48 C. C. A. 705, 109 Fed. 888.

Mr. Max J. Kohler by special leave also filed a brief for appellants:

This court and the lower Federal courts have repeatedly given force and effect to such provisions as article 4 of the treaty of 1894 with China, as invalidating statutes and proceedings devoid of ordinary due process of law.

Yick Wo v. Hopkins, 118 U. S. 356, 368, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Re Quong Woo*, 13 Fed. 229; *Re Ah Chong*, 6 Sawy. 451, 2 Fed. 733; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Re Lintner*, 57 Fed. 587; *United States v. Gue Lim*, 176 U. S. 459, 465, 44 L. ed. 544, 547, 20 Sup. Ct. Rep. 415.

The commissioner erred in excluding the certificate of the United States commissioner, which was relied upon to show an adjudication, made after due hearing by such commissioner, to the effect that the defendant was a citizen of the United States by birth.

United States v. Chung Shee, 22 C. C. A. 639, 44 U. S. App. 751, 76 Fed. 951; *United States v. Luey Guey Auck*, 115 Fed. 252; *United States v. Hills*, 124 Fed. 831.

The principle of *res judicata* is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.

Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18; *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437.

This principle applies to determinations based upon jurisdiction, whether made in courts of record or not of record.

Gates v. Preston, 41 N. Y. 113; *Reich v. Cochran*, 151 N. Y. 122, 37 L. R. A. 805, 56 Am. St. Rep. 607, 45 N. E. 367; *Mohr v. Manierre*, 7 Biss. 419, 17 Fed. Cas. No. 9,695, Affirmed in 101 U. S. 417, 25 L. ed. 1052.

Congress has not failed to provide methods by which the commissioner's determination upon such issues can be proved; though, if there were no express provisions on the point, the power to hear and determine would carry with it power to make an order which can be proved, and to certify to such determination.

United States v. Jones, 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 615; *Hoyne v. 193 U. S.*

United States, 38 Fed. 542; *Phillips v. United States*, 33 Fed. 164.

United States commissioners have for many years past been constantly called upon to issue a large variety of certificates, and their power to do so has been repeatedly sustained both in this court and below.

United States v. McDermott, 140 U. S. 151, 35 L. ed. 391, 11 Sup. Ct. Rep. 746; *United States v. Julian*, 162 U. S. 324, 40 L. ed. 984, 16 Sup. Ct. Rep. 801.

In proceedings before United States commissioners, just as in matters pending before a justice of the peace, absolute technical accuracy is not to be expected or insisted upon.

Southworth v. United States, 151 U. S. 179, 38 L. ed. 119, 14 Sup. Ct. Rep. 274.

The general line of authority requiring complaints setting forth the facts establishing causes of action is applicable here.

Rice v. Amcs, 180 U. S. 371, 374, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406; *Ex parte Hart*, 28 L. R. A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; *Ex parte Lane*, 6 Fed. 34; *United States v. Tureaud*, 20 Fed. 621; *United States v. Sapinkow*, 90 Fed. 654; *West v. Cabell*, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752.

Arrests without investigation, even where sworn complaints were not necessary, are not authorized in these cases.

Reisterer v. Lee Lum, 36 C. C. A. 285, 94 Fed. 343.

A complaint stating facts at least upon information and belief is necessary before this oppressive reversal of burden of proof can be invoked by the government.

Southworth v. United States, 161 U. S. 639, 40 L. ed. 835, 16 Sup. Ct. Rep. 694.

Solicitor General Hoyt argued the cause and filed a brief for appellee:

As to any irregularity in the complaints, if such existed,—which is not conceded,—it was fully cured by the subsequent proceedings.

Chin Bak Kan v. United States, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; *Fong Yue Ting v. United States*, 149 U. S. 729, 37 L. ed. 918, 13 Sup. Ct. Rep. 1016; *Chow Loy v. United States*, 50 C. C. A. 279, 112 Fed. 354; *Nishimura Ekiu v. United States*, 142 U. S. 651, 662, 35 L. ed. 1146, 1150, 22 Sup. Ct. Rep. 336.

The treaty of 1894 did not repeal existing law.

United States v. Lee Yen Tai, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. Rep. 629; *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891.

The term "merchant," as it is used in Chinese exclusion legislation, has been clearly defined by the law and by the decisions of the courts.

Re Ah Yow, 59 Fed. 561; *Lai Moy v. United States*, 14 C. C. A. 283, 29 U. S. App. 517, 66 Fed. 955; *Mar Bing Guey v. United States*, 97 Fed. 576.

It has expressly been held not to include bookkeepers and paid assistants in a store.

United States v. Pin Kwan, 40 C. C. A. 618, 100 Fed. 609.

Even if genuine, the certificate was not properly admissible as evidence.

United States v. Lew Poy Dew, 119 Fed. 786.

Mr. Justice **Holmes** delivered the opinion of the court:

These are appeals from judgments of the United States district court confirming decisions of a commissioner, and adjudging that the appellants be removed from the United States to China. *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891. The commissioner decided that each of the appellants was a Chinese laborer found without certificate of residence, as required by law, within the United States, and was not entitled to remain within the United States. The facts may be summed up as follows: The appellants were arrested in July, 1902, when working in laundries, they all having failed to produce certificates of residence when called upon to do so by the Chinese inspector. At the hearing before the commissioner they offered testimony of witnesses other than Chinese that they were residents of the United States on May 5, 1892. Ah How and Chu Do put in evidence that they were not laborers. Yung Lee offered evidence of illness, which he contended made him unable to procure his certificate. Chu Do offered parol evidence that he was born in the United States, and therefore was a citizen, and also that he was a minor during the time allowed by the statute for obtaining a certificate. Lew Guey offered similar evidence and a certificate of another United States commissioner of a hearing before him and an adjudication that Lew Guey had the right to remain in the United States by reason of being a citizen thereof. The United States offered no evidence beyond the facts stated above.

The ground of appeal common to all the [76] cases is that §§ 3 *and 6 of the act of May 5, 1892, 27 Stat. at L. 25, chap. 60 (U. S. Comp. Stat. 1901, p. 1319), have been repealed. By § 3 any Chinese person arrested under the provisions of the act shall be adjudged to be unlawfully within the United States unless he shall establish by affirmative proof, to the satisfaction of the judge or commissioner, his right to remain. Of course, if the burden of proof was on the appellants, the commissioner and judge might

not be satisfied by the affirmative evidence produced. We are not asked to review the finding of fact. See *Fong Yue Ting v. United States*, 149 U. S. 698, 714, 715, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016. But it is argued that this section is done away with by § 1 of the act of April 29, 1902, chap. 641, 32 Stat. at L. 176, continuing all laws then in force, "so far as the same are not inconsistent with treaty obligations." It is said that the section is inconsistent with article 4 of the treaty of December 8, 1894, 28 Stat. at L. 1210, agreeing that Chinese laborers, or Chinese of any other class, either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. It is pointed out that the treaty of 1894 with Japan [29 Stat. at L. 848] and the treaty of 1859 with Paraguay [12 Stat. at L. 1087] give the rights and privileges of native citizens to the subjects of those countries in access to the courts and in the defense of their rights, and it is said that the law as to the burden of proof cuts down those privileges and rights. The section has been upheld, however, by this court, since the treaty, and after the passage of the act. *Chin Bak Kan v. United States*, 186 U. S. 193, 200, 46 L. ed. 1121, 1125, 22 Sup. Ct. Rep. 891; *United States v. Lee Yen Tai*, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. Rep. 629. It is not repealed by the laws of 1902. The clause of the treaty had a different object, and in view of the difficulties encountered in such an investigation, it could not have been supposed to promise that special measures theretofore taken should not be continued in force for the purpose of ascertaining the very question whether the laborers were lawfully residing in the United States or not. See *Fong Yue Ting v. United States*, 149 U. S. 698, 730, 37 L. ed. 905, 919, 13 Sup. Ct. Rep. 1016. But it is enough to say that the treaty itself, in article 5, expressly refers to the act of 1892 as *amended [77] by the act of 1893, and states that the Chinese government will not object to the enforcement of those acts.

It follows still more clearly from the language of article 5 of the treaty, that § 6, as amended by the act of November 3, 1893, 28 Stat. at L. 7, chap. 14 (U. S. Comp. Stat. 1901, p. 1322), remains in force. *Lee Lung v. Patterson*, 186 U. S. 168, 176, 177, 46 L. ed. 1108, 1111, 22 Sup. Ct. Rep. 795. That section requires Chinese laborers who are entitled to remain in the United States to obtain a certificate of residence from the collector of internal revenue of their district, or to be deported, subject to certain excuses.

Article 5 of the treaty especially refers to the requirement of registration in the acts of 1892 and 1893, although, as we have said, it states that the enforcement of the acts as a whole will not be objected to. In one or two of the cases there was a suggestion below that § 6 of the act was unconstitutional, but that question was disposed of in *Fong Yuc Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016, and was not pressed.

The complaints are objected to as insufficient, because, in addition to alleging that the appellants are laborers not entitled to remain in the United States without certificates, it adds the words "having come unlawfully into the United States without certificates," thus implying, it is said, that an unlawful coming into the United States could be legalized by obtaining a certificate. It is enough to say that such objections have been answered by *Fong Yuc Ting v. United States*, 149 U. S. 698, 729, 37 L. ed. 905, 918, 13 Sup. Ct. Rep. 1016, and *Chin Bak Kan v. United States*, 186 U. S. 193, 199, 46 L. ed. 1121, 1125, 22 Sup. Ct. Rep. 891. In the former it was laid down that "no formal complaint or pleadings are required." That proposition is not affected by the later statutes. We do not mean to imply that there is anything in the objection if we should consider it on its merits.

As to the testimony that two of the appellants were merchants during the period of registration, all that appears is that the commissioner did not believe it. We cannot go outside the record of the specific case for the purpose of inquiring whether the decision was induced by some view of the law which may be open to argument. The same may be said as to the parol testimony as to the age of two of the appellants or their birth in this country. But we may add that [78] it *by no means follows from the decision in *United States v. Gue Lim*, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415, that the minor children of laborers, old enough to do work, are not required to have certificates. The language of the statute certainly is broad enough to include them and does not indicate a division by local laws with regard to coming of age. The principle applicable to the admission into this country of the wife and children of a certificated merchant is not the principle applicable to such a case. As to the certificate of the United States commissioner, offered by Lew Guey, it was merely a written statement by the commissioner that a person of that name was brought before him on the usual charge, and was adjudged to have the right to remain in the United States by reason of being a citizen. Apart from the possibility that the commissioner in the present hearing

was not satisfied of the identity of the party, such a statement is not the certificate of residence required by the act of 1892, and is not evidence of a judgment. *United States v. Lee Poy Dew*, 119 Fed. 786. The evidence that Yung Lee was disabled by sickness from obtaining a certificate did not satisfy the commissioner. We cannot say as matter of law that he was bound to be satisfied by the testimony of Yung Lee himself that he was so disabled.

We have assumed, for the purpose of decision, what does not clearly appear from the record, that the judge who tried the case on appeal tried it solely on the commissioner's report of evidence and heard no witnesses. Whether the fact could be assumed if the result would be a reversal of the judgment below, we need not decide. See *United States v. Lee Seick*, 40 C. C. A. 448, 100 Fed. 398, 399. There is no other question worthy of notice. We are asked to express an opinion as to the right of the appellants to give bail pending their appeal, but that now is a moot point. We agree with the government that these cases are covered by previous decisions of this court.

Judgment affirmed.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissent.

*ALVIN L. LEIGH, *Plff. in Err.*, [79]
v.

HENRY S. GREEN.

(See S. C. Reporter's ed. 79-93.)

Error to state court — Federal question—when raised in time—due process of law in proceedings to foreclose tax lien—notice.

1. A Federal question, though first raised on a motion for rehearing in the highest state court, is in time to confer jurisdiction on the

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States on writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

As to how and when questions must be raised and decided in a state court, in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

As to what service of process is sufficient to constitute due process of law—see note to *Pinnney v. Providence Loan & Invest Co.* 50 L. R. A. 577.

United States Supreme Court of a writ of error to the state court, where that court entertained the motion and decided the question.

2. Due process of law is not denied the holder of a lien on real property by the lack of any provision for personal service on him of notice of the pendency of proceedings *in rem* to enforce the lien acquired by a purchaser of the property at a tax sale, which are authorized by the Nebraska statutes, where notice is given by publication to all persons interested in the property to appear and set up their claims.

[No. 119.]

Argued January 13, 1904. Decided February 23, 1904.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which reversed a decree of the District Court of Knox County in that State in favor of plaintiff in a suit to quiet title, and remanded the cause with directions to render a decree in favor of defendant. *Affirmed.*

See same case below, 62 Neb. 344, 86 N. W. 1093, and 64 Neb. 533, 90 N. W. 255.

Statement by Mr. Justice **Day**:

The facts essential to the determination of this case are briefly summarized as follows: Irwin Davis was the owner of certain lands in Knox county, Nebraska. On the 24th day of November, 1880, an action was begun by Algernon S. Patrick against Davis, in the district court of the county, and an attachment was issued and levied upon the lands. The case was afterwards removed to the circuit court of the United States for the district of Nebraska, on October 18, 1882, where on January 21, 1890, an order for the sale of the lands in question was made for the satisfaction of the judgment, and the same were sold on May 15, 1894, by the United States marshal to Lionel C. Burr. Burr afterwards conveyed the lands to Crawford and Peters. On June 23, 1894, Crawford and Peters conveyed the premises to Alvin L. Leigh, the plaintiff in error in the present case.

Pending said attachment proceedings, on [80] December 28, 1882, a *deed was filed for record in the clerk's office of Knox county, purporting to convey the lands to Henry A. Root on October 8, 1880. Afterwards, on May 12, 1894, a decree was rendered in the district court of Douglass county, Nebraska, in a cause wherein said Patrick was plaintiff and Davis and others were defendants, setting aside the deed from Davis to Root as fraudulent and void as against the said Patrick.

In 1891 actions were brought in the district court of Knox county, wherein the Farmers' Loan & Trust Company was plain-

tiff and Henry A. Root and different subdivisions of the lands were defendants, for the foreclosure of certain tax liens, which actions, taken together, cover the lands in controversy in the present suit.

In the same year, 1891, decrees were entered in those cases, and orders made directing the sale of the lands for the satisfaction of the amounts found due by the decrees. In pursuance of said decrees the lands were sold by the sheriff to Henry S. Green, defendant in error in the present action. The deeds of conveyance were made and delivered to him by the sheriff. Plaintiff in error claims title because of the attachment proceedings, and defendant in error bases his claim to title upon the proceedings had for the foreclosure of the tax liens. This suit was brought by the plaintiff in error Leigh, in the district court of Knox county, to quiet title to the lands in controversy.

In that court a decree was rendered in favor of the plaintiff in error Leigh, which decree was reversed by the supreme court of Nebraska, and the cause remanded with directions to render a decree in favor of the defendant Green.

This writ of error is prosecuted to review the judgment of the supreme court of Nebraska.

Messrs. J. M. Woolworth and W. D. McHugh argued the cause and filed a brief for plaintiff in error:

The same principles and rules which govern private citizens when seeking redress of their grievances in the judicial courts govern the state when it becomes a suitor or consents to be sued.

United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; *Mitchel v. United States*, 9 Pet. 711, 742, 7 L. ed. 283, 294; *Brent v. Bank of Washington*, 10 Pet. 596, 9 L. ed. 547; *Smoot's Case*, 15 Wall. 36, 21 L. ed. 107; *State ex rel. Smyth v. Kennedy*, 60 Neb. 300, 83 N. W. 87; *The Siren*, 7 Wall. 152, 19 L. ed. 129; *Clark v. Barnard*, 108 U. S. 436, 437, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *Beers v. Arkansas*, 20 How. 529, 15 L. ed. 992; *Moore v. Tate*, 87 Tenn. 725, 10 Am. St. Rep. 712, 11 S. W. 935; *Green v. State*, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; *People v. Stephens*, 71 N. Y. 527; *Southern P. R. Co. v. United States*, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154.

If the state, by going into its courts for the purpose of invoking their powers in its behalf, puts itself on a footing with its citizens, a private party holding under the sovereign can be in no better condition. And such private party cannot claim any exemption which the state does not enjoy.

Laws imposing taxes upon property, which provide a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, without notice to the owner, deprive the owner of his property without due process of law.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

Actions for the enforcement of mortgages and other liens are not actions *in rem*, strictly considered. They differ from actions strictly *in rem*, among other things, in that the interest of the defendant is alone sought to be affected; that citation to him is required; and that judgment therein is only conclusive between the parties.

Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165.

When a person interested in property is known, and is a resident and within the jurisdiction, so that he can be personally reached by process, he cannot be cut off by a judgment in an action to which he is not a party and of which he has no notice.

Tyler v. Registration Court Judges, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812.

Messrs. Edward P. Smith and W. R. Green argued the cause and filed a brief for defendant in error:

The proceedings to enforce the tax liens were actions *in rem*.

Cooley, Taxn. § 15; *Blevins v. Smith*, 104 Mo. 583, 13 L. R. A. 441, 16 S. W. 213; *Blackwell*, Tax Titles, § 954; *Jones v. Devore*, 8 Ohio St. 430; *Freeman*, Judgm. § 607, p. 1055; *Pritchard v. Madren*, 24 Kan. 486; *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; *Ball v. Ridge Copper Co.* 118 Mich. 7, 76 N. W. 130; *Woodruff v. Taylor*, 20 Vt. 65.

That plaintiff's grantor was not made a party to the foreclosure proceedings is entirely immaterial.

Herman, Estoppel, § 296; *Pritchard v. Madren*, 24 Kan. 486; *Monroe v. Douglas*, 4 Sandf. Ch. 182; *Cooley*, Taxn. 672; *Ball v. Copper Ridge Co.* 118 Mich. 7, 76 N. W. 130; *Cooley*, Const. Lim. p. 498.

In a proceeding *in rem*, the whole world is a party, and any person whomsoever having an interest in the property may interpose a claim or prosecute his appeal from the sentence.

Mankin v. Chandler, 2 Broek. 127, Fed. Cas. No. 9,030.

The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at

liberty to avail himself by appearing as a claimant in the case.

Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165.

Seizure, however, is not necessary where the property is land within the jurisdiction of the court.

Chauncey v. Wass, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; *Tyler v. Registration Court Judges*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812; *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585.

The owner can always appear as claimant, if he desires.

Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

Within reasonable limits the legislature may prescribe the nature of such notice; and when notice is given in conformity with the legislative provisions, it affords everyone interested in the property due process of law.

Monroe v. Douglas, 4 Sandf. Ch. 182; *Woodruff v. Taylor*, 20 Vt. 73; *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 199; *Happy v. Mosher*, 48 N. Y. 313; *Hogle v. Mott*, 62 Vt. 255, 22 Am. St. Rep. 106, 20 Atl. 276; *Pinney v. Providence Loan & Invest. Co.* 106 Wis. 396, 50 L. R. A. 599, 80 Am. St. Rep. 41, 82 N. W. 308.

It is only necessary, in actions strictly *in rem*, to serve notice on the *res*; and when notice is so served it is notice to the world.

Cross v. Armstrong, 44 Ohio St. 624, 10 N. E. 160; *Montgomery Branch Bank v. Hodges*, 12 Ala. 118; *Freeman*, Judgm. §§ 606, 607.

It is not necessary that the notice should be directed to any person or persons, or even to all persons interested in the property, but only that it should be of such a nature as to apprise parties who read the same that their interests will be affected.

Ball v. Ridge Copper Co. 118 Mich. 7, 76 N. W. 130; *Francis v. Grote*, 14 Mo. App. 324.

It was entirely immaterial whether plaintiff's grantor, Patriek, was a resident or a nonresident.

Pritchard v. Madren, 24 Kan. 486; *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; *Ball v. Ridge Copper Co.* 118 Mich. 7, 76 N. W. 130; *Campbell v. Evans*, 45 N. Y. 356; *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585; *Shephard v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773.

Public policy requires that the state should have its taxes, and the laws should not be so construed as to allow their evasion.

Chauncey v. Wass, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; *De Treville v. Smalls*, 98 U. S. 525, 25 L. ed. 174.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

A motion is made to dismiss because the claim of impairment of a right secured by the 14th Amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the supreme court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska supreme court to decide the claim theretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the 14th Amendment to the Constitution of the United States. Be this as it may, the supreme court of Nebraska entertained the motion and decided the Federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing. *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730.

The Federal question presented for our consideration is briefly this: Is the Nebraska statute under which the sale was made and under which the defendant in error claims title, in failing to make provision for service of notice of the pendency of the proceedings upon a lienholder, such as Patriek, a deprivation of property of the lienholder without due process of law within the protection of the 14th Amendment?

The statutes of Nebraska under which the conveyances were made to the Farmers' Loan & Trust Company are given in the margin.†

[86] *The evident purpose of § 4, where the owner of the land is unknown, is to permit a proceeding *in rem*, against the land itself, with a provision for service as in case of a

nonresident. By § 6 it is provided that in cases where the land itself is made defendant the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction. The object and intent of the action is defined to be "to create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles."

The supreme court of Nebraska has held that the term "owner," as used in the 4th section, applies to the owner of the fee, and does not include a person holding a lien upon the premises. It is this section (4) and § 6 which are alleged to be in conflict with the 14th Amendment. The argument for the appellant concedes that the state may adopt summary or even stringent measures for the collection of taxes so long as they are "administrative" in their character; and it is admitted that such proceedings will not divest the citizen of his property without due process of law, although had without notice of assessments or levy, or of his delinquency and the forfeiture of his lands. But the argument is, that when the state goes into court and invokes judicial power to give effect to a lien upon property, although created to secure the payment of taxes, the same principles and rules prevail which govern private citizens seeking judicial remedies, and require service on all interested parties within the jurisdiction. The right to levy and collect taxes has always been recognized as one of the supreme powers of the state, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, keeping within those which do not impair the constitutional rights of the citizen. Whether property is taken without due process of law depends upon the nature of each particular case. If it be such an exercise of power "as the settled maxims of law

†Sec. 1. That any person, persons, or corporation having by virtue of any provisions of the tax or revenue laws of this state a lien upon any real property for taxes assessed thereon, may enforce such lien by an action in the nature of a foreclosure of a mortgage for the sale of so much real estate as may be necessary for that purpose and costs of suit.

Sec. 2. That any person, persons, or corporation holding or possessing any certificate of purchase of any real estate, at public or private tax sale, or any tax deed, shall be deemed entitled to foreclose such lien under the provisions of this act, within any time not exceeding five years from the date of tax sale (not deed) upon which such lien is based; And provided, That the taking out of a tax deed shall in no wise interfere with the rights granted in this chapter.

Sec. 3. All petitions for foreclosure or satisfaction of any such tax lien shall be filed in the district court in chancery, where the lands are situated.

Sec. 4. Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the district courts, and where the owner of the land is not known the action may be brought against the land itself, but in such case the service must be as in the case of a nonresident; If the action is commenced against a person who disclaims the land, the land itself may be substituted by order of court for the defendant, and the action continued for publication.

Sec. 5. All sales of lands under this chapter, by decree of court, shall be made by a sheriff or other person authorized by the court, in the county where the premises or some part of them are situated.

Sec. 6. Deeds shall thereupon be executed by such sheriff, which shall vest in the purchaser the same title that was vested in the defendant to the suit at time of the assessment of the tax or taxes against the same; and such deed shall be an entire bar against the defendant to

permit and sanction, and under such safeguards for the protection of individual [88] rights as those maxims prescribe "for the classes to which the one in question belongs," it is due process of law. Cooley, Const. Lim. 7th ed. 506.

The most summary methods of seizure and sale for the satisfaction of taxes and public dues have been held to be authorized, and not to amount to the taking of property without due process of law, as a seizure and sale of property upon warrant issued on ascertainment of the amount due by an administrative officer (*Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372), the seizure and forfeiture of distilled spirits for the payment of the tax (*Henderson's Distilled Spirits*, 14 Wall. 44, 20 L. ed. 815). The subject underwent a thorough examination in the case of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, in which Mr. Justice Miller, while recognizing the difficulty of defining satisfactorily due process of law in terms which shall apply to all cases, and the desirability of judicial determination upon each case as it arises, used this language: "That whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some limited portion of the community; and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case,—the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

In the present case, the argument is that as the state has not seen fit to resort to the drastic remedy of summary sale of the land

such suit, and against all parties or heirs claiming under such defendants; and in case the land itself is made defendant in the suit, the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction; the object and intent of this action being to create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles.

Sec. 7. The proceeds of every sale made under a decree, by virtue of this chapter, shall be applied to the discharge of the debt adjudged by the court to be due and of the costs awarded, and if there be any surplus it shall be brought in to court for the use of the defendant, or of the person entitled thereto, subject to the order of the court.

Sec. 8. If such surplus, or any part thereof, shall remain in court, for the period of three months, without being applied for, the court
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for delinquent taxes, but has created a lien in favor of a purchaser, at tax sale, after permitting two years to elapse in which the owner or lienholder may redeem the property, it has, in authorizing a foreclosure without actual service, taken property without due process of law, because the proceedings and sale to satisfy the tax lien do not require all lienholders within the jurisdiction of the court to be served with process. If the state may proceed summarily, we see no reason why it may not resort to such judicial proceedings as are authorized *in this [89] case. And if the state may do so, is the property owner injured by a transfer of such rights to the purchaser at the tax sale, who is invested with the authority of the state? In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, the objection was made that the state could not delegate its power to a private corporation to do certain public work, and by statute fix the price at which the work should be done. In that connection, speaking of the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, Mr. Justice Miller said: "The right of the state to use a private corporation and confer upon it the necessary powers to carry into effect sanitary regulations was affirmed, and the decision is applicable to a similar objection in the case now before us."

In the statute under consideration, for the purpose of collecting the public revenue, the state has provided for the enforcement of a lien by the purchaser at a tax sale, and authorized him to proceed against the land subject to the tax, to enforce the right conferred by the state. The state has a right to adopt its own method of collecting its taxes, which can only be interfered with by Federal authority when necessary for the protection of rights guaranteed by the Federal Constitution. In authorizing the proceedings to enforce the payment of the taxes upon lands sold to a purchaser at tax sale,

may direct the same to be put out at interest, under the direction of the court, for the benefit of the defendant, his representatives, or assigns, to be paid to them by the order of the court; the party to whom said surplus shall be loaned to be designated by the court, and the sureties, upon which said money is loaned, to be approved by the judge.

Sec. 9. All lands sold by the sheriff by virtue of this act shall be appraised, advertised, and sold as upon execution, and the title conferred by his deed shall be entitled to all the presumptions of any judicial sale.

Sec. 10. This act shall be construed as cumulative, and not exclusive, in respect to the remedy for enforcing liens and collecting delinquent taxes, by sale of property or otherwise, in the cases herein provided for, and shall in nowise interfere with, alter, or amend the existing revenue laws of the state.

the state is in exercise of its sovereign power to raise revenues essential to carry on the affairs of state and the due administration of the laws. This fact should not be overlooked in determining the nature and extent of the powers to be exercised. "The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them." *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 33 L. ed. 892, 896, 10 Sup. Ct. Rep. 533, 535.

In authorizing the proceedings under the statute to enforce the lien of the purchaser, who has furnished the state its revenue in reliance upon the remedy given against the land assessed, the state is as much in the exercise of its sovereign power to collect the public revenues as it is in a direct proceeding [90]ing *to distrain property or subject it to sale in summary proceedings.

Nor is the remedy given in derogation of individual rights, as long recognized in proceedings *in rem*, when the 14th Amendment was adopted. The statute undertakes to proceed *in rem*, by making the land, as such, answer for the public dues. Of course, merely giving a name to an action as concerning the thing rather than personal rights in it cannot justify the procedure if in fact the property owner is deprived of his estate without due process of law. But it is to be remembered that the primary object of the statute is to reach the land which has been assessed. Of such proceedings, it is said in *Cooley on Taxation*, 2d ed. 527: "Proceedings of this nature are not usually proceedings against parties; nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form." And see *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 537, 40 L. ed. 247, 16 Sup. Ct. Rep. 83.

Such being the character of the proceedings, and those interested having an opportunity to be heard upon application, the notice was in such form as was reasonably calculated to bring the same to the attention of those interested in the lands. In the

present case the notice was in the form given in the margin.†

*This notice was to all persons interested [91] in the property. The lienholder, the Nebraska court has held, may appear in court and set up his claim. The notice was good as against the world, and all that is necessary when the proceedings are *in rem*:

"Laws exist under which property is responsible for damages done by it, for taxes imposed upon it. . . . These same laws often authorize the obligation by them imposed upon the property to be enforced by proceedings in which the property is the defendant and in which no service of process is required except upon such property. The judgment resulting from such a proceeding is *in rem*, and satisfaction thereof is produced by an execution authorizing the sale of the property. The sale acts upon the property, and, in so acting, necessarily affects all claimants thereto." *Freeman, Judgm.* § 606.

When the proceedings are *in personam* the object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing,

†Legal Notice.

in the District Court of Knox County, Nebraska.
The Farmers' Loan & Trust Company, Plaintiff,

vs.

Henry A. Root and The Northwest Quarter of Section Twenty-two (22), Township Thirty-one (31), Range Three (3) West, of the 6th Principal Meridian, Defendants.

The State of Nebraska, Knox County, to the above-named defendants and all persons interested in said real estate:

You are hereby notified that the petition of plaintiff is now on file in the district court of Knox county, Nebraska, wherein plaintiff claims that it purchased said real estate for taxes due thereon in the sum of twenty-four dollars and fifty-one cents at the tax sale held in said county on the 12th day of June, 1888; that under said sale it has paid subsequent taxes on said land as follows, to wit: On the 10th day of August, 1883, twenty-one dollars and seventy-nine cents and on the 9th day of July, 1889, nineteen dollars and sixty-three cents; for which sum, with interest as provided by statute, plaintiff claims the first lien against said premises, and asks the foreclosure thereof, and that the said property be sold to satisfy the amount due plaintiff, together with the further sum of ten per cent of said amount as attorney's fees and costs of suit. And you are further notified to appear and answer said petition on or before Monday, the 9th day of November, 1891, or the petition will be taken as true, and judgment rendered accordingly.

Dated this 30th day of September, 1891.

Farmers' Loan & Trust Company,
By M. J. Sweeley, Its Attorney.

service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment. *Cross v. Armstrong*, 44 Ohio St. 613, 624, 10 N. E. 160. Where land is sought to be sold, and is described in the notice, a technical service upon it would add nothing to the procedure where the owner is unknown. The publication of notice which [92] describes the land *is certainly the equal in publicity of any seizure which can be made of it.

In *Tyler v. Registration Court Judges*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, the supreme judicial court of Massachusetts upheld as constitutional an act providing for registering and confirming titles to lands, in which the original registration deprived all persons, except the registered owner, of any interest in the land, and the act gave judicial powers to the recorder after the original registration although not a judicial officer, and there was no provision for notice before registration of transfer or dealings subsequent to the original registration. The majority opinion was delivered by Mr. Justice Holmes, then chief justice of Massachusetts. In the course of the opinion, speaking of the Massachusetts Bill of Rights and the 14th Amendment, he said: "Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem*, dealing with a tangible *res*, may be instituted and carried to judgment without personal service upon claimants within the state or notice by name to those outside of it, and not encounter any provision of either Constitution. Jurisdiction is secured by the power of the court over the *res*."

In *Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603, it was held that notice by publication in proceedings to condemn land for railway purposes was sufficient notice to nonresident owners, and was due process of law as to such owners. So as to adjudications of titles of real estate within the limits of the state as against nonresident owners, brought in by publication only. *Arndt v. Griggs*, 134 U. S. 316-327, 33 L. ed. 918-922, 10 Sup. Ct. Rep. 557; *Hamilton v. Lewis*, 161 U. S. 256-274, 40 L. ed. 691-699, 16 Sup. Ct. Rep. 585.

The principles applicable which may be deduced from the authorities we think lead to this result: Where the state seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are "so minded,"

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to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, *whether to be found within the juris-[93] diction or not, is due process of law within the 14th Amendment to the Constitution.

In the case under consideration the notice was sufficiently clear as to the lands to be sold; the lienholders investigating the title could readily have seen in the public records that the taxes were unpaid and a lien outstanding, which, after two years, might be foreclosed and the lands sold and, by the laws of the state, an indefeasible title given to the purchaser. Such lienholder had the right for two years to redeem, or, had he appeared in the foreclosure case, to set up his rights in the land. These proceedings arise in aid of the right and power of the state to collect the public revenue, and did not, in our opinion, abridge the right of the lienholder to the protection guaranteed by the Constitution against the taking of property without due process of law.

The judgment of the Supreme Court of Nebraska is affirmed.

DAVID R. JULIAN, Sheriff, Mrs. Clemye James, Administratrix of W. A. James, and Mrs. Fannie E. Howard, Administratrix of John H. A. Howard, *Petitioners.*
v.

CENTRAL TRUST COMPANY and Southern Railway Company.

(See S. C. Reporter's ed. 93-114.)

Courts—conclusiveness of state decisions in Federal courts—railway mortgage—liability of property sold on foreclosure for mortgagor's subsequent debts—enjoining proceedings in state courts.

1. The determination by a state court that the property covered by a mortgage of all the property and franchises of a railway company remains liable, after a sale under a Federal court decree of foreclosure, for the debts thereafter accruing against the mortgagor, because of the purchaser's failure to organize a domestic corporation, is not conclusive on

NOTE.—As to conclusiveness and effect of judgments as between Federal and state courts—see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478, and *Union & Planters' Bank v. Memphis*, 49 C. C. A. 468.

On mortgages of railroad property—see note to *Thompson v. White Water Valley R. Co.* 33 L. ed. U. S. 256.

On injunction against execution sales or other proceedings under final process—see note to *Parsons v. Hartman*, 30 L. R. A. 98.

As to enjoining proceedings in state courts—see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90, and *Central Trust Co. v. Grant-ham*, 27 C. C. A. 575.

the Federal Supreme Court in determining the rights secured by the purchaser under such decree.

2. Corporate property of a North Carolina railway company covered by a legally authorized mortgage of all its franchises and property does not continue liable for the debts of such company accruing after the sale in foreclosure proceedings to a nonresident railway company authorized by its charter to make the purchase, because of the failure of the latter to exercise the privilege conferred by N. C. Code, §§ 697, 698, 1936, 2005, of organizing a domestic corporation to operate the purchased property.
3. Property purchased at a sale under a decree foreclosing a mortgage of all a railway company's franchises and property is not rendered liable to sale for the satisfaction of a judgment recovered on a tort alleged to have been committed by the mortgagor after the sale, because of N. C. Code, § 1255, making liens for judgments for torts superior to mortgages of incorporated companies.
4. The prohibition against enjoining proceedings in the state courts made by U. S. Rev. Stat. § 720 (U. S. Comp. Stat. 1901, p. 581), does not preclude a Federal court which has decreed a sale in foreclosure proceedings from entertaining a supplemental bill filed in the original suit by the purchaser under the decree of sale to enjoin a sale of the property conveyed by such decree for the satisfaction of judgments rendered by the state courts in suits against the mortgagor to which the purchaser was not a party, on causes of action arising subsequent to the confirmation of sale, where the decrees of sale and confirmation evince the purpose of the Federal court to retain jurisdiction so far as necessary to determine all liens and demands to be paid by the purchaser, as a condition of security in the title decreed to be conveyed.

[No. 139.]

Argued January 21, 22, 1904. Decided February 23, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a decree of the Circuit Court for the Western District of North Carolina enjoining a sale of property conveyed by a decree of that court in foreclosure proceedings, to satisfy judgments rendered in the state courts against the mortgagor on causes of action arising subsequent to the confirmation of sale. *Affirmed.*

See same case below, 53 C. C. A. 438, 115 Fed. 956.

Statement by Mr. Justice **Day**:

On May 2, 1894, a decree was entered in the circuit court of the United States for the western district of North Carolina foreclosing a second mortgage of the Western North Carolina Railroad Company to the Central Trust Company of New York, trustee. The property was subject to a first mortgage to

the same trustee, which was not in default. The decree provided:

"The purchaser or purchasers of the property herein decreed to be sold," the Western North Carolina Railroad and its franchises, "shall be invested with and shall hold, possess, and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges, and franchises appertaining thereto, as fully and completely as the Western North Carolina Railroad now holds and enjoys, or has heretofore held and enjoyed the same; and further, the said purchaser or purchasers shall have and be entitled to hold the said railroad and property discharged of and from the lien of the mortgage foreclosed in this suit, and from the claims of the parties to this suit or any of them, except the first consolidated mortgage of September 1st, 1884."

In pursuance of this decree the Southern Railway Company, a corporation of the state of Virginia, became the purchaser. On August 22, 1894, the sale was confirmed, the decree of confirmation providing, among other things:

"It is further ordered and decreed that the special master is hereby authorized and directed, on the request of said purchaser, to sign, seal, execute, acknowledge, and deliver a proper deed of conveyance to the said Southern Railway Company, conveying to it, all and singular, the railroad, equipment, property, and franchises so as aforesaid sold under the decree of this court, free^[95] from any and all equity of redemption of the said Western North Carolina Railroad Company, or anyone claiming by, under, or through it, except the prior mortgage recited in such decree. Upon the delivery of such conveyance by the special master the said Southern Railway Company shall fully possess and be invested with all of the estate, right, title, and interest in, to, and of such railroad, equipment, property, and franchises so sold under the decree of this court as the absolute owner thereof, to have and to hold the same to it and its successors and assigns forever.

"On August 31, 1894, on exhibition of the deed executed and delivered by the special master herein ordered, the defendant company is authorized, directed, and required forthwith to deliver over to the said Southern Railway Company the possession of all and singular the railroad and property described in and conveyed by such deed.

"It is also further ordered that by way of further assurance and confirmation of title to such Southern Railway Company of the property so by it purchased under the decree of this court, the said The Western North Carolina Railroad Company, by its proper officers and under its corporate seal,

and the Central Trust Company of New York, trustee, shall, upon request of said Southern Railway Company, sign, seal, execute, acknowledge, and deliver to said Southern Railway Company all proper deeds of conveyance, transfer, release, and further assurance of all the railroad property and franchises so as aforesaid sold under the decree of this court and embraced in the deed of the special master, so as fully and completely to transfer to, and invest in, the said Southern Railway Company the full legal and equitable title to all such railroad property and franchises sold or intended to be sold under the decree of this court."

Afterwards the master conveyed to the Southern Railway Company—

"All and singular the railroad of the said Western North Carolina Railroad Company in the state of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to [96] Asheville, on or near the *French Broad river in Buncombe county; thence along French Broad river to Paint Rock in Madison county, and also from said Asheville westward to the Tennessee river at or near the mouth of the Nantahala river, and thence westward to Murphy in Cherokee county; and all real estate now owned or acquired for the purpose of said railroad, including all station, depot, or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad, and all the franchises, rights, privileges, easements, income, earnings, and profits of the said Western North Carolina Railroad Company, connected with, issuing from, or relating to, the said above-described railroad.

"The foregoing properties—real, personal, choses in action, and franchises—being embraced in the lien of the second mortgage of the Western North Carolina Railroad Company, executed September 2, 1884, and being sold in foreclosure of the same.

"A more full and particular description of the property intended to be conveyed by this instrument being contained in said decree of the 5th of May, 1894, to which reference is hereby made, together with all the corporate estate, equity of redemption, rights, privileges, immunities, and franchises of said Western North Carolina Railroad Company, and all the tolls, fares, freights, rents, income, issues, and profits of

the said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold, at any time owned or acquired by, and now in the possession of, said Western North Carolina Railroad Company."

The deed of purchase was duly recorded, and in August, 1894, the purchaser took possession of the railroad property *and has [97] ever since been in possession of the road, operating it as owner.

On March 20, 1897, Mrs. James, as administratrix of her deceased husband, W. A. James, brought an action in the superior court of Rowan county, North Carolina, against the Western North Carolina Railroad Company for damages for the wrongful killing of her husband. The Southern Railway Company was the employer of the deceased and he was killed in its service while acting as a locomotive engineer. In the trial court a judgment was rendered in favor of the railroad company. On appeal the judgment was reversed and the cause remanded to the superior court, with directions to enter a judgment for the damages assessed in favor of the administratrix. *James v. Western N. C. R. Co.* 121 N. C. 523, 46 L. R. A. 306, 28 S. E. 537. Judgment was entered accordingly against the Western North Carolina Railroad Company for \$15,000 on February 21, 1898.

On the same day that the James suit was begun, March 20, 1897, Fannie E. Howard, as administratrix of her husband, John H. A. Howard, deceased, commenced an action in the superior court to recover of the Western North Carolina Railroad Company damages sustained in the death, by wrongful act, of her husband, who was killed at the same time with James, being a fireman in the employ of the Southern Railway Company, and recovered damages in the sum of \$5,000 on February 21, 1898. To neither of these suits was the Southern Railway Company made a party defendant. After the recovery of these judgments, Mrs. James and Mrs. Howard caused executions to be issued from the superior court of Rowan county, and placed the same in the hands of D. R. Julian, sheriff, who proceeded to levy the same upon the property as belonging to the Western North Carolina Railroad Company, to wit:

"The Western North Carolina Railroad Company, existing in the state of North Carolina, including its corporate franchises, rights, privileges, immunities, easements, and appurtenances of every kind appertaining, belonging to, or in any wise connected therewith, or issuing out of and relating to

[98] the said The Western North Carolina Railroad Company, together *with all of its property in the state of North Carolina, and including its roadbed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight, and other houses, machine shops, buildings, and fixtures,—the said railroad extending from the town of Salisbury through Statesville, Newtown, Hickory, Morganton, Mar-ian, Asheville to Paint Rock in Madison county, and from Asheville westward by way of Waynesville to Murphy in Cherokee county,—reference being had for a further description of said road and its property, rights, and franchises to the charter of the said road and the amendments thereto enacted from time to time by the general assembly of North Carolina.”

The sheriff advertised the property levied upon for sale, whereupon the Central Trust Company of New York and the Southern Railway Company filed a supplemental bill in the foreclosure proceeding, making the sheriff party defendant, seeking to quiet the title to the property and franchise purchased at the foreclosure sale and to enjoin the sale of the same to satisfy the judgments rendered in the state courts against the Western North Carolina Railroad Company. In the answer of the sheriff and of the administratrices of James and Howard, issue was taken upon the right of the circuit court to entertain the bill or grant an injunction, and among other things it was averred:

“3. That these respondents deny the truth of the allegations contained in the 3d section of the supplemental bill of complaint, and while they admit that the Southern Railway Company took a deed from the master purporting to convey the said franchises and property subject to the lien of the first-mortgage bonds theretofore issued by the said company, they aver that the Southern Railway Company, being at the time of said sale not a resident corporation of the state of North Carolina, and not subject to visitation of said state, but attempting to do business therein by comity, was not allowed or authorized by the laws of North Carolina to purchase, or hold, or operate the Western North Carolina Railroad, or to own [99] its *franchise and property without becoming a domestic corporation, and that, by virtue of certain laws enacted by the legislature of North Carolina at its session of 1879, being chapter 10 of the Laws of 1879, re-enacted in the Code of North Carolina as § 1255,

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no mortgage of the Western North Carolina Railroad Company, thereafter issued, had the legal effect of exempting the property or earnings of said company from execution for the satisfaction of any judgment obtained in the courts of said state against said company for torts thereafter committed by said company, its agents, or employees, whereby any person should be killed, or any person or property injured, ‘any clause or clauses in such mortgage to the contrary notwithstanding,’ both the first mortgage bonds subject to which the sale of the franchise and property of said company purporting, under the decree referred to in the bill of complaint to have been sold, and the second mortgage bonds, for default in payment of the interest on which the decree of foreclosure was entered, appear from said record (Exhibit A to said bill of complaint) to have been issued long after the enactment of said statute in the year 1871, and said statute, since its enactment in 1871, has been the law of the state of North Carolina, in contemplation of which all railroad companies created by, and organized under, the laws of said state, have issued all mortgage bonds, the said statute, as these respondents are advised, informed, and believe, having entered into and formed a part of every mortgage bond issued by any railroad corporation operating under the laws of North Carolina since its enactment in 1871.

“But these respondents deny the truth of the allegation ‘that, at the time of their death (referring to the death of W. A. James and John H. A. Howard) the Western North Carolina Railroad Company had no interest in the Western North Carolina Railroad, or the franchises, nor had it any interest or estate in said railroad or franchise of any kind or nature whatsoever since the 22d day of August, 1894, the day the Southern Railway Company took possession of said railroad;’ and these respondents aver that the supreme court of North Carolina, the highest appellate court of said state, held and adjudged, *in the year A. D. [100] 1898, in actions pending therein on appeal, and in which these respondents, respectively, were plaintiffs, and the said The Western North Carolina Railroad Company was defendant, that the said Western North Carolina Railroad Company was still an existing corporation, liable to be sued in the courts of said state, and that the said judgments in favor of these respondents, respectively, and against the Western North Carolina Railroad Company, constituted liens upon the franchise and property of the company, superior to the liens of the said first mortgage bonds or the said second mortgage bonds mentioned in the said foreclosure suit, and these respondents

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ents are advised, informed, and believe that the courts of the United States are bound to follow and adopt the construction given by the highest appellate court of North Carolina in construing its own Constitution and its own laws. And these respondents are advised, informed, and believe that, though the Southern Railway Company had assumed the right to operate the Western North Carolina Railroad, and had employed the intestates of these respondents as engineer and fireman, when they were killed by the negligence of said Southern Railway Company, that the supreme court of North Carolina had held and adjudged in the said actions brought by these respondents against the Western North Carolina Railroad Company, and wherein they recovered the judgments in pursuance of which executions have issued, as alleged in the bill of complaint, that the said The Western North Carolina Railroad Company was answerable for the torts of the Southern Railway Company, and for any damages to its employees caused by the negligence of said Southern Railway Company in operating said railroad."

Upon hearing upon the bill, answer, and testimony, a decree was entered in favor of the Central Trust Company and the Southern Railway Company, and an injunction granted against the proposed sale of the property levied upon. From this decree an appeal was taken to the circuit court of appeals, from whose judgment affirming the decree of the circuit court (53 C. C. A. 438, 115 Fed. 956) a writ of certiorari to this court was granted.

Messrs. Lee S. Overman, A. C. Avery, C. A. Mountjoy, and B. F. Long, for petitioners.

Messrs. Charles Price and F. H. Busbee argued the cause, and, with **Mr. William A. Henderson**, filed a brief for respondents:

The Western North Carolina Railroad Company had, under its charter and the statutes of the state, the power to mortgage its franchise and other property. To render this power effective, the power of foreclosure and sale is carried with it.

New Orleans, S. F. & L. R. Co. v. Delamare, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009.

This court is not bound by state court decisions on matter of general law.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 378, 37 L. ed. 777, 13 Sup. Ct. Rep. 914; *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 165.

The bill filed, praying for the injunction, may be a supplemental bill. If, however, treated as an original bill, it is ancillary

in its character, and in aid of the original bill. It grows out of, and is dependent upon, the original bill.

Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; *Foster*, Fed. Pr. pp. 28, 29.

It was an assertion of a right by the court to carry into effect its own orders and decrees.

Root v. Woolworth, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136.

Laws allowing the purchasers at a foreclosure sale to form a new corporation are not intended to prevent a sale or transfer to a corporation already formed and capable, under the laws of its creation, of holding the corporate property and exercising the franchises, which pass to the purchaser by sale.

People v. Brooklyn, F. & C. I. R. Co. 89 N. Y. 75.

The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment.

Memphis & L. R. R. Co. v. Railroad Comrs. 112 U. S. 619, 28 L. ed. 841, 5 Sup. Ct. Rep. 299.

The Southern Railway Company, a Virginia corporation, could purchase the franchise of the Western North Carolina Railroad Company at the foreclosure sale, without permission of the sovereign.

Lafayette Ins. Co. v. French, 18 How. 404, 407, 15 L. ed. 451, 452; *Central Trust Co. v. Western N. C. R. Co.* 89 Fed. 31; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274.

Any citizen, any individual, had the right to purchase this property at the foreclosure sale, whether a resident of this or any other state.

New Orleans, S. F. & L. R. Co. v. Delamare, 114 U. S. 508, 29 L. ed. 247, 5 Sup. Ct. Rep. 1009; *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 619, 28 L. ed. 841, 5 Sup. Ct. Rep. 299; *Barcello v. Hapgood*, 118 N. C. 728, 24 S. E. 124.

With regard to the purchase the word "person" is used; and a corporation is a person under the 14th Amendment.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Missouri P. R. Co.*

v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herriek*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

As to the effect of permission, under the laws of comity, given a foreign corporation to do business in another state than that of its creation, etc., see—

Conn v. Chicago, B. & Q. R. Co. 48 Fed. 177.

To accomplish the end aimed at in taking the property of the Southern Railway Company for the debt of the Western North Carolina Railroad Company, incurred over two years after the consummation of the title to the same by the Southern, would be to nullify the foreclosure proceedings of 1894 in the circuit court of the United States. It would be in disregard of the principles laid down by Justice Shiras in *Farmers' Loan & T. Co. v. Lake Street Elevated R. Co.* 177 U. S. 61, 44 L. ed. 667, 20 Sup. Ct. Rep. 564.

At the time of the judgments the defendant, the Western North Carolina Railroad Company, had no property of any kind,—not even a franchise, except that to be and exist as a corporation.

Memphis & L. R. R. Co. v. Railroad Comrs. 112 U. S. 610, 28 L. ed. 838, 5 Sup. Ct. Rep. 299.

When the bill of foreclosure was filed in the circuit court of the United States, and the process issued and the decree of foreclosure entered, this property was in the hands of the court, and no other court, state or Federal, could interfere in any way with it, or the proceedings in that suit.

Farmers' Loan & T. Co. v. Lake Street R. Co. 177 U. S. 51, 61, 44 L. ed. 667, 671, 20 Sup. Ct. Rep. 564; *Covell v. Heyman*, 111 U. S. 179, 182, 28 L. ed. 391, 392, 4 Sup. Ct. Rep. 355; *Phelps v. Mutual Reserve Fund Life Asso.* 50 C. C. A. 339, 112 Fed. 453.

The prohibition in U. S. Rev. Stat. § 720, does not apply when the jurisdiction of a Federal court has first attached.

Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

This is so in "ancillary bills" filed in the Federal court to enforce their own judgments and decrees by preventing defeated parties from wresting property from plaintiffs who, by final judgments or decrees, are entitled to it.

Reinecke Coal Min. Co. v. Wood, 112 Fed. 477.

The adequate, complete remedy at law,

is the test of the equitable jurisdiction of the Federal courts.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; *McConihay v. Wright*, 121 U. S. 201, 206, 30 L. ed. 932, 7 Sup. Ct. Rep. 940; *National Surety Co. v. State Bank*, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 595.

There must be an adequate remedy on the law side of the Federal court, or the equity court will possess jurisdiction.

Buzard v. Houston, 119 U. S. 352, 30 L. ed. 453, 7 Sup. Ct. Rep. 249.

The jurisdiction of the Federal courts of equity is uniform throughout the United States.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260, *Kiuby v. Lake Shore & M. S. R. Co.* 120 U. S. 138, 30 L. ed. 573, 7 Sup. Ct. Rep. 430; *Hull v. Dills*, 19 Fed. 657.

The state and Federal courts are jurisdictions foreign to each other. A plea in a state court, of "former suit pending," is not good when the suit is pending in a Federal court.

Latham v. Chafee, 7 Fed. 523; *Stanton v. Embrey*, 93 U. S. 554, 23 L. ed. 984; *Gordon v. Gilfoil*, 99 U. S. 178, 25 L. ed. 386; *Mutual L. Ins. Co. v. Brune*, 96 U. S. 593, 24 L. ed. 740; *Sharon v. Hill*, 10 Sawy. 394, 22 Fed. 30.

Mr. Justice **Day**, after making the foregoing statement, delivered the opinion of the court:

The title of the Southern Railway Company to the franchise and property of the Western North Carolina Railroad Company would seem to be plain, unless there is something in the North Carolina statutes or judicial determinations which prevents the foreclosure proceedings from having effect to pass the title. A railroad company in North Carolina has full authority to mortgage its franchises and property. N. C. Code, § 1957. This power was also given by the charter of the Western North Carolina Railroad Company. By the foreclosure proceedings, the title of the Western North Carolina Railroad Company to its franchise and property, except its mere right to be a corporation, was sold and the title confirmed in the purchaser. By the law of North Carolina the title to mortgaged premises is in the mortgagee. The Central Trust Company, the trustee under the first and second mortgages, was a party to the foreclosure proceedings. It is estopped to dispute the effect of the decree, sale, and confirmation, clothing the Southern Railway Company with the full title to the property and franchise to operate a railroad which had theretofore belonged to the Western North Carolina Railroad Company. From this record and a consideration of the

litigation that has arisen in the attempt to collect the James and Howard judgments, it is evident that a conflict exists between the views of the Federal courts and the supreme court of North Carolina as to the effect of the foreclosure proceedings to relieve the property purchased at the sale from levy and execution to satisfy the James and Howard judgments. Such differences, always to be deprecated, should be approached "in a spirit of fairness and comity, with a view to preventing conflicts of jurisdiction detrimental to the rights of parties and to the respect and authority due judicial tribunals. The decision relied upon as justifying the sheriff in the levy of execution and sale of the property formerly belonging to the Western North Carolina Railroad Company is *James v. Western N. C. R. Co.* reported in 121 N. C. 523, 46 L. R. A. 306, 28 S. E. 537, in which case it was held that the sale of the railroad company's property upon the foreclosure of the second mortgage did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which the property was operated. Further, that the sale under the decree in the circuit court of the United States foreclosing the second mortgage did not, under §§ 697, 698 of the Code of North Carolina, make the purchaser a domestic corporation, and that, in order to have the effect to dissolve the mortgagor corporation as provided in § 697 of the Code, another corporation must be provided, as contemplated in § 1936 of the Code, to take its place and to assume and discharge the obligations to the public growing out of the franchise, and until that is done the old corporation will continue to exist. Speaking of §§ 697 and 698 of the North Carolina Code, the learned judge, delivering the opinion, said:

"These sections were passed in 1872, and we think should be considered in connection with § 701, which was passed in 1879, and §§ 1936 and 2005 referred to in § 701.

"If this be the correct reading of these sections of the Code, it would seem that while § 697 does say that these facts, *ipso facto*, dissolved the corporation, another corporation must be provided, as in § 1936 of the Code, to take its place before it is dissolved; that there must always be a corporation in existence liable to the public for the duties and obligations assumed by the grantee for the privileges conferred in the grant of the franchise and that the old corporation must continue to exist until this is done; and that when the new corporation is formed it will be a domestic corporation. It cannot be that the legislature ever intended, by this general legislation, to create a foreign corporation here, when it

could *not do so by positive and direct enactment. 119 N. C. 918, 78 Fed. 387, Judge Diek's opinion in *Bradley v. Ohio River & C. R. Co.* published in the appendix. By this view of the case all the interests of the parties may be harmonized. The 'Southern,' the purchaser of the equity of redemption of the 'Western,' stands in the shoes of that company. The Southern is in effect the mortgagor in its relations to the 'Central Trust Company of New York,' the mortgagee of the first mortgage, and being in possession of the road, its property and franchise, has the right to run and operate the same. But the old corporation, still in existence, is liable for damages caused by the maladministration of the Southern, which it allows to run and operate the road. But the property of this road, which the 'Southern' is allowed to use, will be held liable to the public for damages. *Chollette v. Omaha & R. Valley R. Co.* 26 Neb. 159, 4 L. R. A. 135, 41 N. W. 1106; *Brunswick Gaslight Co. v. United States Gas, Fuel, & Light Co.* 35 Am. St. Rep. 385, and note on page 390 (85 Me. 532, 27 Atl. 525).

"It therefore follows that, in our opinion, the court below erred in its ruling upon the third issue. This ruling is reversed, and judgment should be entered for the plaintiff according to the verdict of the jury." *James v. Western N. C. R. Co.* 121 N. C. 523-528, 529, 46 L. R. A. 306, 310, 311, 28 S. E. 537, 538, 539.

This decision of the highest court of the state was made after the rights of the Southern Railway Company, whatever they may be, had accrued in the property and franchise of the Western North Carolina Railroad Company, and, while entitled to the highest respect and consideration, is not conclusive upon this court in determining the rights secured to the purchaser under the decree of foreclosure in the Federal court. *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

If the North Carolina supreme court can be taken to have held that the property purchased by the Southern Railway Company at the judicial sale continued liable for debts thereafter accruing against the Western North Carolina Railroad Company we are constrained to dissent from such conclusion. Under § 697, North Carolina Code, it is provided that the sale under a deed of trust or mortgage shall pass not only the works and property of a corporation and those acquired *aft-[104]er the mortgage and before the sale, but all other property of which it may be possessed at the time of the sale other than debts due it, and "upon such conveyance to the purchaser the said corporation shall, *ipso facto*, be dissolved, and the said purchaser shall forthwith be a new corporation by any name

which may be set forth in the said conveyance, or in any writing signed by him, and recorded in the same manner in which the conveyance shall be recorded." Section 698 provides that the corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights, and privileges, and perform all such duties as would have been or should have been performed by the first corporation but for such sale and conveyance, save only that the corporation so created shall not be entitled to the debts due to the first corporation, and shall not be liable for any debts or claims against the first corporation which may not be expressly assumed in the contract of purchase; nor shall the property, franchise, or profits of such new corporation be exempt from taxation. This, with other provisions of § 698, indicate an intention to clothe the purchaser with all the property of the old corporation, including the franchise to conduct and operate a railroad, freed from all debts or obligations of the old corporation.

But these sections, it is said in the *James Case*, must be read in connection with § 701 and §§ 1936 and 2005, referred to in § 701. They are set forth in the margin.†

[105] *And it is said, as the result of these provisions, that, unless the purchaser shall organize a new domestic corporation to take the place of the old corporation, the property continues liable, though in the hands of the purchaser, upon a cause of action asserted against the old corporation for the con-

duct of the new owner, and this in actions to which the purchaser is not a party, and whose knowledge of the suit and judgment may come with the seizure of the property to satisfy the judgment. For, it is said, "there must always be a corporation in existence liable to the public for the duties and liabilities assumed by the grantee for the privileges conferred in the grant of the franchise." This reasoning, it seems to us, assumes that the franchise to operate the road did not pass by the sale, *unless such [106] new domestic corporation is organized. As we have seen, the North Carolina statutes authorize the conveyance by mortgage of the property and the franchise to use and operate it. The decree of foreclosure undertakes to sell, and the confirmation to secure the purchaser in the use and enjoyment of, the property. The power given to mortgage the franchise of the corporation must necessarily include the power to bring it to sale with the property to make the sale effectual as a means of transferring the right to use the thing conveyed. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009.

It is true the right to be a corporation is not sold. By the statute the corporation is declared to be dissolved by the sale, and under other sections of the North Carolina Code its affairs are to be wound up. But the franchise to operate and use the property has passed at the sale, and must have done so to make the purchase of any value. This

†Sec. 701. This chapter, unless otherwise declared herein, or in the chapter entitled "Railroads and Telegraphs," shall apply to all corporations, whether created by special act of assembly, by letters of agreement under this chapter, or by the chapter entitled "Railroads and Telegraphs." And this chapter and the chapter on railroads and telegraphs, so far as the same are applicable to railroad corporations, shall govern and control, anything in the special act of assembly to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter, and of the chapter entitled "Railroad and Telegraph Companies," intended to be repealed, shall be specially referred to by number, and as such specially repealed.

Sec. 1936. There shall be a board of six directors and a president of every corporation formed under this chapter, to manage its affairs; and said directors and president shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors and president each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be ap-

pointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting if a majority of the stockholders present shall require it. And whenever the purchaser or purchasers of real estate, track, and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court shall acquire title to the same in the manner prescribed by law, such purchaser or purchasers may associate with him and them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation, with all the powers, privileges, and franchise, and be subject to all the provisions of this chapter.

Sec. 2005. When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage, or other conveyance, the owner or purchaser shall constitute a new corporation, and the property, franchise, and profits of said new corporation shall be taxed as other like property, franchise, and profits are rated.

principle, recognizing the distinction between the mere right or franchise to be a corporation and the franchise of maintaining and operating the railroad, was distinctly pointed out by Mr. Justice Matthews in *Memphis & L. R. R. Co. v. Railroad Commissioners*, 112 U. S. 619, 28 L. ed. 841, 5 Sup. Ct. Rep. 303:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

[107] *It is true the sections of the North Carolina Code herewith given clothe the purchaser with the right and privilege of organizing a corporation to operate the purchased property, but we find no requirement that he shall do so. The language of the last paragraph of § 1936 is "such purchaser or purchasers may associate with him or them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation, with all the powers, privileges, and franchise, and be subject to all the provisions of this chapter." This confers a privilege, but does not prevent the purchaser from transferring the property to a company already formed and authorized to purchase and operate a railroad. *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75.

The Southern Railway Company was authorized by its charter, among other things, to purchase or otherwise acquire the property of any railroad company organized under the laws of another state. We have been cited to no statute of the state of North Carolina forbidding the purchase of a railroad at foreclosure sale by a corporation of another state. It is said that the state requires a domestic corporation organized under, and subject to, its laws to be

come the purchaser of a railroad under the North Carolina statutes already cited. But the Southern Railway Company, in purchasing a franchise granted by the state of North Carolina, and undertaking to operate a railroad within the state, is subject to regulation by the law of the state. *Runyan v. Coster*, 14 Pet. 122, 10 L. ed. 382; *American & Foreign Christian Union v. Yount*, 101 U. S. 352-354, 25 L. ed. 888-890. This principle is not qualified because the right of removal of suits for diverse citizenship still exists, as was held in *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713. It is urged that the supreme court of North Carolina, by a course of decisions antedating the mortgage and foreclosure, had established the rule of law contended for as to the continuing liability of a railroad corporation unless a domestic corporation is organized to own and operate the property. We have examined these cases and do not find such to be the case. The supreme court of North Carolina had held a lessor liable for the conduct and management *of the lessee, and in *Pierce v.* [108] *North Carolina R. Co.* 124 N. C. 83, 44 L. R. A. 316, 32 S. E. 399, decided in March, 1899, that court said:

"The motion to dismiss the complaint and for judgment of nonsuit appears from brief of defendants' counsel to be intended to raise again the question whether the lessor company, The North Carolina Railroad Company, the defendant herein, is liable 'for all acts done by the lessee in the operation of the road,' as was held in *Logan v. North Carolina R. Co.* 116 N. C. 940, 21 S. E. 959, but why the counsel should feel 'encouraged to believe' that this court 'will retire from the position it has taken upon the question, we are not advised. We have perceived no lack of 'soundness of reasoning' therein. The decision in *Logan's Case* was made after full deliberation and with full appreciation and careful discussion of the important principle now again called in question, and it was held that 'a railroad company cannot escape its responsibility for negligence by leasing its road to another company, unless its charter or a subsequent act of the legislature specially exempts it from liability in such case,' and it was made in an action to which the appellant herein was the party raising the question. The same proposition had been theretofore laid down by Smith, C. J., in *Ayeock v. Raleigh & A. Air Line R. Co.* 89 N. C. at page 330, with cases there cited, and *Logan's Case* upon this point has been expressly cited and sustained in *Tillett v. Norfolk & W. R. Co.* 118 N. C. at page 1043, 24 S. E. 113; *James v. Western N. C. R. Co.* 121 N. C. at page 528, 46 L. R. A. 310, 28 S. E. 538; *Benton v.*

North Carolina R. Co. 122 N. C. 1007, 30 S. E. 333, and *Norton v. Carolina C. R. Co.* 122 N. C. at pages 936, 937, 29 S. E. 894. In the last two cases this point was again held against the same corporation, which is the appellant in this case; the verdicts were for considerable sums, and in *Norton's Case* the defendant was represented by the same counsel as in the present case."

But this is far from holding that in the case of a sale the corporate property shall remain liable for the debts of the old corporation in suits against it until a new domestic corporation is organized to take the place of the old one. The cases cited hold the lessor to a continued liability, notwithstanding a lease. In the case in hand the [109] property and franchise have been sold, *and there is no contractual relation between the companies nor permissive operation of the road by the new company.

Nor can we see any room for the application of § 1255 of the North Carolina Code, making liens for judgments for torts superior to mortgages of incorporated companies. In this case the tort was committed after the judgment debtor had parted with all its property and there was nothing for such judgment to operate upon. *Jeffrey v. Moran*, 101 U. S. 286, 25 L. ed. 786.

Objection is made to the right of the corporation to maintain this bill. To determine this question reference must be had to the attitude of the parties and the nature of the remedy sought. By the decree of the circuit court all the property of the Western North Carolina Railroad Company was ordered to be sold, and was conveyed and confirmed to the purchaser, the Southern Railway Company; it was placed in possession of the property and has operated it ever since. The judgments in controversy were obtained for acts committed more than two years after the confirmation of the sale and were rendered about four years after the court adjudicated a sale of all the property of the Western North Carolina Railroad Company. To these actions the Southern Railway Company was not a party, yet it is sought to levy upon and sell the very property conveyed to it by the decree of the Federal court, and this upon the theory set up in the answer herein that the property is still liable for the debts of the Western North Carolina Railroad Company because of the failure to organize a domestic corporation to take its place after the sale. The return of the sheriff shows that he has levied upon all this property, said to be of the value of five millions of dollars, to pay these judgments of twenty thousand dollars.

It is not claimed that the Western North Carolina Railroad Company acquired the

property by any new title, but in effect it is sought to annul the order and decree of the Federal court because it has not operated to transfer the title to the purchaser. Examining the decree under which this property was sold, we find certain provisions which are important in this connection. It is provided:

"The purchaser or purchasers at said sale [110] shall, as part of the consideration for such sale, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court, will pay off and satisfy any and all claims filed in this cause, but only when the court shall allow such claims and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto, and the purchaser or purchasers, or their approved assigns, shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the right in respect to such appeals which the complainant Central Trust Company of New York would have in case such appeals had been taken by it. The purchaser or purchasers at said sale shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court, will pay off and satisfy all debts or obligations incurred or to be incurred by the receivers having possession of such property which have not been, or shall not be paid by said receivers, and which shall be adjudged by the court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of the mortgage foreclosed in this suit.

"The court reserves the right to retake and resell said property in case of the failure or neglect of purchaser or purchasers, or his or their assigns approved by the court as aforesaid, to comply with any order of the court in respect to payment of prior lien claims above mentioned within twenty days after service of a copy of such order upon said purchaser or purchasers, or his or their assigns."

And in the decree affirming the sale we find:

"Thereupon the court orders and decrees that the said report of the special master be spread at large upon the record, and be in all things approved, and the sale made by him to the said Southern Railway Company, being all and singular the railroad, equipment, property, and franchises of the Western *North Carolina Railroad Company as [111]

described in and by the decree of foreclosure entered in this cause on May 5, 1894, at and for the sum of five hundred thousand dollars (\$500,000) by it bid, be and the same is in all things ratified, approved, confirmed, and made absolute, subject, however, to all the mortgages, receivers' debts and preferential claims, and to all equities reserved, and to all and singular the conditions of purchase as recited in said decree, and the continued right of the court to adjudge and declare what receivers' or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed, or ought to be paid out of such proceeds of sale in preference to the bonds secured thereby. And this court expressly reserves for future adjudication, and power thereby to bind the property sold, all liens and claims and equities specified in, and reserved by, the said final decree of foreclosure so as aforesaid entered on May 5, 1894.

"And the court accepts the said Southern Railway Company as the purchaser of all and singular the railroad property and franchises sold under the decree in this cause, and holds it obligated as such purchaser to complete and fully pay its said bid and to comply with all the orders of the court heretofore entered, or hereafter from time to time to be entered by it obligatory on such purchaser. And the court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell the property this day confirmed to such purchaser, if it fails or neglects fully to complete such purchase and comply with the orders of court in respect to the full payment and performance of its bid, or to pay into court in accordance with such decree of sale all such sums of money hereafter ordered by the court to be paid into its registry to discharge any and all such debts, liens, or claims as it may decree ought to be paid out of the proceeds of sale in preference to the mortgage of the Western North Carolina Railroad Company herein foreclosed."

It is obvious that by this decree of sale and confirmation it was the intention and purpose of the Federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to [112] be paid by the purchaser. It accepted *the purchaser and thereby made it a party to the suit. *Blossom v. Milwaukee & C. R. Co.* 1 Wall. 655, 17 L. ed. 673. The court reserved the right to retake the property if necessary to enforce any lien that might be adjudged against the same. On the other hand, the purchaser agreed to pay only such demands as the circuit court might declare and adjudge to be legally due, with the right of appeal from such judgment. These
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provisions make apparent the purpose of the court to retain jurisdiction for the purpose of itself settling and determining all liens and demands which the purchaser should pay as a condition of security in the title which the court had decreed to be conveyed. If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because, in the view of the state court, it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal court and to render effectual its decree. *Central Trust Co. v. St. Louis, A. & T. R. Co.* 59 Fed. 385; *Fidelity Ins. Trust & S. D. Co. v. Norfolk & W. R. Co.* 88 Fed. 815; *State Trust Co. v. Kansas City, P. & G. R. Co.* 110 Fed. 10.

In such cases, where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding § 720, Rev. Stat. (U. S. Comp. Stat. 1901, p. 581), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon v. Terry*, 13 Sawy. 387, 1 L. R. A. 572, 36 Fed. 337, per Mr. Justice Field; *French v. Hay*, 22 Wall. 250, 22 L. ed. 857; *Dietzsch v. Huidkoper*, 103 U. S. 494, 26 L. ed. 497.

Nor is it an answer to say that these judgments were for causes of action arising subsequent to the confirmation of sale. The Federal court by its decree reserved the right to determine what liens or claims should be charged upon the title conveyed by the court, and by the levy and sale to pay these judgments the title is charged with other liens, established in another court, in a proceeding to which the purchaser was not a party. The Federal court, in protecting the purchaser *under such circumstances, [113] was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.

In *Re Farmers' Loan & T. Co.* (original) 129 U. S. 206-213, 32 L. ed. 656, 657, 9 Sup. Ct. Rep. 265, 266, Mr. Justice Miller said: "But the doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights,

may be appealed from, is well established by the decisions of this court."

We think this case belongs to the class instanced by the learned justice, and that the circuit court, by the order made, retained jurisdiction of the case to settle all claims against the property and to determine what burdens should be borne by the purchaser as a condition of holding the title conveyed. In such cases the jurisdiction of the court may be invoked by supplemental bill or bill in the nature of a supplemental bill, irrespective of the citizenship of the parties. *Freeman v. Howe*, 16 L. ed. 749-752, 24 How. 450-460. The authorities are collected in a note to § 97, vol. 1, of Bates on Federal Equity Procedure, and the doctrine thus summarized: "It would seem that the prevention of a conflict of authority between the state and Federal courts, and the protection and preservation of the jurisdiction of each, free from encroachments by the other, are considerations which lie at the very foundation of ancillary jurisdiction. A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits, and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party [114] from using the proceedings and judgment* of the same court for fraudulent purposes, or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right, or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court,—is an ancillary suit."

While recognizing the weight which should be given to decisions of the supreme court of a state in construing its own laws, and being disposed to follow them and accept the conclusions reached in construing local statutes in every case of doubt, we are here dealing with a right and title conferred by authority of the decree of a Federal court, which may be virtually set aside and held for naught if the property awarded can be taken upon execution in suits to which the purchaser is not a party. It is conceded that the Federal right could be set up in the

state court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court. In the view we have taken of this case the Federal court had not lost its jurisdiction to protect the purchaser at its sale upon direct proceedings such as are now before us.

We find no error in the judgment of the Circuit Court of Appeals, and the same is affirmed.

*UNITED STATES, *Appt.*,

[115]

v.

CHOCTAW NATION and Chickasaw Nation.
(No. 322.)

CHICKASAW FREEDMEN, *Appts.*,

v.

CHOCTAW NATION and Chickasaw Nation.
(No. 323.)

(See S. C. Reporter's ed. 115-127.)

Indians — adoption of Chickasaw freedmen — effect of Congressional approval — rights of freedmen in trust fund.

1. The adoption of the Chickasaw freedmen into the Chickasaw Nation was not completed by the congressional approval given in the act of Congress of August 15, 1894 (28 Stat. at L. 336, chap. 290), to the Chickasaw legislation of January 10, 1873, in which the freedmen were declared to be adopted in conformity with article 3 of the treaty of July 10, 1866 (14 Stat. at L. 769), between the United States and the Choctaw and Chickasaw Indians, upon certain expressed conditions, and with a proviso that this legislation was only to have effect when approved by the proper authority of the United States,—where the Chickasaw legislature, prior to this approval by Congress, had consented to the exercise by the United States of the right of removal given by the treaty for the benefit of the freedmen in case of failure to adopt, and in the act of October 22, 1885, had declared that the Chickasaws refused to accept or adopt the freedmen upon any terms or conditions, and provided for memorializing Congress to remove such freedmen from the Chickasaw Nation to Oklahoma.
2. Chickasaw freedmen, whom the United States has not removed from the Chickasaw Nation in compliance with its agreement in article 3 of the treaty of July 10, 1866 (14 Stat. at L. 769), with the Choctaw and Chickasaw Nations to remove such freedmen as were willing to be removed, are not entitled to share as beneficiaries in the fund held in trust by the United States under such treaty, to be paid to the Indians upon the adoption of the freedmen, and, in default thereof, to be held in trust for such freedmen as should remove.

[Nos. 322, 323.]

Argued January 26, 27, 1904. Decided February 23, 1904.

CRoss APPEALS from the Court of Claims to review a decree denying the right of the Chickasaw freedmen, independently of an agreement between the United States and the Choctaw and Chickasaw Indians, ratified by Congress, to share in the allotments of the lands of the Chickasaw Nation. *Affirmed.*

See same case below, 38 Ct. Cl. 558.

Statement by Mr. Justice **McKenna**:

These are cross appeals from a decree of the court of claims, entered in a suit brought under an agreement between the United States and the Choctaw and the Chickasaw Indians, made the 21st of March, 1902, and ratified and affirmed by the act of July 1, 1902 (32 Stat. at L. 649, chap. 1362).

The controversy is as to the relations of the Chickasaw freedmen to the Chickasaw Nation, and the rights of such freedmen, independent of such agreement, in the lands of the said Indian nations under the 3d article of the treaty of 1866 [14 Stat. at L. 769] between the United States and the [116] said nations, and under *any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

There is no dispute about the facts. They are substantially as follows: By treaty of October 20, 1832 [7 Stat. at L. 381] the Chickasaw Indians ceded to the United States, for the purpose of sale, their land east of the Mississippi river, and later were permitted to migrate west of that river. By the treaty between the Choctaw and Chickasaw tribes of June 17, 1837, the Chickasaw tribe was permitted to occupy, with the Choctaw tribe, certain territory within the United States, the United States confirming the treaty and such occupation by a treaty with the tribes June 22, 1855 [11 Stat. at L. 611]. By this treaty the lands were guaranteed "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole." By said treaty the said tribes leased to the United States "all that portion of their common territory west of the ninety-eighth degree of west longitude" for the settlement of the Wichita and other tribes of Indians. The leased territory was also to be opened to the settlement by Choctaws and Chickasaws. This is the "leased district" hereinafter referred to. The Choctaws and Chickasaws are separate nations. Upon the breaking out of the Civil War they entered into relations with the Southern confederacy, and took up arms against the United

States. On January 1, 1863 [12 Stat. at L. 1268], the President of the United States, in pursuance of the proclamation of September 22, 1862 [12 Stat. at L. 1267], issued a proclamation abolishing slavery.

The appellants in No. 323 are the survivors or descendants of the slaves held by the Chickasaw Nation, and number about 9,066. The Creeks, Cherokees, and Seminoles also rebelled against the United States, and on the 10th of September, 1865, a treaty was entered into at Fort Smith, Arkansas, between them, said Choctaws and Chickasaws and the United States, by which they and the said Choctaws and Chickasaws renewed their allegiance to the United States, and acknowledged themselves to be under the protection of the United States, and covenanted and agreed that thereafter they would in all things recognize the *government of the [117] United States, which should exercise exclusive jurisdiction over them. The United States on its part promised to afford ample protection for the security of the persons and property of the respective nations or tribes. The treaty was ratified by the legislature of the Chickasaw Nation.

A treaty was concluded between the United States and the Choctaw and Chickasaw Indians, and proclaimed July 10, 1866. It provided, among other things, as follows:

"Article II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

"Article III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all the persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively; and also to give to such persons who were residents, as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and

Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the [118] proportion *of three fourths to the former and one fourth to the latter,—less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days after the passage of such laws, rules, and regulations, shall elect to remove and actually remove from the said nations, respectively. And should said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper,—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.” [14 Stat. at L. 769.]

The legislature of the Chickasaw Nation has taken action at various times in regard to the said Chickasaw freedmen, as follows:

On November 9, 1866, the Chickasaw legislature passed an act declaring it to be the unanimous desire of the legislature that the United States hold the share of the Chickasaw Nation in the \$300,000, stipulated for the cession of the “leased district,” for the benefit of the Chickasaw freedmen, and remove them beyond the limits of the Chickasaw Nation, according to the 3d article of the treaty of 1866.

In 1868 similar action was taken by the Chickasaw legislature, asking for the removal, by the United States, of the Chickasaw freedmen from the Chickasaw country.

January 10, 1873, the Chickasaw legislature passed an act by which the freedmen were declared to be adopted in conformity with the 3d article of the treaty of 1866. Certain conditions were expressed, and it [119] was provided that the act *should “be in full force and effect from and after its approval

by the proper authority of the United States.”

That act was transmitted by the governor of the Chickasaw Nation, by letter of the same date, to the President of the United States, and was submitted by the Secretary of the Interior to the Speaker of the House of Representatives on February 10, 1873, with recommendation for appropriate legislation for extending the time for the execution of the 3d article of the treaty. The papers were referred to the committee on freedmen affairs, but no action thereon was had at that time.

In October, 1876 or 1877, another act was passed, § 3 of which was as follows:

“Sec. 3. Be it further enacted, that the provisions contained in article 3 of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit, or passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the government of the United States that it is the wish of the legislature of the Chickasaw Nation that the government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866.”

An act passed October 22, 1885, provided, *inter alia*, as follows:

“Sec. 1. Be it enacted by the legislature of the Chickasaw Nation, That the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Cherokee Nation, upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the department at Washington of the action of the legislature in the premises.

“Sec. 2. Be it further enacted, That the governor is hereby *authorized and directed [120] to appoint two competent and discreet men of good judgment and business qualifications to visit Washington city, D. C., during the next session of Congress, and memorialize that body to provide a means of removal of the freedmen from the Chickasaw Nation to the country known as Oklahoma, in the Indian territory, or to make some suitable disposition of the freedmen question, so that they be not forced upon us as equal citizens of the Chickasaw Nation.”

Congress took no action until August 15,

1894, when it passed an act, § 18 of which provided—

"That the approval of Congress is hereby given to 'An Act to Adopt the Negroes of the Chickasaw Nation,' and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January 10, 1873, particularly as set forth in a letter from the Secretary of the Interior transmitting to Congress a copy of the afore-said act contained in House Executive Document numbered two hundred and seven, Forty-second Congress, third session." 28 Stat. at L. 336, chap. 290.

Subsequently, April 23, 1897, an agreement was entered into between the United States and the Choctaw and Chickasaw tribes. The agreement, ratified and confirmed by the act of June 28, 1898, § 29 (30 Stat. at L. 505, chap. 517), provides, *inter alia*, as follows:

"That all the lands within the Indian territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes, so as to give to each member of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands. . . .

"The lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

"That the said Choctaw and Chickasaw freedmen who may be entitled to allotments [121] of 40 acres each shall be entitled *each to land equal in value to 40 acres of the average land of the two nations."

These provisions relative to the freedmen are previously qualified as to their holdings of such lands by this clause in the statute: "to be selected, held, and used by them until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress."

Then came the agreement of 1902. It provides for the allotment of land to each member of the Choctaw and Chickasaw tribes of 320 acres, and to each freedman "land equal in value to 40 acres of the average allottable land of the Choctaw and Chickasaw Nations."

The agreement provides also as follows:

"36. Authority is hereby conferred upon the court of claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty of eighteen hundred and sixty-six between the 193 U. S.

United States and the Choctaw and Chickasaw Nations and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

"37. To that end the Attorney General of the United States is hereby directed, on behalf of the United States, to file in said court of claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw Nations and the Chickasaw freedmen setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen, and praying that the defendants thereto be required to interplead and settle their respective rights in such suit."

"Sec. 40. In the meantime the commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that *the Chickasaw freedmen are not, independ-[122] ently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the court of claims shall render a decree in favor of the Choctaw and Chickasaw Nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw Nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid." [32 Stat. at L. 649, chap. 1362.]

The agreement was ratified by the Choctaws and Chickasaws by elections September 25, 1902, and became effective on that date. The court of claims found the averments in the bill to be true, and found that the 3d article of the treaty of 1866 remained unaffected by any and all laws subsequently thereto enacted by the said Indian nations or by Congress independently of the agreement of March 21, 1902, and confirmed by act of Congress of July 1, 1902; that the Chickasaw Nation had not conferred the rights upon their freedmen as provided in

said treaty, or given to them 40 acres of land as provided. And further found that none of the said freedmen elected to remove or were willing to remove from said nation, but they did and now do remain therein; that the United States only agreed to remove them if they were willing to be removed. And further, the freedmen, by not electing to remove from the nation, and remaining therein, forfeited all benefit to the money mentioned in the treaty, "became in said nation upon the same footing as other citizens of the United States in said nation, and were entitled only to the rights and privileges of such citizens, and were not entitled to the 40 acres of land mentioned and described" in said treaty. It was therefore

[123] *adjudged that, independently of said agreement, the relations of the freedmen to said nation were only those "of citizens of the United States residing in the said nation," and that the said freedmen, independently of said agreement and the aforesaid act of 1902, "have no rights in the lands of the Chickasaw Nation, nor are they, or any of them, under said article, entitled to allotments in the lands of the said Chickasaw Nation." The decree concluded as follows:

"And it is further ordered that, upon the coming in of the roll and appraisal to be made by the Dawes Commission, as referred to in the said statute, the defendants, the Choctaw and Chickasaw Nations, have leave to apply for an additional decree to be entered at the foot of this decree, determining the amount which shall be paid and allowed by the United States to the said Choctaw and Chickasaw Nations, as directed by said statute; and that the complainant, the United States, be at the same time heard in regard to such amount for which judgment shall be rendered against the United States."

Assistant Attorney General Pradt and *Mr. Charles W. Needham* argued the cause and filed a brief for appellants.

Messrs. George A. Mansfield and *A. A. Hoehling, Jr.*, argued the cause, and, with *Messrs. Mansfield, McMurray, & Cornish*, filed a brief for appellees.

Mr. Justice *McKenna*, after stating the case as above, delivered the opinion of the court:

Full quotations have necessarily been made from the statutes and agreements relied on and from the treaty of 1866, but the questions presented are, nevertheless, not complex.

The main, if not crucial, question is, Were the freedmen adopted by the Chickasaw Nation as provided in the treaty? They were declared adopted by the act of 1873 upon certain conditions, but the act was only to

have force and effect "from and after the approval by the proper authority of the United States." The United States did not approve until 1894. In the meantime, as early as 1876, the Chickasaws passed an act *by which it was "declared to be the unanimous consent of the Chickasaw legislature" that the United States exercise the right given to it for the benefit of the freedmen by the treaty of 1866. Against the effect of this act several contentions are presented.

It is urged that the negroes became free by the emancipation proclamation and the 13th Amendment to the Constitution of the United States, and acquired thereby all the rights of freedmen. That may be granted, but what is its consequence? Certainly not to invest the freedmen with any rights in the property, or to participate in the affairs, of their former owners. For such rights we must look to the treaty and subsequent legislation and, to a certain extent, to the act which gave jurisdiction of this suit to the court of claims. We get no aid from the emancipation proclamation or the 13th Amendment. Prominent, of course, in the inquiry is the act of adoption passed by the Chickasaw legislature in 1873. It responded, in the main, to the treaty of 1866, and if it had force in 1894, when it was approved by Congress, the adoption of the freedmen was made complete. Appellants so contend. They say the act of adoption "was complete in itself and a full exercise of the power possessed by that (Chickasaw) legislature." And, further, if the act were subject to repeal, it was not repealed. The act, it is contended, expressed a wish only, and not a purpose, and left to the United States to "follow either of two courses." Counsel say: "It (the United States) could approve the act of adoption of 1873, but it could refuse to approve that act, and remove the freedmen as requested by the act of 1876. The power of determining which course should be adopted rested wholly and exclusively with the United States." The argument is plausible, but we cannot assent to it. Besides, the act of 1876 does not stand alone. In 1885—nine years before Congress acted—another act was passed. Its terms were unmistakable. Its declaration was "that the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Cherokee Nation upon any terms or conditions whatever." The governor was requested to notify the department at Washington *of the action of the legislature, and [125] was also directed to appoint two competent men to visit Washington and to memorialize Congress "to provide the means of the removal of the freedmen from the Chickasaw Nation to the country known as Oklahoma in the Indian Territory." These two acts

must be construed to work a repeal of the act of adoption if it could be repealed by the Chickasaw Nation. The latter is denied, and we are brought to the last contention of appellants in regard to the question of adoption. The contention is that "Congress by the act approved August 15, 1894, gave life and vitality to the Chickasaw act of January 10, 1873;" that is, as we understand the contention, by mere power, and disregarding whatever of convention there was in the treaty of 1866, and whatever of volition was given to the Indians, the United States peremptorily determined the rights of the freedmen in the lands and affairs of the Indians. Granting, without deciding, that Congress possessed such power, we are forced to believe its exercise, if intended, would have been explicit and direct, not left to be inferred by the approval of the act of 1873. That approval is, of course, an element in the controversy, but to give it the effect which appellants do is to make it practically the sole element, and reduces the case to the inquiry what Congress had willed, not what Congress had agreed to. The act of 1902 certainly contemplated and provided for a different inquiry, one that depended upon the agreements of the United States, not upon its power. And this view is supported by the opinion of the Secretary of the Interior, expressed August 9, 1898, and which was presumably known to Congress when it passed the act of 1902. The opinion reviewed the treaty of 1866 and subsequent legislation and interpreted § 18 of the act of 1894, which approved the act of adoption of 1873, as follows:

[126] "The language of this provision is not such as would be appropriate to the enactment of original legislation, such as an adoption of the freedmen into the Chickasaw tribe by Congressional enactment, against the consent of the tribe. The terms employed harmonize better with a purpose to merely assent to, or sanction, an act of the tribal legislature supposed *to be awaiting assent, or sanction, by Congress. The words used are those of approval and acquiescence, and not those of creation or command."

The conclusion was deduced "that the Chickasaw freedmen are not members of that tribe, within the meaning of the provision of the agreement submitting the amended agreement to a vote of the male members of the tribe qualified to vote under tribal laws."

It follows from these views that the freedmen were not adopted into the Chickasaw tribe, and necessarily did not acquire the

rights dependent upon adoption. They make, however, a specific claim to be beneficiaries of the \$300,000.

By the treaty, as we have seen, the United States was to hold that sum in trust for the Indians, to be paid to them upon their conferring certain rights upon the freedmen, and by giving the latter 40 acres of land. If such rights were not conferred within two years from the ratification of the treaty the said sum should then be held in trust for said freedmen, and be held and used by the United States for the benefit of such freedmen as should remove from the territory; and the United States agreed to remove, within ninety days from the expiration of said two years, all such freedmen who should be willing to remove; those who remained or who should return after having been removed, to have no benefit of said sum or any part thereof, but should be upon the same footing as other citizens of the United States.

The treaty is clear. The Indian nations were to receive the \$300,000 if they conferred upon the freedmen the rights expressed in the treaty. Failing to confer those rights, that sum was to be held in trust for all such freedmen, and only such freedmen, as should remove from the territory. The treaty was not complied with either by the Indians or the United States. No rights were conferred upon the freedmen; no freedmen were removed, and the statutes were enacted and the agreements were made that we have described. But those statutes and agreements gave no rights to the freedmen. The only explicit provision for the freedmen was the allotment of 40 acres of land to each of them. They claim to be *beneficiaries [127] of the \$300,000, but the disposition of that under the treaty was to be in the United States, and only to be used for freedmen who should remove from the territory. None have removed. There is an intimation in the brief of their counsel that in their memorials to Congress they expressed a willingness to remove, but Congress did not choose, and has not chosen, to remove them; indeed, has provided for the exact opposite, -- provided for the allotment of homes to them out of the lands of the Indians, and for payment to the Indians therefor if it should be determined, in this suit, that the freedmen were not, independently of that agreement, "entitled to allotments in Choctaw and Chickasaw lands."

As we hold the freedmen were not so entitled, *the decree of the Court of Claims is affirmed.*

DELAWARE INDIANS, Residing in the
Cherokee Nation, *et al.*, *Appts.*,
v.
CHEROKEE NATION.

(See S. C. Reporter's ed. 127-146.)

Indians—contractual rights of Delawares in Cherokee lands—parol evidence to contradict grant—jurisdiction under enabling act.

1. Only a right of occupancy for life, with the additional privilege secured in case of allotment, was acquired by the registered Delaware Indians in the lands which the Cherokees agreed, in their contract of April 8, 1867, with the Delawares who were to be incorporated into the Cherokee Nation, to sell to such Delawares "for their occupancy," to be equal in the aggregate to 160 acres for each individual registered Delaware, with a guaranty to each of not less than 160 acres, with improvements, in case of the allotment of the Cherokee lands among the members of that nation, and with a stipulation that the lands sold were to be held on the same terms as the Cherokee citizens held their lands, and that the children thereafter born of such Delawares should, in all respects, be regarded as native Cherokees.
2. Parol evidence of the understanding of the parties is not admissible to contradict the terms of the agreement of April 8, 1867, negotiated between representatives of the Delaware and Cherokee Nations, meeting upon equal terms.
3. Inquiry into the validity of the method by which certain amendments to the constitution of the Cherokee Nation were adopted, or revision of the political or administrative action of that nation, was not authorized by the provision of the act of June 28, 1898 (30 Stat. at L. 495, chap. 517), § 25, empowering the Delaware Indians residing in the Cherokee Nation to bring suit in the court of claims for the purpose of determining the contractual rights of the Delawares in the Cherokee national lands and funds.

[No. 240.]

Argued December 1, 2, 1903. Decided February 23, 1904.

APPEAL from the Court of Claims to review a decree dismissing a bill filed by the Delaware Indians residing in the Cherokee Nation for the purpose of determining their contractual rights to the lands and funds of the Cherokee Nation. Modified, and, as modified, *affirmed*.

See same case below, 38 Ct. Cl. 234.

The facts are stated in the opinion.

Mr. Walter S. Logan argued the cause, and, with **Mr. Charles M. Demond**, filed a brief for appellants:

The decision of an appellate court is not to be judged by its opinion, but by the action taken or by the decree rendered. A de-

creed of affirmance means that, to the extent that the court below adjudicated a fact in issue, that fact is affirmed, and nothing more. The rules with respect to *dicta* are well settled, and this court will enforce them, even with respect to its own previous adjudications.

Cohen v. Virginia, 6 Wheat. 399, 5 L. ed. 257.

Where the question arose as to what were Indian tribes, and as to what was the tenure of certain lands, this court declined to pass on the question of citizenship, which was not necessarily involved.

United States v. Joseph, 94 U. S. 614, 24 L. ed. 295.

Conversely, where the question of citizenship was involved this court did not pass upon a question not involved, namely, the title to lands.

Cherokee Nation v. Journeycake, 155 U. S. 213, 39 L. ed. 125, 15 Sup. Ct. Rep. 55. See also *Carroll v. Carroll*, 16 How. 286, 14 L. ed. 941; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 654, 39 L. ed. 759, 844, 15 Sup. Ct. Rep. 673.

The statute is a remedial one, and should be liberally construed, in view of all the surrounding circumstances, the evil which existed, and the remedy needed.

Aldridge v. Williams, 3 How. 9, 11 L. ed. 469; *United States v. Buchanan*, 4 Hughes, 487, 9 Fed. 689.

The general rule of construction of deeds of grant is that the language is to be construed strictly against the grantor and in favor of the grantee. This rule does not apply to public grants, in which case the construction is in favor of the state, except when the grant is based on a consideration moving from the grantee, when the general rule applies as between private parties, and the construction must be strictly in favor of the grantee.

Charles River Bridge v. Warren Bridge, 7 Pick. 344, *Affirmed* in 11 Pet. 591, 9 L. ed. 841; *Langdon v. New York*, 93 N. Y. 129.

In construing a statute, courts may refer to the history of the times to ascertain the reason for and the meaning of its terms.

United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; *Aldridge v. Williams*, 3 How. 9, 11 L. ed. 469; *District of Columbia v. Washington Market Co.* 108 U. S. 243, 27 L. ed. 714, 2 Sup. Ct. Rep. 543; *Katzenberger v. Aberdeen*, 16 Fed. 745.

In construing statutes the state of things as they appeared to the legislature at the time of enactment may be considered.

Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424.

A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter;

and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers; and such construction ought to be put upon it as does not suffer it to be eluded.

People v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243.

Limitations of the power of alienation, where Indian tribes are concerned, do not take away from the character of the title. They are useful and necessary conditions to prevent white settlers and others from taking possession of Indian lands when they are under no obligation to obey Indian constitutions or laws. The idea is to prevent a sale by Indians until the time comes when the lands can be allotted, at which time the occupancy title in the tribe as a whole is changed to the fee title in the several members of the tribe in severalty.

Pickering v. Lomax, 145 U. S. 313, 36 L. ed. 718, 12 Sup. Ct. Rep. 860, Reversing 120 Ill. 289, 11 N. E. 175; *Smythe v. Henry*, 41 Fed. 705; *Libby v. Clark*, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045; *Ross v. Eells*, 56 Fed. 855.

A treaty with the Indians, so far as respects the grants of land to individuals contained in it, is evidence of the grantee's title, and, as such, proper to be laid before a jury.

Harris v. Doe, 4 Blackf. 370.

Where the act or treaty provides no other mode of conveyance, the courts incline by construction to make the terms of the act or treaty operate as grants, if the language, taken all together, and in connection with what may be supposed to have been the intention, will admit it.

Verden v. Coleman, 4 Ind. 457.

Words of perpetuity are not necessary to the vesting of title in the Delawares to the lands they claim.

United States v. Rocse, 5 Dill. 405, Fed. Cas. No. 16,137.

While a Cherokee citizen does not have a fee in the land he occupies, he can hold it forever and enjoy his profits; and this right may descend to his heirs.

Payne v. Kansas & A. Valley R. Co. 46 Fed. 546.

By paying \$121,824.28 for citizenship, the Delawares acquired as citizens the right to improve and occupy lands other than the 157,600 acres, with such an indefeasible right of possession and occupancy as to be practically a fee simple.

Ibid.

Such a right as this was upheld in the case of the Shawnees, who by their agreement merely bought citizenship rights.

Cherokee Nation v. Blackfeather, 155 U. S. 218, 39 L. ed. 126, 15 Sup. Ct. Rep. 63.

The title of the Cherokee Nation is a base,

qualified, or determinable fee, without the right of reversion, and only the possibility of reversion, in the United States.

United States v. Rogers, 23 Fed. 659; *Re Wolf*, 27 Fed. 606; *Cherokee Nation v. Southern Kansas R. Co.* 33 Fed. 900.

By the treaty of December 29, 1835 (7 Stat. at L. 478), the United States made the sale of the lands to the nation in fee simple; and the fact and validity of this sale have been recognized by Congress through appropriations made in execution of the treaty making it.

Holden v. Joy, 17 Wall. 211, 21 L. ed. 523; *Mehlin v. Ice*, 5 C. C. A. 403, 12 U. S. App. 305, 56 Fed. 12; *Payne v. Kansas & A. Valley R. Co.* 46 Fed. 546.

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used in the latter sense. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; *Jones v. Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Wau-pe-man-qua v. Alldrich*, 28 Fed. 489.

An Indian treaty, like any other instrument, must be construed in the light of its obvious purpose; and general words may often be limited and restricted by such purpose.

Miami County v. Brackenridge, 12 Kan. 114.

In construing the treaty the court will take into consideration the situation of the parties, the property involved, their intention and purpose, the construction they gave it, and the construction which was adopted and acted upon by them.

United States v. Payne, 2 McCrary, 289, 8 Fed. 883; *Wilson v. Wall*, 6 Wall. 83, 18 L. ed. 727.

It is unquestionably the law that parol evidence is admissible to explain the terms of Indian treaties or the circumstances which surround them.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483. See also *Re Kansas Indians*, 5 Wall. 737, 760, 18 L. ed. 667, 674; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75.

Extrinsic evidence is competent to explain ambiguities which are latent in the instrument.

Greenl. Ev. §§ 277, 282.

Whatever be the nature of the document

under review, the object is to discover the intention of the writer as evidenced by the words he has used; and in order to do this the court must put itself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter.

Jenkins v. Cooper, 50 Ala. 419; *Swayne v. Vance*, 28 Ark. 282; *Brick v. Brick*, 98 U. S. 514, 25 L. ed. 256; *Phelps v. Clasen*, Woolw. 204, Fed. Cas. No. 11,074; *Tibbs v. Morris*, 44 Barb. 138; *King v. Merriman*, 38 Minn. 47, 35 N. W. 570.

Numerous persons were adopted as citizens after the making of the Delaware-Cherokee agreement. It is evident that they may be citizens without having property rights.

Stephens v. Cherokee Nation, 174 U. S. 488, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

Messrs. **William T. Hutchings** and **John J. Hemphill** argued the cause and filed a brief for appellee:

In addition to the plain terms of the agreement, it has been decided by the Supreme Court of the United States what character of title the Delawares took.

United States v. Journeyake, 155 U. S. 213-215, 39 L. ed. 125, 126, 15 Sup. Ct. Rep. 55.

Whatever right any citizen has to occupy any particular parcel of the public lands of the nation, he must acquire under and in pursuance of the laws of the nation, and not in defiance of them.

Bell v. Atlantic & P. R. Co. 11 C. C. A. 271, 27 U. S. App. 305, 63 Fed. 417.

There must be some ambiguity or obscurity about the language of any instrument, to warrant the introduction of testimony to explain it.

The Cherokee Trust Funds, 117 U. S. 288, 29 L. ed. 880, 6 Sup. Ct. Rep. 718.

Mr. Justice **Day** delivered the opinion of the court:

On June 28, 1898, the Congress of the United States passed an act entitled "An Act for the Protection of the People of the Indian Territory and for Other Purposes." 30 Stat. at L. 495, chap. 517. By the 25th section of the act it is provided:

"That before any allotment shall be made of lands in the Cherokee Nation, there shall be segregated therefrom by the commission heretofore mentioned, in separate allotments or otherwise, the one hundred and fifty-seven thousand, six hundred acres purchased by the Delaware tribe of Indians from the Cherokee Nation, under agreement of April eighth, eighteen hundred and sixty-seven, subject to the judicial determination of the rights of said descendants and the Cherokee Nation under said agreement. That the

Delaware Indians residing in the Cherokee Nation are hereby authorized and empowered to *bring suit in the court of claims [129] of the United States, within sixty days after the passage of this act, against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation under their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States."

Under this section the present suit was prosecuted in the court of claims by the Delaware Indians residing in the Cherokee Nation, as a tribe and individually, joined by certain others suing for the surviving registered Delawares, their children, descendants, and personal representatives, against the Cherokee Nation, for the purpose of determining the right of the Delaware Indians "in and to the lands and funds of said nation" under the contract and agreement with the Cherokee Nation dated April 8, 1867. This contract sets forth:

"Now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

"The Cherokees, parties of the first part, for and in consideration of certain payments and the fulfilment of certain conditions hereinafter mentioned, agree to sell to the Delawares for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elect to remove to the 'Indian country,' to which list may be added, only with the consent of the Delaware council, the names of such other Delawares as may, within one month after signing of this agreement, desire to be added thereto, and the selections of the lands to be purchased by the Delawares may be made by said Delawares in *any part of the Cherokee reservation east of [130] said line 96° not already selected and in possession of other parties, and in case the Cherokee lands shall hereafter be allotted among the members of said nation, it is agreed that the aggregate amount of land herein provided for the Delawares to include their improvements according to the legal subdivisions when surveys are made (that is to say, 160 acres for each individ-

ual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation, nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent but shall be subject to the same conditions and restrictions as are, by the laws of the Cherokee Nation, imposed upon native citizens thereof.

"Provided that nothing herein shall confer the right to alienate, convey, or dispose of any such lands except in accordance with the constitution and laws of said Cherokee Nation.

"And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees from the Delaware funds now held or hereafter received by the United States, a sum of money equal to \$1 per acre for the whole amount of 160 acres of land for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto heretofore provided for.

"And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares to procure funds necessary to pay for said lands; but in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation, at their market value at the date of such transfer.

"And the said Delawares further agree that there shall be paid from their funds now or hereafter to come into possession of the United States a sum of money which shall sustain the same proportion to the [131] existing Cherokee national fund that *the number of Delawares registered as above mentioned and removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee Nation. And for the purpose of ascertaining such relative numbers the registers of the Delawares herein referred to, with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares, and an accurate census of the Cherokees residing in the Cherokee Nation shall be taken under the laws of that nation within four months, and properly certified copies thereof filed in the Office of Indian Affairs, which shall be the basis of calculation as to the Cherokees.

"And that there may be no doubt hereafter as to the amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the in-

vested funds of the Cherokees, after deducting all just claims thereon, is \$678,000.

"And the Delawares further agree that in calculating the total amount of said national fund there shall be added to the said sum of \$678,000 the sum of \$1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee national fund \$1,678,000; and this last mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund.

"Provided, that as the \$678,000 of funds now on hand belonging to the Cherokees is chiefly composed of stocks of different values, the Secretary of the Interior may transfer from the Delawares to the Cherokees a proper proportion of the stocks now owned by the Delawares of like grade and value, which transfer shall be in part of the *pro rata* contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the *pro rata* contribution by the Delawares to said fund shall be in cash or United States bonds, at their market value.

"All cash, and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the *Dela-[132] wares under the agreement, shall be invested and applied in accordance with the 23d article of the treaty with the Cherokees of August 11, 1866.

"On the fulfilment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

"And the children hereinafter born of such Delawares so incorporated into the Cherokee Nation shall, in all respects, be regarded as native Cherokees."

The treaties which led up to this agreement are referred to in the contract and were ratified in 1866. The 15th article of the treaty of August 11, 1866, between the United States and the Cherokee Nation provided:

"Article XV. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, *viz.*: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid

into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into, and ever after remain, a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds

[133] equal to one hundred and sixty acres, *if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and, in cases of disagreement, the price to be fixed by the President.

"And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organization, shall be permitted to settle east of the ninety-sixth degree of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the ninety-sixth degree of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the ninety-sixth degree of longitude." [14 Stat. at L. 803.]

Article IV. of the Delaware treaty, referred to in the agreement of April 8, 1867, is in the following terms:

"Article IV. The United States agree to sell to the said Delaware Indians a tract of land ceded to the government by the Choc-taws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the

Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware *Indians shall so desire, a quantity [134] equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of land in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request; when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior." [14 Stat. at L. 794.]

At the time of moving upon these lands there were 985 registered Delawares, of whom 212 survived at the beginning of this suit, together with children and descendants of those deceased.

The agreement of April 8, 1867, was before this court in the case of the *Cherokee Nation v. Journeyeake*, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55. While the precise questions involved in the present controversy were not then before the court, the rights adjudicated turned upon the construction of the agreement of April 8, 1867, and its nature and the history of the events which led up to its execution by the parties thereto were the subjects of consideration and determination by this court. In that case it was held that under the agreement the registered Delawares were incorporated into the Cherokee Nation, and as members and citizens thereof were entitled to participate in the proceeds of the sale of a portion of the Cherokee lands upon equal terms with native Cherokee citizens. The claim is made that the contract of 1867 secured to the registered Delawares individually, or to the Delawares as a tribe, the 157,000 acres of land which were to be set off to them east of the ninety-sixth meridian. This agreement was made and entered into in pursuance of the treaty stipulations hereinbefore referred to. And while it may be regarded as arising from these preliminary treaties with the United States, the care with which it was *made, and the evident intention of [135] the parties to deal at arm's length with full knowledge of their respective rights and aims, leaves little to be gained from these preliminary treaties as an aid to construction, except as a means of placing ourselves in the situation of the parties when the con-

tract was signed and delivered. It is the claim in behalf of the Delawares that if not technically an estate in fee, one was conveyed permanent in its character and transmissible by descent to the children and kin of the registered Delawares, or at least it was a holding which should endure so long as the Delawares and their descendants continued to exist as a tribe.

It was held in the *Journeycake Case*, to be the purpose of this agreement to incorporate the registered Delawares into the Cherokee Nation, with full participation in the political and property rights of citizens of that nation. As a part of the general agreement, provision is made for rights in certain lands as a home for the Delawares who are to remove from their Kansas lands to the Indian territory. These lands are to pass to registered Delawares and they are to have the privilege of selecting them from unoccupied lands east of the line 96 degrees west longitude. This right is conferred not upon the Delaware Nation, but upon certain registered Delawares who are to be incorporated into the Cherokee Nation. To such is given a quantity of land equal in the aggregate to 160 acres for each registered Delaware, whose name is required to be entered upon a register to be filed in the Office of Indian Affairs, the lands thus conveyed being distinctly declared to be sold to the Delawares "for their occupancy." This limitation, in what may be characterized as the habendum clause of the conveyance, does not import a holding beyond the life of the first taker, and is entirely inconsistent with the idea of permanency of tenure in the estate conveyed unless there is something in the nature of Indian titles to lands or in the terms of the instrument which requires an enlargement of an estate for occupancy into one the equivalent of a fee. It is argued that an estate of occupancy is the ordinary

[136] estate of the Indian tribes and *embraces all the title held by them, the fee remaining in the United States. There is nothing to prevent the United States, if it chooses to convey a fee to the Indian tribes, from so doing.

Indeed, in the 16th clause of the treaty with the Cherokee Nation of August, 1866, it is provided that a fee may be conveyed to friendly Indians settled west of the ninety-sixth meridian. But for the present purpose, it is unnecessary to speculate as to the nature of the Indian title derived from the United States by treaty. The nature and extent of the Cherokee title has been settled by previous adjudications of this court. In the case of *Cherokee Trust Funds*, 117 U. S. 288, 308, 29 L. ed. 880, 886, 6 Sup. Ct. Rep. 718, 727, it was held that the lands of the Cherokee Nation belonged to them

as a political body, and not to its individual members, and, speaking of the rights of individual Cherokees, it was said: "He had a right to use parcels of the lands thus held by the nation, subject to such rules as its governing authority might prescribe."

The lands of the Cherokee Nation are not held in individual ownership, but are public lands, though held for the equal benefit of all the members. *Stephens v. Cherokee Nation*, 174 U. S. 445-488, 43 L. ed. 1041-1056, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 295, 47 L. ed. 184, 23 Sup. Ct. Rep. 115. Under the patent issued to the Cherokees for their lands, whatever title conveyed was to the Cherokees as a nation, and no title was vested in severalty in any of the Cherokees. *Cherokee Nation v. Journeycake*, 155 U. S. 196-207, 39 L. ed. 120-124, 15 Sup. Ct. Rep. 55.

In an agreement incorporating certain Delawares into the Cherokee Nation it is important to consider under what terms and conditions its citizens held and used the lands occupied by them. We are here dealing with the extent of the title conveyed as between Indian tribes, and the question is, What did the Cherokees convey in the agreement to the Delawares who came within the terms of the compact and who were to be incorporated into the Cherokee Nation? In addition to the limitations expressed in the conveyance, "for occupancy," we find other terms of the instrument inconsistent with the grant of a perpetual estate. It is provided that in case the Cherokee *lands shall [137] hereafter be allotted among the members of said nation, the aggregate amount of land provided for the Delawares, to include their improvements according to the legal subdivisions when surveys are made (that is to say, 160 acres for each individual), shall be guaranteed to each Delaware incorporated by the articles into the Cherokee Nation. The lands which are for occupancy of the Delawares are described as "Cherokee lands," and a provision made which secures 160 acres, to include their improvements, to each registered Delaware in case of allotment. If the full title was intended to be transferred to the Delawares, either as a tribe or individually, this stipulation to secure the rights of the Delawares in the contingency named was entirely superfluous. Further, the contract reads: "Nor shall the ownership and occupancy of said lands by any Delawares so registered be interfered with in any manner whatsoever without his consent, but shall be subject to the same conditions and restrictions as are, by the laws of the Cherokee Nation, imposed upon the native citizens thereof. Provided, that nothing herein shall confer the right to alienate, convey, or dispose of any such land

except in accordance with the constitution and laws of said Cherokee Nation."

These stipulations wholly inconsistent with the full title of the Delawares to the lands in question, must be read in the light of the Constitution and laws of the Cherokee Nation as to the holding of land by Cherokee citizens.

The provisions of the Cherokee constitution and the statutes passed in pursuance thereof pertinent to the subject are collected in the opinion of the court of claims in the *Journeycake Case*, and are cited in a note to the opinion of this court in the same case. 155 U. S. 207, 39 L. ed. 124, 15 Sup. Ct. Rep. 55. From them it is apparent that lands to be held upon the same terms as the Cherokees hold their lands cannot be alienated by those who occupy and hold them, but the ownership is lodged in the Cherokee Nation. The individual has no right to alienate or lease the lands. The nation grants and restricts the right of occupancy. The title [138] to "the lands is vested in the government, to be held and controlled in such wise as to promote the general welfare. Under these restrictions and conditions the registered Delawares held the lands set apart for their occupancy. In the laws of the Cherokee Nation we find that the use of the terms "for use and occupancy" was not an unfamiliar form of expression in describing the character and limitation upon the right of private ownership. Thus, in the act relating to the public domain, and reserving tracts of lands 1 mile square along railroads at stations, and providing for the sale of town lots, it is provided that the purchaser shall acquire no other rights than those of use and occupancy. If the lands in question were granted in perpetuity to the Delawares, we have the awarding of an estate of this character carved out of lands recognized in the agreement as continuing to be Cherokee lands, belonging to the nation which expressly limits the conveyance of its lands to its own citizens for use and occupancy only. Again, if it was intended to provide for the children or heirs of the first takers—the registered Delawares—we should expect to find some words in the agreement competent for that purpose, conceding that the technical terms of the common law to create an estate in fee need not have been used. As to the children of the registered Delawares, we find this specific provision: "And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall, in all respects, be regarded as native Cherokees." This provision is utterly inconsistent with the grant of an estate in the lands to survive the "occupancy" of the registered Delawares. Such children are to have the rights of native Cherokees, and no

more. Their parents were incorporated into the Cherokee Nation with certain specific rights; the children were to stand upon an equality with their adopted brethren of the Cherokee blood.

The importance of the issue now distinctly made as to the title to these lands has led us to give renewed examination to the question of the extent and character of the interest conveyed to the Delawares in the lands in controversy. In the **Journeycake* [139] *Case*, while it is true that the precise question was not the same as is now presented, full consideration to all the terms of this contract was given in order to determine the interests of the Delawares in the Cherokee lands sold, and the court, speaking by Mr. Justice Brewer, used this pertinent language, the force of which has not been diminished in the light of subsequent examinations aided by the arguments and briefs of counsel now presented: "So far as the provision in the agreement for the purchase of homes is concerned, it will be perceived that no absolute title to these homes was granted. We may take notice of the fact that the Cherokees, in their long occupation of this reservation, had generally secured homes for themselves; that the laws of the Cherokee Nation provided for the appropriation by the several Cherokees of lands for personal occupation, and that this purchase by the Delawares was with the view of securing to the individual Delawares the like homes; that the lands thus purchased and paid for still remained a part of the Cherokee reservation. And as a further consideration for the payment of this sum for the purchase of homes the Delawares were guaranteed not merely the continued occupancy thereof, but also that in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they should receive an aggregate amount equal to that which they had purchased, and such a distribution as would secure to them the homes upon which they had settled, together with their improvements. So that if, when the allotment was made, there was, for any reason, not land enough to secure to each member of the Cherokee Nation 160 acres, the Delawares were to have at least that amount, and the deficiency would have to be borne by the native Cherokees *pro rata*. In other words, there was no purchase of a distinct body of lands, as in the case of the settlement of other tribes as tribes within the limits of the Cherokee reservation. The individual Delawares took their homes in, and remaining in, the Cherokee reservation, and as lands to be considered in any subsequent allotment in severalty among the members of the *Cherokee Nation. All this [140] was in the line of the expressed thought of

a consolidation of these Delawares with, and the absorption of them into, the Cherokee Nation as individual members thereof. If it be said that all of the Delaware trust funds were not turned into the national fund it will be remembered that there was no impropriety in the reservation of a part thereof in order to enable the Delawares to make such improvements as they might desire on the tracts that they selected for homes, and also that there was no certainty that all the members of the Delaware tribe would elect to remove to the Cherokee country, and that those who remained in Kansas were entitled to their share in the Delaware national funds."

If such be the true construction of the agreement, it is nevertheless insisted that it should not be literally enforced in view of the understanding of the parties, more particularly of the Delawares, that they were thereby receiving full title to the occupied lands. To establish this contention it is claimed that in view of the character of the contracting parties they should not be held to the strict rule of evidence which denies the competency of parol testimony to contradict written agreements, and a class of cases is cited of which *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483, may be taken as an example. The language of Justice McLean is quoted, in which he said:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

But the Justice was here dealing with a treaty negotiated between the representatives of the United States and those of the Indians, wherein the disparity of the contracting parties in education and knowledge of law and the use of language is obvious.

[141] *The contract of April 7, 1867, was negotiated between representatives of Indian nations, meeting upon equal terms. In the testimony of John G. Pratt, called for the Delawares, and at one time Indian agent for the Delaware agency, it appears:

Q. Do you know whether or not the agreement frequently referred to in your testimony was read over to the two delegations representing the Delawares and Cherokee tribes of Indians?

A. It was read over repeatedly; read over and corrected and altered and read over again several times, and each party put in

his suggestions, until they finally harmonized.

Q. Then, as I understand, the agreement, as finally signed, expressed the wishes of both sides, and both sides were fully satisfied with all it contained?

A. No; the Delawares were not satisfied, but they signed because it was the best they could do. They wanted to own the land outright.

Q. They did not contend at any time afterwards that the agreement did not fully express what they intended to express, did they?

A. No, sir; I did not hear anything of that kind.

We can perceive no room in this case for a departure from the familiar rules of the law protecting written agreements from the uncertainties of parol testimony. The testimony offered was, in the main, that of interested persons nearly thirty years after the agreement had been reduced to writing and signed by the parties thereto. Nor can we find a latent ambiguity in the terms of the contract which requires the admission of parol testimony to explain its effect. In the light of the circumstances and the language used in the writing, its construction is not rendered difficult because of latent ambiguities. It is claimed as a cogent circumstance, which should be considered in construing this agreement, that the Cherokee Nation received \$1 per acre for these lands,—a sum sufficient to cover their full value, and of consequent importance in determining the character of the estate conveyed. *In the *Journeycake Case* it was held [142] that, in consideration of the sum paid for citizenship rights, the Delawares obtained an interest in the lands of the Cherokee Nation, although the same were not considered in making up the sum paid for what has been denominated the right of citizenship. In that case it is pointed out that at the time the agreement under consideration was made the Cherokee Nation possessed, in addition to the "neutral" lands in Kansas, which were estimated at \$1,000,000 in making up the total of the Cherokee national fund of \$1,678,000 upon the basis of which the Delawares paid into the common fund—"Strip" lands in Kansas

(about) 400,000 acres.
Lands west of 96 degrees,

Indian territory (about) 8,000,000 acres.
Lands east of 96 degrees,

Indian territory home
reservation (about) . . . 5,000,000 acres.

In that case it was held that the Delawares acquired a right in the distribution of the proceeds, not only of the Kansas lands, but as well in such sales as were made of

this vast domain held by the Cherokee Nation. Of this feature of the agreement Mr. Justice Brewer, in the *Journeycake Case*, says: "Neither should too much weight be given to the fact that the Delawares were to pay for their homes at the rate of \$1 an acre, for by that purchase they acquired no title in fee simple, and it is not unreasonable to believe that the price thus fixed was not merely as compensation for the value of the lands (to be taken in the eastern portion of the reservation, where the body of the Cherokees had their homes, and therefore probably the most valuable portion of the entire reservation), but also as sufficient compensation for an interest in the entire body of lands, that interest being, like that of the native Cherokees, limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and the right to share in any future allotment."

[143] *We conclude, then, that the registered Delawares acquired in these lands only the right of occupancy during life, with a right, upon allotment of the lands, to not less than 160 acres, together with their improvements, and the children and descendants of such Delawares took only the rights of other citizens of the Cherokee Nation, as the same are regulated by its laws.

The bill further seeks to exclude from the allotment of Cherokee lands and funds certain citizens alleged to have been illegally admitted to citizenship, thereby wrongfully diminishing the shares of the Delawares in the common property. At the time of the agreement of April 7, 1867, the constitution, §§ 2 and 5, of the Cherokee Nation had been amended to read:

"Sec. 2. The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the provisions of article 20th of the treaty of 19th July, 1866, between the United States and the Cherokee Nation.

"Sec. 5. No person shall be eligible to a seat in the national council but a male citizen of the Cherokee Nation who shall have attained to the age of twenty-five years, and who shall have been a bona fide resident of the district in which he may be elected at least six months immediately preceeding such election. All native-born Cherokees, all Indians, and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as freed colored persons who were in the country at the commencement of the Rebellion, and are now residents therein, or who may return within six months from the 19th day of

July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

These constitutional provisions were in full force when the Delawares acquired their rights and when they were incorporated, or, as the agreement expressed it, "consolidated," with the *Cherokee Nation. Under [144] its terms the Delawares have participated in political rights and have taken part in the government of the nation. It is claimed that these amendments were illegally adopted for want of compliance with authorized methods for amending the national constitution. But the nation has never undertaken to set them aside or call in question their force and effect. They were in the fundamental law when the Delawares were made a part of the Cherokee Nation and the rights exercised were only those belonging to the nation when the Delawares saw fit to subject themselves to the laws of a new nation of which they were to become a component part upon equal terms with other citizens. The Cherokee Nation has many of the rights and privileges of an independent people. They have their own constitution and laws and power to administer their internal affairs. They are recognized as a distinct political community and treaties have been made with them in that character. *Cherokee Trust Funds*, 117 U. S. 288, 29 L. ed. 880, 6 Sup. Ct. Rep. 718. It is not reasonable to suppose that in the act under which these proceedings were brought it was intended to authorize inquiry into the administration of the political affairs of the Cherokee Nation, with a view to setting aside the adoption of constitutional amendments and the revision of political action in admitting persons to citizenship in the nation under authority of its constitution. The same conclusion disposes of the contention of the appellants that relief can be granted in this case in respect to alleged maladministration of the financial affairs of the Cherokee Nation, with a view to holding it to account in favor of the Delawares prosecuting this suit. We are authorized by the enabling act to determine the contractual rights of the Delawares in the national lands and funds; not to overhaul the political and administrative action of the Cherokee Nation.

The act authorizing this suit contemplates a determination of the rights and interest of the Delawares residing in the Cherokee Nation in the lands and funds of the Cherokee Nation under the compact of April, 1867. That it was the purpose *of [145] Congress to have a full and final determination of such rights is further shown in the

Cherokee allotment act of July 1, 1902. Section 23 of this act provides:

"Sec. 23. All Delaware Indians who are members of the Cherokee Nation shall take lands and share in the funds of the tribe, as their rights may be determined by the judgment of the court of claims, or by the Supreme Court if appealed, in the suit instituted therein by the Delawares against the Cherokee Nation, and now pending; but if said suit be not determined before said commission is ready to begin the allotment of lands of the tribe as herein provided, the commission shall cause to be segregated one hundred and fifty-seven thousand, six hundred acres of land, including lands which have been selected and occupied by Delawares in conformity to the provisions of their agreement with the Cherokees dated April eighth, eighteen hundred and sixty-seven, such lands so to remain, subject to disposition according to such judgment as may be rendered in said cause; and said commission shall thereupon proceed to the allotment of the remaining lands of the tribe as aforesaid. Said commission shall, when final judgment is rendered, allot lands to such Delawares in conformity to the terms of the judgment and their individual rights thereunder. Nothing in this act shall in any manner impair the rights of either party to said contract as the same may be finally determined by the court, or shall interfere with the holdings of the Delawares under their contract with the Cherokees of April eighth, eighteen hundred and sixty-seven, until their rights under said contract are determined by the courts in their suit now pending against the Cherokees, and said suit shall be advanced on the dockets of said courts, and determined at the earliest time practicable." [32 Stat. at L. 718, chap. 1375.]

[146] These acts contemplate a judgment of the court which shall determine the rights of the Delawares and Cherokees in the lands and funds of the Cherokee Nation in such wise as to enable a division to be made conformable to the rights of the parties as judicially determined. The court of claims rendered a *decree dismissing the bill. Whilst agreeing with the conclusions reached in that court as to the rights of the Delawares, we think the bill was broad enough in its allegations and prayer for relief to require a definite settlement of the rights in controversy. Instead of dismissing the bill, we think a decree should have been entered finding the registered Delawares entitled to participate equally with Cherokee citizens of Cherokee blood in the allotment of lands of the Cherokee Nation, with the addition that if there is not enough land to give to each citizen of the nation 160 acres, then the

registered Delawares shall be given that quantity, together with their improvements. In all other respects the Cherokee citizens, whether of Delaware or Cherokee blood, should be given equal rights in the lands and funds of the Cherokee Nation. *The decree dismissing the bill is so modified as to conform to the terms just stated; and as so modified it is affirmed.*

JACKSON W. GILES, *Plff. in Err.*,
v.

CHARLES B. TEASLEY *et al.*, Board of Registrars of Montgomery County, Alabama. (No. 337.)

JACKSON W. GILES, *Plff. in Err.*,
v.

CHARLES B. TEASLEY *et al.*, Board of Registrars of Montgomery County, Alabama. (No. 338.)

(See S. C. Reporter's ed. 146-167.)

Error to state court—Federal question—decision on non-Federal grounds.

1. The Federal Supreme Court is without jurisdiction to review the judgment of a state court sustaining a demurrer to the petition in an action to recover damages for the refusal of a board of registrars to register a negro as an elector on the ground that, conceding the truth of the averments of the petition that such board was appointed and qualified under a state Constitution adopted for the purpose of disfranchising negroes, in violation of U. S. Const. 14th and 15th Amendments, no damage has been suffered because no refusal to register by a board constituted in defiance of the Federal Constitution could disqualify a legal voter otherwise entitled to exercise the elective franchise, since this amounts to a decision upon an independent non-Federal ground, sufficient to sustain the judgment without reference to the Federal question presented.
2. The denial by a state court of a writ of mandamus to compel a board of registrars to register a negro as an elector because the board would have no existence and no duties to perform if the truth of the allegations of the petition as to the unconstitutional character, under U. S. Const. 14th and 15th Amendments, of

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Klpley v. Illinois*, 42 L. ed. U. S. 998, and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States on writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

As to how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

the registration authorized under the Alabama Constitution be admitted, rests upon a ground adequate to sustain it, and wholly independent of the Federal rights claimed, and is therefore not reviewable in the Supreme Court of the United States.

[Nos. 337, 338.]

Argued January 5, 1904. Decided February 23, 1904.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the City Court of Montgomery in that State, sustaining a demurrer to the petition in an action to recover damages for the refusal of the board of registrars of Montgomery County to register a negro as an elector. Also

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the City Court of Montgomery in that State sustaining a demurrer to the petition for a writ of mandamus to compel the board of registrars of Montgomery County to register a negro as an elector. *Writs of error in both cases dismissed.*

See same case below, 136 Ala. 164, 33 So. 819.

Statement by Mr. Justice Day:

These cases are writs of error to the supreme court of the state of Alabama.

In No. 337, the action was brought to recover damages in the sum of \$5,000 against the board of registrars of Montgomery County, Alabama, for refusing to register the plaintiff as a qualified elector of the state. The substance of the complaint is: The plaintiff is a native of the state of Alabama, a resident of Montgomery county for thirty years, and of the voting precinct for more than two years. He applied for registration, having theretofore enjoyed the right of voting in the state; the application was made to the board of registrars on March 13, 1902; the plaintiff complied with all reasonable requirements of the board, but was arbitrarily refused the right of registration for no other reason than his race and color. At the same time a large number of negroes similarly situated were likewise refused, while all the white men were registered and given certificates, without denial, nor was any question raised as to their qualifications. The registrars required the plaintiff and all members of his race to furnish the testimony of two white men as to their qualifications, and refused to accept the testimony of colored persons, while all the white

[148]men *were registered without any proof except the oath of the applicant. It is alleged that §§ 180, 181, 183, 184, 185, 186, 187,

and 188 of article 8 of the Constitution of the state of Alabama, which went into effect November 28, 1901, under authority of which the registrars were acting, was intended, designed, and enacted by the constitutional convention to deny and abridge the right of the plaintiff and others of his race in the state to vote, solely on account of race, color, and previous condition of servitude. The convention of the state of Alabama was composed entirely of white men, although the population of the state is composed of 1,001,152 white and 827,545 colored persons. It is alleged that article 180 of said Constitution is repugnant to the 14th and 15th Amendments to the Constitution of the United States because subdivisions 1 and 2 of said section do not contain a statement of qualifications applicable to all, regardless of race, color, and previous condition of servitude, but discriminate against negroes solely on account of race. Subdivision 3 is unreasonable and void, in not defining what character a good citizen must have and what obligations he must understand under a republican form of government, and gives to the registrars a wide discretion and authority, and invests them with arbitrary power. That § 181 of article 8 is repugnant to the said amendments to the Constitution of the United States in that, while it pretends to describe the qualifications of persons who shall apply for registration after January 1, 1903, it was in truth and in effect enacted to apply to the plaintiff and all negroes of the state, and not to operate against and affect any white persons in the state, and is a part of a scheme to disfranchise the negroes of Alabama on account of race, color, and previous condition of servitude. By refusing to permit the negroes to register the board of registrars is forcing them to wait until January 1, 1903, when § 181 comes into effect. It is charged that said board is composed exclusively of white men, and the right of appeal given from the action of said board to the circuit court and thence to the supreme court of the state was given to more effectually hinder the plaintiff and others of his race in their right to vote, and not to accomplish *their registration. The negroes[149] are excluded from serving on juries in the trial courts of the state and have been for many years, although qualified for the service, on account of race, color, and previous condition of servitude. That on appeal the plaintiff would encounter the same prejudice and obtain the same result as before the board of registrars. The defendants, well knowing the object of the constitutional provisions, were appointed by the state to administer the same, and while so engaged did wilfully and wrongfully refuse to register

the plaintiff and others of his race for no other reason than their race and color, and thus deprived them of the right to vote as electors of the state, contrary to the provisions of the 1st section of the 15th Amendment to the Constitution of the United States.

In No. 338, the petition for mandamus contains like allegations as to the right of the petitioner to be registered as a voter in the state of Alabama, and avers that he is a person of good character and understands the duties of citizenship under a republican form of government. The petitioner avers, as in his petition for damages, his application to be registered March 13, 1902, which was arbitrarily refused for the reasons set forth in the petition for damages, contrary to the right of the petitioner. He repeats the allegations as to the registration of white persons, and avers that the denial of registration to him and others of his race was a denial by the state of Alabama of the equal protection of the laws, and the denial of his right to vote solely on account of his race, color, and previous condition of servitude, and was in violation of the 14th and 15th Amendments to the Constitution of the United States. Allegations are inserted as to the intent and purpose of the state in calling the constitutional convention, and the adoption of the Constitution September 3, 1901. It is alleged that the §§ 180, 181, 183, 184, 185, 186, 187, and 188 of article 8 of said new Constitution were enacted with the intent and for the purpose set forth in the petition for damages. Allegations are set forth as to the exclusion of the negroes from representation, notwithstanding the part they compose of the population of the state. It is claimed [150] that § 180 of *article 8 is obnoxious and repugnant to the 14th and 15th Amendments to the Constitution of the United States, in that it divides the inhabitants into three classes, *viz.*: 1, soldiers' class; 2, descendants of soldiers' class; 3, a class not soldiers nor their descendants. That the class not soldiers or their descendants are under greater restrictions and given greater burdens than the other classes. That § 3 is void and unreasonable, failing to define what duties and obligations a citizen must understand under a republican form of government, and gives too wide a discretion to the registrars, amounting to vesting them with arbitrary power. Subdivisions 1 and 2 do not contain a statement of qualifications which are applicable to all alike, but discriminate against the negroes of the state on account of race, color, and previous condition of servitude. The petition in mandamus contains substantially the allegations of the petition for damages as to the man-

ner in which the Constitution was adopted, and avers that § 181, describing the qualifications of persons who apply for registration after January 1, 1903, was designed and intended to apply to petitioner and others of his race, and not intended to operate against and affect white persons in the state of Alabama. It is charged that in the counties of Alabama colored persons are refused registration, while, under the same circumstances and possessing the same qualifications, white men are registered without objection, thereby compelling colored men to wait until January 1, 1903, when the provisions of § 181 will be in operation, and compelling the colored men to have greater and different qualifications than are imposed upon the white men in the state, all of which, it is charged, was in pursuance of a design to evade the terms of the 14th and 15th Amendments to the Constitution of the United States, and to deny to the plaintiff and others of his race the equal protection of the laws, and to deprive them of the right to vote solely on account of their race, color, and previous condition of servitude. Petitioner repeats the allegations of the former petition for damages as to the composition of the board of registrars, and the remedy of appeal from their action to the courts of the state, and claims *that if [151] such appeal was prosecuted it could not be heard and determined before the election, but the hearing of the cases would take many years. There are attached to the petition as exhibits extracts from the speeches and debates in the convention of Alabama. The petition charges that the board of registrars refused to register colored men, so that not less than 75,000 of such persons were denied registration solely on account of race, color, and previous condition of servitude, although possessing the necessary qualifications of electors, while the white men were permitted to register without let or hindrance. Affidavits were filed with the petition setting forth the denial of the right of colored persons in various counties in the state of Alabama. The prayer of the petition is that the aforesaid sections of the state Constitution be declared absolutely null and void as repugnant to the 14th and 15th Amendments to the Constitution of the United States, and for a writ of mandamus commanding the board of registrars to register the plaintiff as a qualified voter of the state of Alabama, and to issue to him a certificate of the fact, and the like to all voters of his race in the state of Alabama who were such under the Constitution of the state prior to the adoption of §§ 180, 181, 183, 184, 185, 186, 187, and 188 of the new Constitution of the state. And that said board be further commanded not to refuse

to register said petitioner or other members of his race on account of their race or color and previous condition of servitude.

To the petitions in both cases demurrers were filed in the court of original jurisdiction, which were sustained, and upon appellate proceedings in the supreme court of the state of Alabama the decisions of the lower court were affirmed. These writs of error seek to bring this action of the state courts in review here.

Mr. Wilford H. Smith argued the causes and filed a brief for plaintiff in error:

The record in these cases clearly shows that nothing but a Federal question was therein presented to the highest court of Alabama for decision, and that its decision was absolutely necessary to the determination of the causes, and that the judgment rendered by the supreme court of Alabama could not have been rendered without deciding the Federal question.

Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner*, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528.

The fact that a state court while deciding the Federal question erroneously held that it was not a Federal one does not take the case out of the rule that, when a Federal question has been decided below, jurisdiction exists to review. The result of a contrary doctrine would be that no case where the question of Federal right had been actually decided could be reviewed here, if the state court in passing upon the question had also decided that it was non-Federal in its character.

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 534, 46 L. ed. 676, 22 Sup. Ct. Rep. 446.

Nor can the political nature of the rights involved be urged in these cases against the jurisdiction of this court.

McPherson v. Blacker, 146 U. S. 23, 36 L. ed. 873, 13 Sup. Ct. Rep. 3; *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; *Swafford v. Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; *Kinncon v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916.

Mr. W. A. Gunter argued the causes and filed a brief for defendants in error:

On every writ of error to a state court the doctrine of *res judicata* is called in question. It must appear by all the certainty and according to the principles of *res judicata* that a Federal right was directly or necessarily involved and decided adversely to the plaintiff in error claiming such right. And consequently if there are several questions involved, upon one or more of which the judgment may rest without the decision of a

Federal question, this court is without jurisdiction to hear the case.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 84, 35 L. ed. 944, 12 Sup. Ct. Rep. 142; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214.

The primary question is whether there is any non-Federal question upon which the judgment of the state court can rest. If there is, the judgment will not be disturbed, even though a Federal question was in the case and might have been wrongly decided.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 84, 35 L. ed. 944, 12 Sup. Ct. Rep. 142.

It seems impossible to discover the adjudication of any Federal question in the state court adversely to the right claimed, which is a *sine qua non* to the jurisdiction of this court by writ of error to state courts.

Phoenix Ins. Co. v. The Treasurer, 11 Wall. 208, 20 L. ed. 112; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 430, 43 L. ed. 503, 19 Sup. Ct. Rep. 202; U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575); *Scott v. Jones*, 5 How. 375, 12 L. ed. 196; *Michigan C. R. Co. v. Michigan Southern R. Co.* 19 How. 379, 15 L. ed. 689.

If a dismissal may rest upon one of several grounds, there is no right to confine it to any particular ground; and if an appeal must be based on a decision of a particular ground, when other questions equally may have been the point decided, the predicate of appeal is wanting.

Phoenix Ins. Co. v. The Treasurer, 11 Wall. 204, 20 L. ed. 112; *Connecticut ex rel. New York & N. E. R. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Delaware City, S. & P. S. B. Nav. Co. v. Reybold*, 142 U. S. 636, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

The right to review in this court the judgment of a state court is regulated by § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). The extent and nature of the remedy therein given has been the subject of numerous decisions. The jurisdiction in the cases now under consideration is invoked because of alleged denial of the rights of the plaintiff in error, secured to him by the 14th and 15th Amendments to the Constitution of the United States. When the jurisdiction depends, as in the present

cases, upon a right, privilege, or immunity under the Constitution of the United States specially set up and denied in the state court, certain propositions, it is said by Mr. Chief Justice Fuller, speaking for the court in *Sayward v. Denny*, 158 U. S. 180-183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777, are well settled; among others, "The right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed. *Hoyt v. Sheldon*, 1 Black, 518, 17 L. ed. 65; *Maxwell v. Newhold*, 18 How. 511, 515, 15 L. ed. 506, 508. . . . Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly invoked so that the state court could not have given judgment without deciding it." It is equally well settled that if the decision of a state court rests on an independent ground—one which does not necessarily include a determination of the Federal right claimed—or upon a ground broad enough to sustain it without deciding the Federal question raised, this court has no jurisdiction to review the judgment of the state court. *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Dower v. Richards*, 151 U. S. 658-666, 38 L. ed. 305-308, 14 Sup. Ct. Rep. 452; *Wade v. Lawder*, 165 U. S. 624-628, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

In every case which comes to this court on writ of error or appeal the question of jurisdiction must be first answered, whether repounded by counsel or not. *Defiance Waterworks Co. v. *Defiance*, decided at this term, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63. In No. 337, in which an action was begun against the registrars for damages, the case was decided upon demurrer to the declaration. The supreme court of Alabama placed its decision affirming the lower court, which sustained the demurrer, upon two grounds, as follows:

"If we accept (without deciding) as correct the insistence laid in appellant's brief that § 186 of article 8 of the Constitution of 1901 is void because repugnant to the 14th and 15th Amendments of the Constitution of the United States, then the defendants were wholly without authority to register the plaintiff as a voter, and their refusal to do so cannot be made the predicate for a recovery of damages against them.

"On the other hand, if that section is the source of their authority, the jurisdiction is expressly conferred by it upon the defendants as a board of registrars to determine the qualifications of plaintiff as an elector and of his right to be registered as a voter.

For their judicial determination that plaintiff did not possess the requisite qualifications of an elector, and their judicial act of refusing to register him, predicated upon that determination, they are not liable in this action. 17 Am. & Eng. Enc. Law, 2d ed. pp. 727, 728, and notes. Affirmed." 136 Ala. 164, 33 So. 819.

A consideration of the plaintiff's petition shows that it attacked the provisions of the Alabama Constitution regulating the qualifications and registration of the electors of the state as an attempt to disregard the provisions of the 14th and 15th Amendments to the Constitution of the United States, by qualifying the whites to exercise the elective franchise and denying the same rights to the negroes of the state. It is alleged that §§ 180, 181, 182, 184, 185, 186, 187, and 188 of the Alabama Constitution, which took effect on November 28, 1901, and under which the defendants were appointed registrars, and were acting at the time, were enacted by the state of Alabama, through its delegates to the constitutional convention, to deny and abridge the right of the plaintiff and others of his race to vote in the state on account of their color *and previous condition of servitude, without disfranchising a single white man in the state. These sections of the Alabama Constitution were before this court in the case of *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639, and the general plan of voting and registration was summarized by Mr. Justice Holmes, delivering the opinion of the court, as follows:

"By § 178 of article 8, to entitle a person to vote he must have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election, have paid his poll taxes, and have been duly registered as an elector. By § 182, idiots, insane persons, and those convicted of certain crimes are disqualified. Subject to the foregoing, by § 180, before 1903 the following male citizens of the state, who are citizens of the United States, were entitled to register, viz.: First. All who had served honorably in the enumerated wars of the United States, including those on either side in the 'war between the states.' Second. All lawful descendants of persons who served honorably in the enumerated wars or in the War of the Revolution. Third. 'All persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government.' . . . By § 181 after January 1, 1903, only the following persons are entitled to register: First. Those who can read and write any article of the Constitution of the United States in the English language, and who ei-

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ther are physically unable to work or have been regularly engaged in some lawful business for the greater part of the last twelve months, and those who are unable to read and write solely because physically disabled. Second. Owners or husbands of owners of 40 acres of land in the state, upon which they reside, and owners or husbands of owners of real or personal estate in the state, assessed for taxation at \$300 or more, if the taxes have been paid, unless under contest. By § 183, only persons qualified as electors can take part in any method of party action. By § 184, persons not registered are disqualified from voting. By § 185, an elector whose vote is challenged shall be required to swear that the matter of the challenge is untrue before his vote shall be received. By § 186, the legislature is to provide for registration after January 1, 1903, the qualifications and oath of the registrars are prescribed, the duties of registrars before that date are laid down, and an appeal is given to the county court and supreme court if registration is denied. There are further executive details in § 187, together with the above-mentioned continuance of the effect of registration before January 1, 1903. By § 188, after the last-mentioned date applicants for registration may be examined under oath as to where they have lived for the last five years, the names by which they have been known, and the names of their employers."

It is apparent that paragraph 3 of § 180, permitting the registration of electors before 1903, of "all persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government," opened a wide door to the exercise of discretionary power by the registrars. It is charged that this section, in connection with § 181, permitting the registration of certain persons after January, 1903, was intended to be so carried into operation and effect that the negroes of Alabama should be excluded from the elective franchise, and to permit the white men to register before January 1, 1903, and thus become electors, compelling the colored men to wait until after January 1, 1903, and then to apply under conditions which were especially framed and would have the effect to exclude the colored man from voting. It is charged that the registrars well knew the scheme and purpose set forth in the complaint to work the disfranchisement of negro voters and to qualify the white voters to exercise the elective franchise, and it is charged that the defendants were appointed by the state under sections of the state Constitution adopted for the purpose of denying the colored man the right to vote and under which the defendants are undertaking to carry out the

scheme and were so acting when they denied the right of the plaintiff to register, thus depriving him of the right guaranteed to him by the 1st section of the 15th Amendment to the Constitution of the United States. A consideration of the allegations of this complaint, to which the demurrer was sustained, *makes apparent that the [164] Federal right for which the plaintiff sought protection and the recovery of damages was that secured by the amendment to the Federal Constitution which prohibits a state from denying to the citizen the right of suffrage because of race, color, or previous condition of servitude. But in the present case the state court has not sustained the right of the state to thus abridge the constitutional rights of the plaintiff. It has planted its decision upon a ground independent of the alleged state action seeking to nullify the force and effect of the constitutional amendments protecting the right of suffrage. The first ground of sustaining the demurrer is, in effect, that, conceding the allegations of the petition to be true, and the registrars to have been appointed and qualified under a constitution which has for its purpose to prevent negroes from voting and to exclude them from registration for that purpose, no damage has been suffered by the plaintiff, because no refusal to register by a board thus constituted in defiance of the Federal Constitution could have the effect to disqualify a legal voter, otherwise entitled to exercise the elective franchise. In such a decision no right, immunity, or privilege, the creation of Federal authority, has been set up by the plaintiff in error, and denied in such wise as to give this court the right to review the state court decision. This view renders it unnecessary to consider whether, where a proper case was made for the denial of the right of suffrage, it would be a defense for the election officers to say that they were acting in a judicial capacity where the denial of the right was solely because of the race, color, or previous condition of servitude of the plaintiff. In the ground first stated we are of opinion that the state court decided the case for reasons independent of the Federal right claimed, and hence its action is not reviewable here.

In the case for a writ of mandamus the same attack was made upon the action of the state of Alabama in adopting and enforcing the provisions of the state constitution, which it was charged were adopted for the purpose of disfranchising the negroes and permitting white men only to exercise the elective *franchise. In the mandamus [165] case the decision of the state court was:

"The petition in this case is for a writ of mandamus to compel the board of registrars for Montgomery county to register the

petitioner as an elector. It alleges that §§ 180, 181, 183, 184, 185, 186, 187, and 188 of art. 8 of the Constitution of 1901, fixing the qualifications of electors, and prescribing the mode of registration, are unconstitutional because violative of the 14th and 15th Amendments of the Constitution of the United States. The prayer is in substance that these sections of the Constitution above enumerated be declared null and void and that an alternative writ of mandamus issue to the board of registrars commanding them to register as a qualified elector of the state of Alabama, upon the books provided therefor, the name of petitioner, and to issue to him a certificate of the fact in disregard of said sections of the Constitution, etc.

"As these sections of the Constitution as-sailed created the board of registrars, fixed their tenure of office, defined and prescribed their duties, if they are stricken down on account of being unconstitutional, it is entirely clear that the board would have no existence and no duties to perform. So then, taking the case as made by the petition, without deciding the constitutional question attempted to be raised or intimating anything as to the correctness of the contention on that question, there would be no board to perform the duty sought to be compelled by the writ, and no duty imposed of which the petitioner can avail himself in this proceeding, to say nothing of his right to be registered.—Affirmed." 136 Ala. 228, 33 So. 820.

We do not perceive how this decision involved the adjudication of a right claimed under the Federal Constitution against the appellant. It denies the relief by way of mandamus, admitting the allegations of the petition as to the illegal character of the registration authorized in pursuance of the Alabama Constitution.

This is a ground adequate to sustain the decision and wholly independent of the rights set up by the plaintiff as secured to him by the constitutional amendments for his protection.

[166] *The plaintiff in error relies upon two cases adjudicated in this court: *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; and *Swafford v. Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783. In the former it was held that an action may be sustained in a court of the United States against election officers for refusing the plaintiff's vote for member of Congress. The allegations of the complaint are set forth in full in the statement of the case, and it ap-
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pears that the board of managers were averred to be legally qualified to preside at the Federal election, and as such wrongfully refused the proffered vote of the plaintiff, a duly qualified elector, wilfully and without legal excuse. It was held that the complaint was defective for not averring that the plaintiff was a duly registered voter. It appeared that the registration law had not been held unconstitutional, and it further appeared that if such was the fact plaintiff was not in a position to impugn its constitutionality. In *Swafford v. Templeton* it was held that the circuit court erred in dismissing for want of jurisdiction an action kindred to that sustained in *Wiley v. Sinkler*, wherein the plaintiff was denied the right to vote for member of Congress, which was held to have its foundation in the Constitution of the United States, with consequent jurisdiction in a Federal court to redress a wrongful denial of the right. Neither of these cases are in point in determining our right to review the action of the state court in the case now before us. It is apparent that the thing complained of, so far as it involves rights secured under the Federal Constitution, is the action of the state of Alabama in the adoption and enforcing of a constitution with the purpose of excluding from the exercise of the right of suffrage the negro voters of the state, in violation of the 15th Amendment to the Constitution of the United States. The great difficulty of reaching the political action of a state through remedies afforded in the courts, state or Federal, was suggested by this court in *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639.

In reaching the conclusion that the present writs of error must be dismissed the court is not unmindful of the gravity of the statements of the complainant charging violation of a constitutional amendment which is a part of the supreme law *of the land; [167] but the right of this court to review the decisions of the highest court of a state has long been well settled, and is circumscribed by the rules established by law. We are of opinion that plaintiffs in error have not brought the cases within the statute giving to this court the right of review.

The writs of error in both cases will be dismissed.

Mr. Justice **McKenna** concurs in the result.

Mr. Justice **Harlan** dissents.

SECURITY LAND & EXPLORATION
COMPANY, *Plff. in Err.*,

v.

G. A. BURNS *et al.*

(See S. C. Reporter's ed. 167-188.)

*Public lands—when meander line controls
against actual water line.*

The courses and distances as set forth in the plat of an official survey, and referred to in patents from the United States which show an alleged meander line of a lake as one boundary, control in ejectment, as against the actual boundary of the lake, where the survey was grossly fraudulent, and the lake never existed within half a mile of the point indicated on the plat, and where to fix the lake as the boundary would give the patentees an area very largely in excess of that described in the patents and actually paid for, and the extension of the side lines to the lake is a matter of considerable difficulty and would necessitate going outside of the section in which the description and plat placed the land.

[No. 127.]

Argued January 19, 1904. Decided February 29, 1904.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of St. Louis County in that State in favor of defendants in an action of ejectment. *Affirmed.*

See same case below, 87 Minn. 97, 91 N. W. 304.

NOTE.—*Effect of meander line on boundary of Federal grant.*

If the Federal government, in surveying its land, meanders a stream or other body of water, and grants the land according to the survey, the water, and not the meander line, will, in general, be the boundary. *Hendricks v. Feather River Canal Co.* 138 Cal. 423, 71 Pac. 496; *Kirby v. Potter*, 138 Cal. 686, 72 Pac. 338; *Houck v. Yates*, 82 Ill. 181; *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917; *Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655; *Kraut v. Crawford*, 18 Iowa, 549, 87 Am. Dec. 414; *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Schlosser v. Crulekshank*, 96 Iowa, 414, 65 N. W. 344, Followed in *Re Valley*, 116 Fed. 983; *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59, Gil. 59; *Everson v. Waseca*, 44 Minn. 247, 46 N. W. 405; *Oisou v. Thorndike*, 76 Minn. 399, 79 N. W. 399; *Hauson v. Rice*, 88 Minn. 273, 92 N. W. 982; *Heald v. Yumisko*, 7 N. D. 422, 75 N. W. 806; *Provins v. Lovi*, 6 Okla. 94, 50 Pac. 81; *Minto v. Delaney*, 7 Or. 337; *Moore v. Willamette Transp. & Locks Co.* 7 Or. 355; *Turner v. Parker*, 14 Or. 340, 12 Pac. 495; *French Live Stock Co. v. Springer*, 35 Or. 312, 58 Pac. 102; *Johnson v. Tomlinson*, 41 Or. 198, 68 Pac. 406; *Hinckley v. Peay*, 22 Utah, 21, 60 Pac. 1012; *Washougal & L. Transp. Co. v.*

Statement by Mr. Justice **Peckham**:

This is an action of ejectment, commenced in the district court of St. Louis county, in the state of Minnesota, to recover certain lands in that county, described in the complaint. The trial was by the court, and judgment was entered for the defendant, *which [168] was affirmed by the supreme court of Minnesota, and the plaintiff has sued out this writ of error to review that judgment. 87 Minn. 97, 91 N. W. 304.

The following facts (among others) were found by the trial court:

"1. The plaintiff is a corporation duly organized and existing under the laws of the state of Minnesota, and the defendants are husband and wife.

"2. In 1876, township fifty-seven north of range seventeen west, in St. Louis county, Minnesota, was ordered by the General Land Office of the United States to be surveyed, and a contract for the survey, thereof was made by the United States surveyor general of the state of Minnesota with one H. S. Howe, who, by said contract, was constituted a deputy United States surveyor for said purpose. Under said contract said Howe was required, and undertook and agreed, to survey said township, to run out all section lines, and to set posts marking all section and quarter section corners throughout said township where the same could be marked upon the ground, and accurately to meander and establish upon the ground meander posts of all lakes and streams found to exist within said township.

Dalles, P. & A. Nav. Co. 27 Wash. 490, 68 Pac. 74; *Wright v. Day*, 33 Wis. 260; *Manasha Wooden Ware Co. v. Lawson*, 70 Wis. 600, 36 N. W. 412; *Northern Pine Land Co. v. Bigelow*, 84 Wis. 157, 21 L. R. A. 776, 54 N. W. 496; *St. Clair County v. Livingston*, 23 Wall. 64, 23 L. ed. 62; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *St. Paul & P. R. Co. v. Schurmeier*, 7 Wall. 286; 19 L. ed. 78; *Forsyth v. Smale*, 7 Biss. 205, Fed. Cas. No. 4,950.

A line meandered along a stream, for the purpose of ascertaining the quantity of land in a section, is not a boundary so as to exclude the grantee from the thread of the stream. *Illinois & M. Canal v. Haven*, 10 Ill. 548; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Jones v. Pettibone*, 2 Wis. 308.

But in *Granger v. Swart*, Woolw. 90, Fed. Cas. No. 5,685, it was held that, where land was granted according to meander lines along the stream, the meander line, and not the stream, was the boundary, where between the meander line and the stream there was a body of waste lands or flats on which timber and grass grew, and horses and cattle could feed, and hay was cut.

So, if the government surveyor omits to include large tracts of land between the meander line and the stream, the grant will extend only to the meander line, and not to that of the

"3. Thereafter said Howe ran and marked the exterior lines of said township, except the south township line, which had been previously surveyed, and set posts at all section and quarter section corners on said three exterior lines. He also set a meander post upon the north line of said township as surveyed by him, where said line running west from the northeast corner of said township first encountered the shore of Ely lake, or, as it is sometimes called, Cedar Island lake.

"4. No survey of the interior of said township was ever made, and no section lines within said township were ever run by said Howe, with the possible exception of the west line of section 36 thereof, and no section or quarter section corners were ever located, established, or marked by him (with the possible exception of the northwest corner [169] of section 36 aforesaid), and *none of the streams or permanent lakes (of which there were several) within said township were meandered by him, and no posts of any description were ever set, nor any lines or bearing trees ever blazed, within said township, with the possible exception of a corner post at the northwest corner of said section 36.

"5. Said Howe made and filed with the United States surveyor general of the state of Minnesota what purported to be field notes of a survey of said township made by him under said contract, purporting to give the length and directions of all interior section lines in said township, the location of all sections and quarter section posts, and

the bearing trees thereof, the character of the soil and timber in said township, and all other data and information required by the statutes of the United States and the rules of the United States General Land Office to be ascertained and reported by deputy surveyors in due course of making surveys of public lands.

"6. With the exception of the description of the survey of the three exterior boundary lines of said township actually run by him, said field notes returned by said Howe were imaginary and fictitious, and the purported facts and data contained therein were not based upon any personal knowledge or inspection of the interior of said township, and were, in fact, false and erroneous.

"7. From said purported field notes it appears that there existed in the northerly part of said township, lying in sections 2, 3, 4, 9, 10, and 11 thereof, a lake known as Ely lake, or Cedar Island lake, with surface area, as indicated in said field notes, of 1,800 acres; in fact, instead of having an area of about 1,800 acres, said lake then was and still is a body of water not exceeding 800 acres in area. It is a permanent, deep, and navigable lake, having high, steep, and heavily timbered banks, except about the outlet thereof. Said lake does not, in fact, touch section 11 at all, and covers only an area of very small extent (less than one half of a 40-acre tract) in the southeast corner of section 4. *Between the actual water line [170] of said lake and the meander line thereof,

stream. *Barnhart v. Ehrhart*, 33 Or. 274, 54 Pac. 195; *Lammers v. Nissen*, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 725, 28 N. W. 303; *Fuller v. Shedd*, 161 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286; *Grant v. Hamphill*, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618.

The same survey involved in *SECURITY LAND & EXPLORATION CO. v. BURNS* was before the lower courts in *Kirwan v. Murphy*, 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 275, 103 Fed. 104, 48 C. C. A. 399, 109 Fed. 354, which were of the opinion that the fractional lots went to the lake. But even without the decision to the contrary in *SECURITY LAND & EXPLORATION CO. v. BURNS*, the value of these decisions as precedents was destroyed by *Kirwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599, which reversed the final judgment of the circuit court of appeals because of the want of jurisdiction in the circuit court to entertain the suit.

Where there is no water proper to be meandered, the meander line is the boundary line. *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842.

The meander line is the boundary where there never was any water forming an actual and visible boundary of the land granted. *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563, Affirming 35 Or. 312, 58 Pac. 102.

If there is no body of water corresponding to the meander line, to which the ownership of the adjoining subdivision can extend, then the meander line itself limits the extent of the land conveyed. *Carr v. Moore* (Iowa) 93 N. W. 52.

In Texas it was held that, if the actual meander lines can be found, they, and not the shore line of a bay, will control. *Fulton v. Frandolig*, 63 Tex. 330.

In Wisconsin the rule seems to be that, where there is a discrepancy between the meander line and the water course itself, the latter is only the boundary when not farther away from the meander line than the next eighth section line; otherwise such eighth line will be the boundary. *Lally v. Rossman*, 82 Wis. 147, 51 N. W. 1132; *Whitney v. Detroit Lumber Co.* 78 Wis. 248, 47 N. W. 425.

The question whether or not the meander line is the boundary is one of fact, to be determined by all the surrounding circumstances. *Shoemaker v. Hatch*, 13 Nev. 261.

The fact that a meander line was run in surveying fractional sections of public land does not conclusively show that they bordered on a body of water, so as to give the purchaser riparian rights. *Niles v. Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563, Affirming 35 Or. 312, 58 Pac. 102.

as returned by the purported field notes of said Howe, there were, at the time of the survey, and still are, at least 1,000 acres of high, tillable land, which has never been a part of the lake, and which was and is heavily timbered with trees of more than a century's growth and growing down to the water's edge.

"8. The field notes and report of survey made and filed by said Howe were approved by the surveyor general for the district of Minnesota, August 7, 1876, and a plat of said township was made in accordance with said purported field notes under the direction of said surveyor general, and was approved by him on said 7th day of August, 1876, and a duly certified copy thereof was transmitted by him to the proper local United States land office on the 24th day of August, 1876, and another duly certified copy of the same was by him forwarded to the General Land Office of the United States, and filed therein August 23, 1876, and was by that office accepted as representing a correct survey of said township, and as the official plat thereof. Such survey and plat of said township were the only ones ever made by or under the authority of the United States government."

[The plat, which is to be found at page 43 of 189 United States Reports, 47 L. ed. 702, 23 Sup. Ct. Rep. 602, illustrates with sufficient accuracy the township in which the lands in question lie, and it delineates the meandering of Cedar Island lake, the outer meander line representing that which was marked on the official plat of the survey and as shown by the field notes of Howe, and the inner meander line representing the lake as it actually existed in 1876, when the field notes were made and filed, and as it now exists. A portion of the land lying between these lines is the land involved in this action, being land lying between the lake and the lots 3, 5, 6, and 7, in section 4, of the township mentioned.]

The dotted lines on the plat show the courses which would have to be followed in order to permit each of the lots above named to reach the lake as it actually exists.]

[171] *"9. Since the spring of 1892, the defendants have been in actual and continuous occupancy of a portion of the land lying between the meander line described and returned by said Howe in his said purported field notes, and as located upon the government plat of said township, and the actual water line of said lake. Said occupancy has been under the claim that the lands occupied by said defendants were and are unsurveyed government lands, subject to homestead entry, and that they have not been patented by the government. The defendants have made valuable and lasting im-

provements upon the lands occupied by them respectively.

"10. According to the plat of said township, the land in section 4 was divided into eight fractional government lots, lots 1, 2, and 8 comprising all of the land in the east half of said section, containing an aggregate of 122.3 acres, and lots 3, 4, 5, 6, and 7 containing an aggregate of 182.08 acres, comprising all of the land in the west half of said section.

"11. Between December, 1879, and March, 1887, all of said government lots [and all the surveyed lands within said township] were patented and conveyed by the United States, pursuant to the laws relating to the disposal of public lands, and by patents containing the usual clause, 'according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general.' By divers mesne conveyances from said patentees, the title to said lots 3, 5, 6 and 7, containing, according to said plat and to the patents of said lands, the following quantities of land, respectively: Lot 3, 50.37 acres; lot 5, 34.75 acres; lot 6, 30.5 acres; and lot 7, 25.25 acres, became vested in the plaintiff in the year 1891 and prior to the commencement of the actions; and the plaintiff is still the owner thereof, and, as such owner, has within the boundary of said lots, as shown upon said plat, and within the meander line of said lake described in said field notes, the full quantity of land above described as contained therein.

"If the side lines of said lot 3 were produced and extended *in straight lines south-[172] erly from its southern boundary, as shown upon the government plat, and as herein found and determined, and the said lot was so extended to the southerly boundary of said section 4, then in that event the said lot would not touch said Ely lake, nor would there be any lake frontage thereon, and said lot would then contain 160 acres of land; neither would said lines nor said lot reach said lake, no matter how far extended.

"If the side lines of said lot 5 were produced and extended easterly from the eastern boundary of said lot, as shown upon the government plat, and as herein found and determined, to the eastern boundary of said section 4, the northern line of said lot following the old meander line of said lake, and the southern line of said lot being produced and extended in a straight line, and said lot was so extended, then in that event the said lot would not touch said Ely lake, nor would there be any lake frontage thereon, and said lot would contain about 112 acres of land.

"If the side lines of lot 6 were produced and extended in straight lines easterly from the eastern boundary of said lot, as shown upon the government plat and as herein found and determined, to the eastern boundary of section 4, and said lot was so extended, then in that event the said lot would not touch said Ely lake, nor would there be any lake frontage thereon, and said lot would then contain 160 acres of land.

"If the side lines of said lot 7 were produced and extended in straight lines easterly from its eastern boundary, as shown upon the government plat and as herein found and determined, to the eastern boundary of said section 4, and the said lot was so extended, in that event the south line of said lot would touch said Ely lake, and a few feet of lake frontage would then be contained in said lot, and said lot would contain about 139 acres of land.

"I further find that it would be impossible to extend said lots within their respective side lines, as above specified, without [173]stant *and irreconcilable interference with each other, and that no one of said lots has any prior or superior right over any of the others to be so extended."

Mr. William W. Billson argued the cause, and, with **Mr. Chester A. Congdon**, filed a brief for plaintiff in error:

The rule in favor of monuments is universal.

Preston v. Bowmar, 6 Wheat. 582, 5 L. ed. 336; *Brown v. Huger*, 21 How. 305, 318, 16 L. ed. 125, 129; *Higuera v. United States*, 5 Wall. 827, 835, 18 L. ed. 469, 471; *St. Clair County v. Lovington*, 23 Wall. 46, 62, 23 L. ed. 59, 61; *M'Iver v. Walker*, 9 Cranch, 173, 178, 3 L. ed. 694, 696; *Morrow v. Whitney*, 95 U. S. 551, 555, 24 L. ed. 456, 458; *Garrard v. Silver Peak Mines*, 82 Fed. 578; *Nelson v. Hall*, 1 McLean, 518, Fed. Cas. No. 10,107; *Koons v. Bryson*, 16 C. C. A. 227, 25 U. S. App. 368, 69 Fed. 297; *Robinson v. Moore*, 4 McLean, 279, Fed. Cas. No. 11,960; *Kirwan v. Murphy*, 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 275; *Jones v. Martin*, 13 Sawy. 314, 35 Fed. 348; *Ellinwood v. Stancliff*, 42 Fed. 316; *United States v. Murray*, 41 Fed. 862; *Whitehurst v. McDonald*, 3 C. C. A. 214, 8 U. S. App. 164, 52 Fed. 633; *McDonald v. Whitehurst*, 47 Fed. 757; *Murphy v. Kirwan*, 103 Fed. 104; *Kirwan v. Murphy*, 48 C. C. A. 399, 109 Fed. 354; *Belding v. Hebard*, 43 C. C. A. 296, 103 Fed. 532; *Ex parte Davidson*, 57 Fed. 883.

The rule has been repeatedly enforced by this court, in cases involving larger discrepancies than in the case at bar, and as large as are likely to occur within the range of actual experience.

Newson v. Pryor, 7 Wheat. 7, 5 L. ed. 382; 193 U. S. U. S., Book 48.

Ayers v. Watson, 113 U. S. 594, 28 L. ed. 1093, 5 Sup. Ct. Rep. 641; *Bartlett Land & Lumber Co. v. Saunders*, 103 U. S. 316, 26 L. ed. 546; *Chinoweth v. Haskell*, 3 Pet. 92, 98, 7 L. ed. 614, 616; *Horne v. Smith*, 159 U. S. 40, 43, 40 L. ed. 68, 69, 15 Sup. Ct. Rep. 988; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840.

To the same effect are the state decisions.

Whiteside v. Singleton, Meigs, 207; *Fowler v. Nixon*, 7 Heisk. 719; *Sturgeon v. Floyd*, 3 Rich. L. 80; *Simpkins v. Wells*, 19 Ky. L. Rep. 881, 42 S. W. 348; *Pitman v. Nunnally*, 17 Ky. L. Rep. 793, 32 S. W. 606; *Literary Fund v. Clark*, 31 N. C. (9 Ired. Law) 58; *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. 147; *Nicolin v. Schneiderhan*, 37 Minn. 63, 33 N. W. 33; *Chan v. Brandt*, 45 Minn. 93, 47 N. W. 461; *Simms v. Baker*, Cooke (Tenn.) 146.

Monuments have been enforced against the courses and distances, although it has appeared with exceptional distinctness that the result was to pass more land than the parties designed.

Pringle v. Rogers, 193 Pa. 98, 44 Atl. 275; *Johnston v. House*, 3 N. C. (2 Hayw.) 301; *Deaver v. Jones*, 119 N. C. 598, 26 S. E. 156; *Gilman v. Riopelle*, 18 Mich. 145.

Such cases suggest that the logical relation in which the courses and distances stand to the monuments is almost exactly identical with the relations sustained by specifications of quantity. Concerning the latter the authorities are equally uniform that the monuments must prevail.

Barclay v. Howell, 6 Pet. 498, 8 L. ed. 477; *Willoughby v. Foster*, 1 Dyer, 80b; *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Reddick v. Leggat*, 7 N. C. (3 Murph.) 539; *Chandler v. McCard*, 38 Me. 564; *Joiner v. Colborne*, 11 U. C. Q. B. 631; Rawle, Covenants, 5th ed. § 297.

In Canada, monuments are as absolutely supreme as with us.

Dunn v. Turner, 3 U. C. C. P. 104; *Doe ex dem. Murray v. Smith*, 5 U. C. Q. B. 225.

The reason of the supremacy of monuments is that it is the intention of every grant to convey the land actually surveyed.

Grier v. Pennsylvania Coal Co. 128 Pa. 79, 18 Atl. 480; *Blasdell v. Bissell*, 6 Pa. 258; *Cox v. Couch*, 8 Pa. 147; *Wood v. Appal*, 63 Pa. 222; *Yoder v. Fleming*, 2 Yeates, 311; *Hall v. Powell*, 4 Serg. & R. 456; 8 Am. Dec. 722; *Doe ex dem. Tatem v. Paine*, 11 N. C. (4 Hawks) 65, 15 Am. Dec. 507; *Cherry v. Slade*, 7 N. C. (3 Murph.) 82; *Deaver v. Jones*, 119 N. C. 598, 26 S. E. 156; *McClinton v. Rogers*, 11 Ill. 279; *Baxter v. Evett*, 7 T. B. Mon. 329; *M'Iver v. Walker*, 9 Cranch, 173, 3 L. ed. 694; *Ayers v. Watson*, 137 U. S. 584, 597, 598, 34 L. ed. 803, 809,

11 Sup. Ct. Rep. 201; *Chinoweth v. Haskell*, 3 Pet. 92, 96, 7 L. ed. 614, 616.

If by reason of the magnitude of the discrepancy, or otherwise, the government is entitled to relief, it must be sought through reformation in equity.

White v. Burnley, 20 How. 235, 15 L. ed. 886; *Lamprey v. Mead*, 54 Minn. 290, 40 Am. St. Rep. 328, 55 N. W. 1132; *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 256-259, 39 L. ed. 971-973, 15 Sup. Ct. Rep. 827; *Cragin v. Powell*, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; *Gazzam v. Phillips*, 20 How. 372, 15 L. ed. 958; *White v. Blum*, 24 C. C. A. 573, 52 U. S. App. 59, 79 Fed. 271; *Sears v. Parker*, 2 N. C. (1 Hayw.) 126; *Fowler v. Nixon*, 7 Heisk. 719; *Curle v. Barrel*, 2 Sneed, 66; *Pringle v. Rogers*, 193 Pa. 94, 44 Atl. 275; *Hull v. Fuller*, 7 Vt. 100; *Owens v. Rains*, 5 Hayw. (Tenn.) 106.

The field notes and plat are assumed to be correct until the contrary is shown, and they are important evidence in ascertaining where monuments are located; but if the location of the monument is clearly shown by other evidence to be at a distance different than that given in the field notes and plat, they must give way.

Ogilvie v. Copeland, 145 Ill. 98, 33 N. E. 1085.

Generally speaking, it is the particular intention of the purchaser to acquire the land lying on the stream called for, as being more valuable than other land.

Newsom v. Pryor, 7 Wheat. 7, 5 L. ed. 382; *St. Clair County v. Lovington*, 23 Wall. 46, 65, 23 L. ed. 59, 62.

As the settler or purchaser necessarily assumed the hazard of finding less land inclosed by his monuments than reported by the surveyor, he may reasonably claim the benefit in case of an excess.

Taylor v. Brown, 5 Cranch, 234, 249-252, 3 L. ed. 88, 92, 93; *Beckley v. Bryan*, Sneed, 91; *Johnson v. Buffington*, 2 Wash. (Va.) 116.

The most that the government could expect to receive at the hands of a court of equity would be payment for the excess acreage at the rate per acre originally paid by the patentee. As the fault was that of the government's official, and as the government would be thereby indemnified, any larger measure of relief would be oppressive.

Lindsey v. Hawes, 2 Black, 554, 560, 561, 17 L. ed. 265, 268.

The supremacy of the monuments does not rest upon any assumption that they have been seen by the grantee.

Anderson v. Richardson, 92 Cal. 623, 28 Pac. 679; *Bartlett Land Co. v. Saunders*, 103 U. S. 316, 322, 26 L. ed. 546, 549.

Nothing short of actual collusion, or evi-

dence that the grantee participated in the matter, would suffice to impair his rights.

White v. Burnley, 20 How. 235, 247, 15 L. ed. 886, 888.

It is not a material circumstance that the government contractor and deputy surveyor to whom the government confided the subdivision of this township may have fraudulently neglected to perform his duty.

M'Iver v. Walker, 9 Cranch, 173, 3 L. ed. 694; *Newsom v. Pryor*, 7 Wheat. 7, 5 L. ed. 382; *White v. Burnley*, 20 How. 235, 15 L. ed. 886; *Chinoweth v. Haskell*, 3 Pet. 92, 7 L. ed. 614; *Blake v. Doherty*, 5 Wheat. 359, 5 L. ed. 109; *Murphy v. Kirwan*, 103 Fed. 104; *Simms v. Baker*, Cooke, (Tenn.) 146; *Singleton v. Whiteside*, 5 Yerg. 36; *Whiteside v. Singleton*, Meigs, 207; *Fowler v. Nixon*, 7 Heisk. 719; *Sturgeon v. Floyd*, 3 Rich. L. 80; *Stafford v. Quing*, 30 Tex. 257, 94 Am. Dec. 304; *Phillips v. Ayres*, 45 Tex. 605; *Jones v. Burgett*, 46 Tex. 292.

A meander line is never a boundary line, since the real boundary is always the water.

St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 286, 287, 19 L. ed. 74, 78; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59, Gil. 59; *Sizor v. Logansport*, 151 Ind. 626, 44 L. R. A. 814, 50 N. E. 377; *Boorman v. Sunnucks*, 42 Wis. 233; *Everson v. Waseeq*, 44 Minn. 247, 46 N. W. 405; *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; *Forsyth v. Smale*, 7 Biss. 201, Fed. Cas. No. 4,950; *Schlosser v. Cruickshank*, 96 Iowa, 424, 65 N. W. 344; *Menasha Wooden Ware Co. v. Lawson*, 70 Wis. 600, 36 N. W. 412; *Coburn v. San Mateo County*, 75 Fed. 520; *Kirwan v. Murphy*, 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 275; *Murphy v. Kirwan*, 103 Fed. 104; *Kirwan v. Murphy*, 48 C. C. A. 399, 109 Fed. 354; *Newsom v. Pryor*, 7 Wheat. 10, 5 L. ed. 383; *Nicolin v. Schneiderhan*, 37 Minn. 63, 33 N. W. 33; *Olson v. Thorndike*, 76 Minn. 399, 79 N. W. 399; *Menasha Wooden Ware Co. v. Lawson*, 70 Wis. 600, 36 N. W. 412; *Wright v. Day*, 33 Wis. 263; *Sphung v. Moore*, 120 Ind. 352, 22 N. E. 319; *Palmer v. Dodd*, 64 Mich. 474, 31 N. W. 209; *St. Clair County v. Lovington*, 23 Wall. 46, 62, 63, 23 L. ed. 59, 62; *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917; *Clute v. Michigan*, 65 Mich. 48, 31 N. W. 614; *Chan v. Brandt*, 45 Minn. 93, 47 N. W. 461; *St. Paul, S. & T. F. R. Co. v. First Div. of St. Paul & P. R. Co.* 26 Minn. 31, 49 N. W. 303; *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Heald v. Yumisko*, 7 N. D. 427, 75 N. W. 806; *Jones v.*

Pettibone, 2 Wis. 308; *Lodge v. Lee*, 6 Cranch, 237, 3 L. ed. 210; *Brown v. Huger*, 21 How. 305, 321, 16 L. ed. 125, 130; *French v. Bankhead*, 11 Gratt. 136; *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Lynch v. Allen*, 20 N. C. 190 (4 Dev. & B. L. 62); *Kelly v. Graham*, 9 Watts. 116.

Messrs. John R. Van Derlip and R. R. Briggs argued the cause, and, with *Mr. George P. Wilson*, filed a brief for defendants in error:

Where a survey is uncertain, that construction is to prevail which is most against the party claiming under the survey, because it is his duty to show and establish his boundaries.

Hill v. Weir, 33 Fed. 100; *Scaife v. Western N. C. Land Co.* 33 C. C. A. 47, 61 U. S. App. 647, 90 Fed. 238.

A true meander line must delimit a stream or body of water, and if where it is laid down no water exists, or ever has existed, it is not a meander line at all, but must subserve some other end. It is well settled that, in such cases, it marks the termination of the survey, and becomes the boundary line of the land which it delimits.

Granger v. Swart, Woolw. 88, Fed. Cas. No. 5,685; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Niles v. Cedar Point Club*, 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 45, Affirmed in 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *French Live Stock Co. v. Springer*, 35 Or. 312, 58 Pac. 102, Affirmed in 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; *Fuller v. Shedd*, 161 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286; Affirmed in *Hardin v. Shedd*, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; *James v. Howell*, 41 Ohio St. 696; *Lammers v. Nissen*, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 725, 28 N. W. 303; *Harrison v. Stipes*, 34 Neb. 431, 51 N. W. 976; *Barnhart v. Ehrhart*, 33 Or. 274, 54 Pac. 195; *Glenn v. Jeffrey*, 75 Iowa, 20, 39 N. W. 160; *Grant v. Hemphill*, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842.

Public agents cannot bind the government by acts outside of, and in violation of, their authority.

Whiteside v. United States, 93 U. S. 247, 257, 23 L. ed. 882, 885; *Moffat v. United States*, 112 U. S. 24, 31, 28 L. ed. 623, 625, 5 Sup. Ct. Rep. 10; *Hume v. United States*, 132 U. S. 406, 414, 33 L. ed. 393, 397, 10 Sup. Ct. Rep. 134; *Kirwan v. Murphy*, 189 U. S. 35, 54, 47 L. ed. 698, 705, 23 Sup. Ct. Rep. 599.

The purpose of showing or finding fraud or error in the survey is not to impeach or avoid the patents under which plaintiff in error claims,—their validity and efficacy are

conceded,—but to make clear the situation upon the ground, and the facts relative to the pretended survey, in order to arrive at the extent of the grant to the patentees.

Cavazos v. Trevino, 6 Wall. 773, 784, 18 L. ed. 813, 815; *Boardman v. Reed*, 6 Pet. 328, 345, 8 L. ed. 415, 422.

While it may be conceded that the description of the lots contained in the survey, plats, and patents are conclusive as against the government and holders of homesteads, so far as the lands actually described and granted are concerned, such conclusive presumption cannot be held to extend to lands not included within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 51, 46 L. ed. 800, 802, 22 Sup. Ct. Rep. 563.

An estoppel must be reciprocal, and certain as to every intent, and it cannot be extended by mere argument or inference.

11 Am. & Eng. Enc. L. 2d ed. p. 388.

Where a grant emanates from the sovereign, it is construed more strictly than a grant by a private person.

Shively v. Bowlby, 152 U. S. 1, 10, 38 L. ed. 331, 335, 14 Sup. Ct. Rep. 548.

Whether the interior boundary of the lots of the plaintiff in error was an existing lake was a question of fact for the determination of the trial court, and was not concluded by a mere call for a meander line.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; *Niles v. Cedar Point Club*, 175 U. S. 300, 308, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 259, 39 L. ed. 971, 973, 15 Sup. Ct. Rep. 827; *Cavazos v. Trevino*, 6 Wall. 773, 18 L. ed. 813; *Jones v. Johnston*, 18 How. 150, 15 L. ed. 320; *Johnston v. Jones*, 1 Black, 210, 217, 17 L. ed. 117; *Menasha Wooden Ware Co. v. Lawson*, 70 Wis. 600, 36 N. W. 412; *Shocmaker v. Hatch*, 13 Nev. 261; *Fuller v. Shedd*, 161 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286; *Lammers v. Nissen*, 4 Neb. 245; *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842; *Barnhart v. Ehrhart*, 33 Or. 274, 54 Pac. 195; *Granger v. Swart*, Woolw. 88, Fed. Cas. No. 5,685.

Surveys of public lands are conclusive and binding upon all persons having to deal with the United States, as well as upon the government itself.

Mann v. Tacoma Land Co. 44 Fed. 27; *Niles v. Cedar Point Club*, 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 45, Affirmed in 175 U. S. 300, 306, 308, 44 L. ed. 171, 173, 174, 20 Sup. Ct. Rep. 124; *Bates v. Illinois C. R. Co.* 1 Black, 204, 17 L. ed. 158; *French-*

Glenn Live Stock Co. v. Springer, 185 U. S. 47, 51, 46 L. ed. 800, 802, 22 Sup. Ct. Rep. 563.

A patent conveys only land which is surveyed.

McIver v. Walker, 9 Cranch, 173, 178, 3 L. ed. 694, 696; *West v. Cochran*, 17 How. 403, 407, 15 L. ed. 110; *United States v. Pacheco*, 22 How. 225, 226, 16 L. ed. 336; *Buxton v. Thaver*, 130 U. S. 232, 32 L. ed. 920, 9 Sup. Ct. Rep. 509; *Niles v. Cedar Point Club*, 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 45, 52, Affirmed in 175 U. S. 300, 306, 44 L. ed. 171, 173, 20 Sup. Ct. Rep. 124; *Horne v. Smith*, 159 U. S. 40, 44, 45, 40 L. ed. 68, 70, 15 Sup. Ct. Rep. 988; *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 52, 46 L. ed. 800, 802, 22 Sup. Ct. Rep. 563; *Lammers v. Nissen*, 4 Neb. 245; *Boyn-ton v. Miller*, 22 Iowa, 579; *Glenn v. Jeffrey*, 75 Iowa, 20, 39 N. W. 160; *Grant v. Hemphill*, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842; *Kean v. Calumet Canal & Improv. Co.* 190 U. S. 498, 47 L. ed. 1152, 23 Sup. Ct. Rep. 651.

A plat is only a pictorial delineation of the actual survey, and reference to a plat in a deed of conveyance is, in fact and in law, a reference to the survey which the plat purports to represent.

Chinoweth v. Haskell, 3 Pet. 92, 96, 7 L. ed. 614, 616; *Heath v. Wallace*, 138 U. S. 573, 583, 34 L. ed. 1063, 1068, 11 Sup. Ct. Rep. 380; *Niles v. Cedar Point Club*, 175 U. S. 300, 306, 44 L. ed. 171, 173, 20 Sup. Ct. Rep. 124; *McClintock v. Rogers*, 11 Ill. 279; *McCormick v. Huse*, 78 Ill. 363; *Esmond v. Tarbox*, 7 Me. 61, 20 Am. Dec. 346; *Heaton v. Hodges*, 14 Me. 66, 30 Am. Dec. 731; *Williams v. Spaulding*, 29 Me. 112; *Chan v. Brandt*, 45 Minn. 93, 47 N. W. 461; *Ferch v. Konno*, 78 Minn. 515, 81 N. W. 524; *Hall v. Davis*, 36 N. H. 569; *Steele v. Taylor*, 3 A. K. Marsh, 225, 13 Am. Dec. 151; *Jackson v. Freer*, 17 Johns. 29, 20 Am. Dec. 699; *Hurt v. Evans*, 49 Tex. 311; *Turner v. Union P. R. Co.* 112 Mo. 542, 20 S. W. 673.

The doctrine that a call for a natural monument has supremacy over courses, distances, and quantities named in a grant rests solely upon the presumption that monuments are less liable to be mistaken than the other calls. If, consequently, the monument does not exist, or is itself a mistake, the presumption disappears, and the rule cannot be invoked.

Davis v. Rainsford, 17 Mass. 207.

Given, then, the adjudged fact that Cedar Island lake is a fictitious and false call, it cannot be said to be less liable to mistake than the courses and distances laid down in the field notes and based upon the township

line actually run by the surveyor and plainly marked upon the ground.

King v. Watkins, 98 Fed. 913; *Scaife v. Western N. C. Land Co.* 33 C. C. A. 47, 61 U. S. App. 647, 90 Fed. 238; *Buffalo, N. Y. & E. R. Co. v. Stigler*, 61 N. Y. 350; *Murdock v. Chapman*, 9 Gray, 156; *New York & T. Land Co. v. Thomson*, 83 Tex. 169, 17 S. W. 920; *Lamprey v. Mead*, 54 Minn. 290, 40 Am. St. Rep. 328, 55 N. W. 1132; *White v. Luning*, 93 U. S. 514, 524, 23 L. ed. 938; *French Live Stock Co. v. Springer*, 35 Or. 312, 58 Pac. 102, Affirmed in 185 U. S. 47, 53, 46 L. ed. 800, 803, 22 Sup. Ct. Rep. 563; *Bates v. Illinois C. R. Co.* 1 Black, 204, 17 L. ed. 158; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Niles v. Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *Kirwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; *Boardman v. Reed*, 6 Pet. 328, 345, 8 L. ed. 415, 422; *United States v. Pacheco*, 22 How. 225, 16 L. ed. 336; *McEwen v. Den*, 24 How. 242, 16 L. ed. 672.

Being purely statutory, grants of public lands must be scrutinized and construed by the courts with reference to the statutes, and the statutes must be given their true interpretation and force.

McClintock v. Rogers, 11 Ill. 279; *Chan v. Brandt*, 45 Minn. 93, 47 N. W. 461.

The boundary lines actually run and marked in the survey returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions.

Goltermann v. Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; *James v. Howell*, 41 Ohio St. 696.

If there be no water course or Indian boundary at the point indicated as marking the subdivision fractional, the other external boundary of the statute may be forest or prairie, land or water, government or Indian reservation. And if it be land, the rights of the patentee do not extend over the meander line.

Niles v. Cedar Point Club, 175 U. S. 300, 308, 44 L. ed. 171, 20 Sup. Ct. Rep. 124.

When no survey is made in the field, the lines of the chamber survey of the surveyor general become the established and controlling boundaries.

Chapman v. Polack, 70 Cal. 494, 11 Pac. 764; *Goltermann v. Schiermeyer*, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; *James v. Howell*, 41 Ohio St. 696; *Beatty v. Robertson*, 130 Ind. 589, 30 N. E. 706; *Doe ex dem. Madison v. Hildreth*, 2 Ind. 274; *New York & T. Land Co. v. Thomson*, 83 Tex. 169, 17 S. W. 920; *Chan v. Brandt*, 45 Minn. 93, 47 N. W. 461.

We are given two sets of absolute data from which plaintiff's lands and the intent

of the parties can be ascertained: First, the exterior corners marked upon the ground; and, second, the established meander line of the lake, both incontestable.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 54, 46 L. ed. 800, 22 Sup. Ct. Rep. 563.

It is merely a matter of measurement, running the lines from the corners established on the exterior of the section to the water line as actually run and established by the surveyor and approved and adopted by the government.

Chan v. Brandt, 45 Minn. 93, 47 N. W. 461.

The water line so established is as conclusive as any other line. The government has the option to declare and fix what shall be deemed the water line for the purpose of a survey and sale of public lands.

Bates v. Illinois C. R. Co. 1 Black, 204, 208, 17 L. ed. 158, 161; *Niles v. Cedar Point Club*, 175 U. S. 300, 307, 44 L. ed. 171, 173, 20 Sup. Ct. Rep. 124, Affirming 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 45; *Horne v. Smith*, 159 U. S. 40, 45, 40 L. ed. 68, 70, 15 Sup. Ct. Rep. 988.

Even if the cases at bar were taken to present an instance of a lost monument, because the natural monument demanded by the plaintiff in error is not found upon the ground, the rule is undoubted that it must be located from the field notes and plats of the original survey. In so doing, resort must be had to known lines and monuments as the basis on which to run out and locate the original lines of the fractional lots.

French Live Stock Co. v. Springer, 35 Or. 312, 58 Pac. 102, Affirmed in 185 U. S. 47, 53, 46 L. ed. 800, 803, 22 Sup. Ct. Rep. 563; *Boardman v. Reed*, 6 Pet. 328, 345, 8 L. ed. 415, 422; *McEwen v. Den*, 24 How. 242, 16 L. ed. 672; *King v. Watkins*, 98 Fed. 913; *Stadin v. Helin*, 76 Minn. 496, 79 N. W. 537, 602; *Thompson v. Trowe*, 82 Minn. 471, 85 N. W. 169; *McClintock v. Rogers*, 11 Ill. 279.

It is conceded that there was no actual survey, and that the interior boundary of the fractional lots was established by the surveyor arbitrarily and without reference to any actually existing object. The presumption, then, becomes conclusive that the intention was to convey nothing beyond the meander line shown upon the plat.

Niles v. Cedar Point Club, 175 U. S. 300, 306, 44 L. ed. 171, 173, 20 Sup. Ct. Rep. 124.

An important element to be considered in discovering the true intent of the parties to a grant is the distances named in the description.

Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.

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In interpreting a patent, the entire description must be taken, and the identity of the land ascertained by a reasonable construction thereof, rejecting, if necessary, any erroneous call.

Boardman v. Reed, 6 Pet. 328, 345, 8 L. ed. 415, 422; *Croghan v. Nelson*, 3 How. 187, 194, 11 L. ed. 554, 557; *Case v. Dexter*, 106 N. Y. 554, 13 N. E. 449; *Buffalo, N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348; *McCormick v. Huse*, 78 Ill. 363; *Rioux v. Cormier*, 75 Wis. 570, 44 N. W. 654; *Hostetter v. Los Angeles Terminal R. Co.* 108 Cal. 38, 41 Pac. 330.

Especially is this the case where a survey was not actually run upon the ground.

Platt v. Vermillion, 39 C. C. A. 555, 99 Fed. 356.

When the starting point is beyond dispute, and the definite metes and bounds of the survey close, there can ordinarily be no doubt of the location of the tract; but when, in addition, the area embraced within such boundaries is the precise quantity specified in the conveyance, the demonstration is conclusive as to the intention of the parties respecting the location of the disputed line.

King v. Watkins, 98 Fed. 913; *McCormick v. Huse*, 78 Ill. 363; *Hostetter v. Los Angeles Terminal R. Co.* 108 Cal. 38, 41 Pac. 330.

The United States has no title to land covered by the waters of navigable lakes, but such title is vested in the state within which such waters are situated, in trust for the public use. The United States has no property therein which it can convey, and the state is powerless to divest itself of the trust.

Niles v. Cedar Point Club, 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 45, 50, Affirmed in 175 U. S. 300, 308, 44 L. ed. 171, 174, 20 Sup. Ct. Rep. 124; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 435, 36 L. ed. 1018, 1036, 13 Sup. Ct. Rep. 110; *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670, 53 N. W. 1139; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402.

If a water boundary be not found within the lines of a forty, it cannot be pursued beyond such subdivision.

Whitney v. Detroit Lumber Co. 78 Wis. 240, 47 N. W. 425.

Whatever land was conveyed by the patents of the fractional lots, the title thereto vested in the patentees the instant the patents were delivered; because claims under patents cannot extend beyond the boundaries therein described.

West v. Cochran, 17 How. 403, 413, 15 L. ed. 110, 114; *Niles v. Cedar Point Club*, 175 U. S. 300, 308, 44 L. ed. 171, 174, 20 Sup. Ct. Rep. 124.

The land so conveyed was at once susceptible of ascertainment from the terms of the patents.

Chinoweth v. Haskell, 3 Pet. 92, 96, 7 L. ed. 614, 616; *Brown v. Huger*, 21 How. 305, 318, 16 L. ed. 125, 129.

The boundaries of the grant were governed by some definite rule of law controlling in all cases presenting facts calling for its application.

McEwen v. Den, 24 How. 242, 247, 16 L. ed. 672, 673.

If such boundaries were not fixed by the patents, the grants were void for uncertainty.

Buyck v. United States, 15 Pet. 215, 224, 225, 10 L. ed. 715, 719; *Muse v. Arlington Hotel Co.* 68 Fed. 637; *Boardman v. Reed*, 6 Pct. 328, 8 L. ed. 415.

Whenever the question in any court, state or Federal, is whether the title to land which has once been the property of the United States has passed, that question must be resolved by the laws of the United States.

Wilcox v. Jackson ex dem. M'Connel, 13 Pet. 498, 517, 10 L. ed. 264, 273; *Kirwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; *Niles v. Cedar Point Club*, 175 U. S. 307, 44 L. ed. 173, 20 Sup. Ct. Rep. 124.

If the patentees acquired from the United States only the land comprised within the meander line indicated on the plat, the plaintiff in error can claim no greater rights or estate.

Barnard v. Campbell, 55 N. Y. 456, 14 Am. Rep. 289; *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 259, 39 L. ed. 971, 973, 15 Sup. Ct. Rep. 827.

In the absence of statute, grants are assumed to be in rectangular form.

Massie v. Watts, 6 Cranch, 148, 165, 3 L. ed. 181, 187; *Ferguson v. Bloom*, 144 Pa. 565, 23 Atl. 49.

It would seem unreasonable, either to prolong the side lines of the survey indefinitely until the lake should be found, or to change the situs of the lots laterally in order to adapt it to a neighboring lake.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 53, 46 L. ed. 800, 22 Sup. Ct. Rep. 563.

The court has no power or jurisdiction to make or correct a government survey.

Cragin v. Powell, 128 U. S. 691, 697, 32 L. ed. 566, 568, 9 Sup. Ct. Rep. 203; *Kirwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; *Chan v. Brandt*, 45 Minn. 93, 47 N. W. 461.

The reason for holding a natural monument superior to courses and distances is that, being visible and distinct on the ground, it is presumably in the minds of the

parties, and is probably intended to be controlling.

Moran v. Lezotte, 54 Mich. 90, 19 N. W. 757.

Where there is no evidence that any other line than that described in the survey was known or imagined at the time of the entry of the lands, the parties will be presumed to have meant the grant to be bounded by the line described.

Heywood v. Wild River Lumber Co. 70 N. H. 24, 47 Atl. 294.

The meander line returned by the deputy surveyor and drawn upon the plat marked the termination of the survey.

James v. Howell, 41 Ohio St. 696; *Niles v. Cedar Point Club*, 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 54, Affirmed in 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *Lammers v. Nissen*, 4 Neb. 245; *Glenn v. Jeffrey*, 75 Iowa, 20, 39 N. W. 160; *Whitney v. Detroit Lumber Co.* 78 Wis. 240, 47 N. W. 425; *Bissell v. Fletcher*, 19 Neb. 725, 28 N. W. 303; *Harrison v. Stipes*, 34 Neb. 431, 51 N. W. 976; *Grant v. Hemphill*, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842; *Fuller v. Shedd*, '61 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286; *Granger v. Swart*, Woolw. 88, Fed. Cas. No. 5,685.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The land in controversy in this case is described in the foregoing statement of facts, and it lies between the meander line as it appears on the plat of the survey referred to in the patents and the actual borders of the lake. See the sketch of the plat at page 43 of volume 189, United States Reports, 47 L. ed. 702, 23 Sup. Ct. Rep. 602. Regarding the question of the boundaries, counsel for plaintiff in error assert in their brief that if distance is to prevail, then the land in controversy is an unsurveyed strip lying between the lots of the plaintiff in error and the lake; while if the natural monument is to prevail, then the strip of land in controversy is part and parcel of the lots of the plaintiff in error. The boundaries of the lots as shown upon the plat of survey giving the so-called meander line of the lake, described in the field notes, are unquestionably correct, so far as the three sides of the fractional lots are concerned, and the only difference is as to the side which purports to front on the lake. In regard to this fourth side, the plaintiff in error, as a remote grantee from the patentees, bases its claim to the land lying between the meander line and the lake, upon the grounds that the patents conveying the lots to the patentees contained

the clause: "According to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general;" that the plat of the survey of the lands, by reason of such reference, became a part of the grant described in the patents; that the plat showed, as the fourth side of the land granted, a meander line around Cedar Island lake; that the lake thereby became a natural monument or boundary, and that although the plat of the survey turns out to have been a mistake as to the position of the lake, and the line was, therefore, not in truth anything like an accurate meander line, yet, by reason of that plat and of that line, which assumed to show the borders of a lake, the patentees had the right to claim that they bought in reliance upon, and that they were entitled to, a boundary upon a lake.

In support of these contentions the plaintiff in error cited *Cragin v. Powell*, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203, and *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 194, 33 L. ed. 872, 878, 10 Sup. Ct. Rep. 518, as to the effect of a grant according to an official plat of a survey referred to in the grant, and to the cases of *M'Iver v. Walker* (1815) 9 Cranch, 173, 3 L. ed. 694; *Newsom v. Pryor* (1822) 7 Wheat. 7, 5 L. ed. 382; *St. Clair County v. Lovington* (1874) 23 Wall. 46, 23 L. ed. 59; *Bartlett Land & Lumber Co. v. Saunders* (1880) 103 U. S. 316, 26 L. ed. 546, and other cases, affirming the general rule that, in matters of boundaries, natural monuments or objects will control courses and distances.

These general rules may be admitted. The rule as to natural monuments is not, however, absolute and inexorable. It is founded upon the presumed intention of the parties, to be gathered from the language contained in the grant, and upon the assumption that the description by monuments approaches accuracy within some reasonable distance, and places the monument somewhere near where it really exists. *White v. Luning*, 93 U. S. 514, 23 L. ed. 938; *Ainsa v. United States*, 161 U. S. 208, 229, 40 L. ed. 673, 680, 16 Sup. Ct. Rep. 544; *Baldwin v. Brown*, 16 N. Y. 359; *Buffalo, N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Hall v. Eaton*, 139 Mass. 217, 29 N. E. 660. These cases illustrate somewhat the principle upon which the general rule is founded, and show how far it has, upon occasion, been regarded as inapplicable. The patents mention the number of acres contained in each lot, and that number is stated in the 11th finding of the trial judge, which is set forth in the foregoing statement of facts. The difference between the number of acres stated in the patents to be in each lot and the number

now claimed by the plaintiff in error is very large, and is subsequently referred to herein. It seems plain that the intention was to convey no more than the number of acres actually surveyed and mentioned in the patents. In *Ainsa's Case*, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544, this is deemed to be a very important, and sometimes a decisive, fact. It is true that many cases cited by the plaintiff in error have enforced the superiority of natural monuments over courses and distances where the difference in the amount of the land conveyed as between the two classes of description was also very great. In the case at bar, while there is a great difference in the amount of land so described, there are, at the same time, other facts which are material and which, in our opinion, when considered in connection with this difference, justify and demand a refusal to be controlled by the borders of the lake as a boundary.

It is well to see what the facts in this case were upon which the state court founded its decision. They are set forth in detail in the foregoing statement of facts, but a few of the more important may be here referred to.

There was, in truth, no such survey as was called for by the contract between the government and the surveyor. The exterior lines, with the exception of the south line of the township, were run, but no survey of the interior of the township was ever made and no section lines thereof were ever run, with one possible exception, and in truth the survey as a whole was a fraud. No such body of water at the place indicated on the plat of survey then existed or now exists. On the contrary, the lake is from half a mile to a mile away from what is called its "meander line on the plat of the survey" filed by the surveyor. It covers only about 20 acres in the southeast corner section 4. The surveyor never was on the ground and never saw the lake he pretended to measure, and the lake never existed where he laid it down in his fraudulent survey. If the side lines of the various lots were protracted in their course, those of lot 3 would never reach the lake, and those of lots 5 and 6 would not reach the lake within the limits of section 4, while the south line of lot 7 would touch the lake, and a few feet of frontage would then be secured, and that lot would then have 139 instead of 25.25 acres. The side lines of lots 5, 6, and 7, if protracted, would instantly cross the protracted side lines of lot 3. There are at least 1,000 acres of high, tillable land between the actual water line of the lake and the meander line as returned by the field notes and the plat of survey, and the land is covered by trees of more than a cen-

ture's growth and growing down to the water's edge. In order to bound on the lake the lots would exhibit a totally different form from that which they take on the plat of survey and such boundary would violate every rule of statutory survey, by conveying lands not conforming to the system adopted by the government, and carried out ever since its adoption.

The patentees, it must also be borne in mind, get all the land they really purchased and paid for, as laid down by the lines and distances set forth in the survey and as stated in the patents. These lines and distances (of lots 3, 5, 6, and 7) gave the patentees 140.87 acres of land, and that was the amount they paid for, while if the fourth line of the boundary of the lots were taken out and others substituted in the way shown by the dotted lines in the plat in 189 U. S. 43, 47 L. ed. 702, 23 Sup. Ct. Rep. 602, and so as to reach the borders of the lake as it then actually existed and now exists, they would get 571 acres, or fourfold more land than was actually mentioned and described in the patents conveying these four lots, or than they supposed they were purchasing, or than they actually paid for.

[182] Upon these facts the question recurs whether the patentees, *by reason of the general rules above mentioned, took these lands which they now claim, although they never in reality bought or paid for them. We think they did not; that the rules have no application to a case like this, and that plaintiff in error must be confined to the lots which are correctly described within the lines and distances of the plat of survey and of the field notes and which the patentees actually bought and paid for.

The fraudulent character of the survey, the nonexistence of the lake within at least half a mile of the point indicated on the plat, the excessive amount of land claimed as compared with that which was described and stated in the patents and actually purchased and paid for, the difficulty in reaching the lake at all, and the necessity, in order to do it, of going outside of section 4 (with the exception as to a small part of lot 7), the section in which the description and plat placed all the land, all go to show that the lake ought not to be regarded as a natural monument within the cases, or within the principle upon which the rule is founded, and therefore the courses and distances by which the amount of land actually purchased and paid for was determined, ought to prevail.

The nonexistence of a lake anywhere near the spot indicated on the plat is a strong reason for regarding the so-called meander line as one of boundary instead of a true meander line, and when the plat itself is the

result of a gross fraud, and indeed is entirely founded upon it, the reason for refusing to recognize the lake as a boundary becomes apparent.

The land actually purchased and paid for was conveyed and covered by the description by courses and distances set forth in the field notes and referred to in the patents, and the government is concluded as to such land; but the implication of a boundary by the lake as delineated on the plat of survey, which might otherwise be made, will not be permitted when it is based upon such facts as have been already adverted to in this case. Giving the patentees all the land in acres, stated in the patents and described and contained in lines and distances *in such [183] patents, and which is all they paid for, protects them, and the government ought not to be further concluded by the fraudulent acts of a public officer.

As is said in the trial court in this case, there must be some limit to the length courts will go in search of the water delineated on a plat of survey, with a meander line shown thereon. If the water were 10 miles away, it is certain that a claim to be bounded thereon would not for one moment be admitted. A distance of half a mile, enough to plainly show the gross error of the survey, together with the other facts adverted to herein, are sufficient to justify a refusal to apply the general rule that a meander line is not usually one of boundary.

Nor in such case is it necessary to go into equity to reform the patent. Where the patentee has in fact received, and is in possession of, all the land actually described in the lines and distances, and is seeking for more on the theory that his plat of survey carries him to the water, a denial of that claim upon such facts as appear here is well founded, and requires no reformation of the patent. It is simply a question of boundary, and it is a legal defense; it is but a denial that the land claimed is in fact included in the patent as it exists, and no aid of a court of equity is necessary to sustain such a defense.

We think the *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563, is authority which calls for the affirmance of this judgment. In that case the plaintiff claimed under patents from the United States, which referred to the official plats of the survey, and by which it appeared the township was rendered fractional by abutting upon the meander line along the south side of Malheur lake, which plat appeared to have been approved by the Land Department of the government, and the plat showed the lots as bounded "north by the meander line of Malheur lake." The field notes of the survey of the exterior

boundaries of the township and its subdivisions and the meander line of Malheur lake itself, under the title heading "Meanderings of the south shore of Malheur lake through fractional township 26," etc., indicated that

[184] it was run "with *the meander of the lake."

The plaintiff in that case claimed title to land which was just north of this meander line on the ground that such land was a portion of the lake when the survey was made and the meander line run around it; that the water had since receded because of certain facts stated, and that plaintiff was entitled to the land thus uncovered, as an accretion by way of reliction to his adjoining land. The defendant disputed this claim, and asserted that when the survey was made and the plat thereof, with its meander line, was referred to in the patent, there was in fact no such lake anywhere near that spot, and the so-called meander line was in truth a line bounding plaintiff's land and limiting him thereby so that he could not go beyond it in order to find the lake which plaintiff claimed as a boundary. This court held that the line, which appeared on the plat as a meander line of the lake, was in truth a line of boundary beyond which the plaintiff could not go in search for the lake. The question of fact as to which of the two contentions was right, the receding of the water or the nonexistence of the lake at the time of the survey, was submitted to the jury, and that body found in favor of the defendant's theory. The result of the decision was to refuse to consider the lake as a natural monument, because it did not exist at any point near where it was placed on the plat. What purported on the plat to be a meander line was held not to be one, but on the contrary it was held to be a boundary of the land of the plaintiff, beyond which he could not go. After speaking of the question of fact and its decision by the jury in favor of the defendant, Mr. Justice Shiras, in giving the opinion of the court, said:

"The land in dispute, in the possession of the defendant in error, was not included within the lines of the original survey, nor in the description of the lots contained in the patents and in the deeds of conveyance under which the plaintiff in error holds, and to add the land in controversy to the lots so described would more than double the area of the land claimed by the plaintiff in error;

[185] but the contention of the plaintiff in *error was, in the courts below and now is, in this court, that, as the plaintiff in error bought in reliance upon the plats and patents which showed the meander line of the lake, such plats and patents must be deemed to conclusively establish that the lake was the northern boundary of the land, so far as the

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rights of riparian grantees are concerned.

"While it may be conceded that the description of the lots contained in the survey, plats, and patents is conclusive as against the government and holders of homesteads so far as the lands actually described and granted are concerned, such conclusive presumption cannot be held to extend to lands not included within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, whose recession has left bare land accruing to the owners of the abutting lots. We agree with the supreme court of Oregon in thinking that the question whether the northern boundary of the lots of the plaintiff in error was an existing lake, the recession of whose waters would leave the bed of the lake, thus laid bare, to accrue to the owner of the lots, was a question of fact which was not concluded by a mere call for a meander line. If, indeed, there had been a lake in front of these lots at the time of the survey, which lake had subsequently receded from the platted meander line, the claim of the owner of the lots to the increment thus occasioned might be conceded to be good, if such were the law of the state in which the lands were situated. But if there never was such a lake—no water forming an actual and visible boundary—on the north end of the lots, it would seem unreasonable, either to prolong the side lines of the survey indefinitely until a lake should be found, or to change the situs of the lots laterally in order to adapt it to a neighboring lake. The jury having found that the facts under this issue were as claimed by the defendant in error, the conclusion must be that the rights of the plaintiff in error must be regarded as existing within the actual lines and distances laid down in the survey and to the extent of the acreage called for in the patents, and that *the meander line was intended to be the [186] boundary line of the fractional section."

In the above cited case the important point to be considered is that the court refused to be bound by the appearance on the plat of survey showing a meander line of the lake when the fact was found by the jury (and exists in this case) that at the time of the survey there was no such lake existing at any point near where it appeared to be on the plat, and that under those circumstances a meander line appearing on the plat would be and was regarded as a line of boundary to the exclusion of what was claimed to be a natural object, namely, the lake itself.

It is not important that the plaintiff's claim was founded upon the allegation that the land there in question was the result of

a subsidence of the water of the lake, and that he was, therefore, entitled to such land by reason of accretion. The point lies in the fact that what appeared as a meander line on the plat was treated as a boundary line and the lake was held not to be such boundary, for the reasons stated in the opinion. Those reasons exist in full force in this case, only here the disparity between the amount of land conveyed and paid for and the amount now claimed is double that stated in the case cited. Mr. Justice Shiras, in the course of his opinion, refers to other cases in this court as authority for the proposition that a meander line may be in some cases a line of boundary limiting the land conveyed or described by the line itself, and not by any body of water. See *Niles v. Cedar Point Club*, 175 U. S. 300, 308, 44 L. ed. 171, 174, 20 Sup. Ct. Rep. 624; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988. Upon this subject it was well said by the state supreme court in this case as follows:

[187] "The official plat was only intended to be a picture of the actual conditions on the ground; but the fraudulent mistake in the plat in this case was so gross that no man actually viewing the premises could possibly be misled or believe that the shore line of the lake was intended as the boundary line of the lots. He would understand at once [187] that the meander line *as traced on the plat was the actual boundary line of the lots. This case, then, is one where the call for the natural monument, the lake, must be disregarded, for the admitted facts show that it is an impossible call, and that if it is rejected the courses and distances and the meander line will exactly close and give to the plaintiff the precise quantity of land bought from the government and paid for. It falls within the rule that a meander line is not, as a general proposition, a boundary line, yet the boundaries of fractional lots will not be indefinitely extended where they appear by the government plat to abut on a body of water which in fact has never existed at substantially the place indicated on the plat. In such exceptional cases the supposed meander line will, if consistent with the other calls and distances indicated on the plat, mark the limits of the survey, and be held to be the boundary line of the land it delimits."

That this was a fraudulent survey cannot be denied. Still, the government is concluded by such survey, so far as the lands actually described, granted, and paid for are concerned, but it will not be concluded in regard to other lands, which were not within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said

lots, when such lake or body of water is in fact and always has been more than half a mile away from such lots, and where the patentee has received all the land that he actually paid for.

It appears from the various reports of the case of *Kirwan v. Murphy*, cited by plaintiff in error, that the government was intending to make a survey of that portion of this township lying between the alleged meander line and the actual lake, as unsurveyed land, when certain grantees of patentees of lots, which by the plat of survey bounded on the lake, commenced proceedings to obtain an injunction to prevent what was alleged would be a resurvey. The case is first reported in 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 275, where the opinion of the circuit court of appeals *is given upon affirming the order [188] granting the injunction. The case was then tried, and the decision of the United States circuit court in Minnesota, upon such trial, directing judgment for the plaintiffs, is reported in 103 Fed. 104, and upon appeal the decision of the United States circuit court of appeals for the eighth circuit, affirming the judgment, is reported in 48 C. C. A. 399, 109 Fed. 354. Those courts were of opinion that the Land Department had no right to make the proposed survey, and that the fractional lots went to the lake, and the government could not revoke its grant and correct the survey so far as regarded the patentees, or their grantees, in good faith. Upon writ of error from this court the judgment was reversed for the reason that the remedy by injunction was not proper, and also because the Land Department was vested with the administration of the public lands and could not be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. The exact point involved here was not presented in that case, and this court held that it could not be passed upon in that proceeding. 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599.

For the reasons we have stated, we cannot concur in the conclusions of the lower Federal courts, that the patentees had the right to bound their lots by the lake as it actually existed. *The judgment is affirmed.*

SECURITY LAND & EXPLORATION
COMPANY, *Plff. in Err.*,

v.

HENRY WECKEY *et al.*

(See S. C. Reporter's ed. 188, 189.)

*Public lands—when meander line controls
against actual water line.*

This case is governed by the decision in *Se-*
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curity Land & Exploration Co. v. Burns, ante, 662.

[No. 128.]

Argued January 19, 1904. Decided February 29, 1904.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court for the County of St. Louis in that State in favor of defendants in an action of ejectment. *Affirmed.*

See same case below, 87 Minn. 97, 91 N. W. 304.

Mr. William W. Billson argued the cause for plaintiff in error.

Mr. John R. Van Derlip and **R. R. Briggs** argued the cause, and, with **Mr. George P. Wilson**, filed a brief for defendants in error.

For contentions of counsel see their brief as reported in *Security Land & Exploration Co. v. Burns, ante, 662.*

Mr. Justice **Peckham** delivered the opinion of the court:

[189] *In this case land in the same section as in the foregoing case is involved, and as the title depends upon precisely the same facts, this case is, by stipulation of counsel, to abide the event of the other.

Judgment affirmed.

WINOUS POINT SHOOTING CLUB, *Plff.*
in Err.,
v.

JEPPE CASPERSEN, Peter Petersen, William Decker, and Charles Petersen.

(See S. C. Reporter's ed. 189-191.)

Error to state court—Federal question.

No Federal question which will confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court is involved in a contention in the highest state court that, by the judgment of the trial court, private property is taken for public use without just compensation, in violation of the 5th Amendment to the Federal Constitution, since this amendment operates solely as a restriction upon Federal powers, and not upon those of the several states.

[No. 153.]

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 207; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to what adjudications of state courts can be brought up for review in the Supreme Court 193 U. S.

Argued February 24, 1904. Decided March 7, 1904.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Ottawa County in that state, which, on a trial *de novo* of a suit begun in the Court of Common Pleas of that County, dismissed the petition in a suit to enjoin fishing in waters which defendants claimed formed part of a public bay. *Dismissed for want of jurisdiction.*

The facts are stated in the opinion.

Mr. S. H. Holding argued the cause, and, with *Messrs. Harvey D. Goulder* and *Frank S. Masten*, filed a brief for plaintiff in error:

It is not necessary that the claim of Federal rights be pleaded, if the record discloses that such claim is made.

Dubuque & S. C. R. Co. v. Richmond, 15 Wall. 3, 21 L. ed. 118; *Pennywit v. Eaton*, 15 Wall. 380, 21 L. ed. 72; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Armstrong v. Athens County*, 16 Pet. 281, 10 L. ed. 965; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Eureka Lake & Y. Canal Co. v. Superior Court*, 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Sayward v. Denny*, 158 U. S. 184, 39 L. ed. 943, 15 Sup. Ct. Rep. 777.

It appears by clear and necessary intendment that the Federal question now presented to this court was directly involved, so that the state court knew just what was claimed, and could not have given judgment without deciding the question.

Powell v. Brunswick County, 150 U. S. 440, 37 L. ed. 1137, 14 Sup. Ct. Rep. 166.

Mr. George A. True argued the cause and filed a brief for defendants in error:

To give this court jurisdiction of a writ of error to the state court it must appear affirmatively, not only that a Federal question was presented for the decision of the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it

of the United States on writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

As to how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

was actually decided, or that the judgment as rendered could not have been given without deciding it.

Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 637, 34 L. ed. 1110, 1111, 11 Sup. Ct. Rep. 435; *Detroit City R. Co. v. Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; *De Saussure v. Gailard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Endowment & Benev. Asso. v. Kansas*, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Church v. Kelsey*, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; *McDonough v. Millaudon*, 3 How. 693, 11 L. ed. 787.

This court will not entertain jurisdiction of state judgments, where, beside the Federal question decided by the state court, there is another and distinct ground upon which the judgment can be sustained.

Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; *Rector v. Ashley*, 6 Wall. 142, 18 L. ed. 733; *Gibson v. Chouteau*, 8 Wall. 314, 19 L. ed. 317; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Moore v. Mississippi*, 21 Wall. 636, 22 L. ed. 653.

Alleged errors of a state court, which involve questions either of fact, or of state, and not Federal laws, are not reviewable in the United States Supreme Court on writ of error.

Quimby v. Boyd, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147.

A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgment of state courts. The bare averment of a Federal question is not sufficient. There must be at least color of ground for such averment.

Hamblin v. Western Land Co. 147 U. S. 530, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a suit brought by the Winous Point Shooting Club against Caspersen and others in the court of common pleas, Ottawa county, Ohio, to enjoin defendants from fishing on certain premises alleged to be parts of Sandusky river and Mud creek, and to belong to plaintiff.

The court found that the waters in dispute formed part of a public bay, which defendants had the right to navigate and to fish in; and dismissed the petition.

The case was then carried to the circuit [190] court of Ottawa county and there tried *de novo*. That court filed findings of fact and conclusions of law; held that the waters in question were not parts of Sandusky river and Mud creek, and formed part of a public bay, in whose waters defendants, as members of the public, had the right of naviga-

tion and fishing; and the petition was again dismissed. Plaintiff then took the case on error to the supreme court of Ohio, and, with other alleged errors not material here, assigned as error that "the judgment of the court is in contravention of § 19, article 1, of the Constitution of Ohio, and article 5 of the Constitution of the United States, in that by said judgment the private property of the plaintiff in error is taken for public use without just compensation." There was no suggestion that any right under the Constitution, or any statute of, or authority exercised under, the United States, had been specially set up or claimed, and decided against. The supreme court affirmed the judgment of the circuit court and entered an order certifying as "part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the prosecution of error to this court from the circuit court of Ottawa county, and in the arguments made in this court, in behalf of plaintiff in error, it was insisted and relied upon by said plaintiff that the waters in dispute had been surveyed and meandered by the United States as those of Sandusky river and Muddy creek, and the lands mentioned and described in said case had been surveyed, sold, and patented by the United States to plaintiff's predecessors in title as lands bordering upon said river and creek, all of which acts had been done under authority of acts of Congress; that plaintiff had and possessed the sole and exclusive right of fishing in said waters; that the judgment and decree of the said circuit court, that said waters are not those of Sandusky river and Muddy creek, but those of an open and public bay, in which the public had the rights of fishing, was in contravention of the Constitution of the United States, in that plaintiff was deprived of its private property, and the same was taken for a public use, without just *compensation to it; and it became ma-[191] terial to the determination of said case in this court to determine said question so made by plaintiff in error, which was determined adversely to plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein."

The certificate in itself would not confer jurisdiction, but may properly be referred to, and it appears therefrom, as well as from the terms of the assignment of error in the supreme court, that plaintiff's contention was that the judgment of the circuit court was in violation of the 5th Amendment. But that amendment is a restriction on Federal power, and not on the power of the states. The supreme court of Ohio gave no affirmative expression of its views in that regard, or, indeed, in respect

of § 19 of article 1 of the Constitution of Ohio, treating of taking private property for public use on compensation made.

The judgment was affirmed on the authority of *Bodi v. Winous Point Shooting Club*, 57 Ohio St. 226, 48 N. E. 944. In that case the same waters were in dispute as in this case, and it was held that they formed "part of a public bay, and not parts of the Sandusky river and Mud creek," and the ruling in *Sloan v. Biemiller*, 34 Ohio St. 492, sustaining the public rights of navigation and fishing, in such circumstances, was followed and approved.

Federal questions cannot be raised here which did not arise below, and as the 5th Amendment had no application, the averment of its violation created no real Federal question. *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

Writ of error dismissed.

[192]***DAVID J. HODGES**, Ella M. Parker, Gertrude M. Hodges, and Willie E. Hodges, Heirs at Law of James L. Hodges, *Appts.*,
v.

WILLIAM C. COLCORD, Henry S. Colcord, Charles F. Colcord, and Mary L. Griffith.

(See S. C. Reporter's ed. 192-196.)

Public lands — uncanceled prima facie valid entry — rights of successful contestant — effect of intermediate settlement.

The right of entry given by the act of Congress of May 14, 1880 (21 Stat. at L. 141, chap. 89, U. S. Comp. Stat. 1901, p. 1392), § 2, to a contestant who procures the cancellation of a homestead entry, inures to the benefit of one who, by his contest, induced the relinquishment in the local land office of a homestead entry of land in Oklahoma territory prima facie valid, but made by one in fact disqualified to make the entry, although a settlement was made intermediate the homestead entry and the initiation of the contest; since such entry, though ineffectual to vest any rights in the entryman, was sufficient to prevent the acquisition of homestead rights by another until it had been set aside.

[No. 155.]

Submitted February 23, 1904. Decided March 7, 1904.

A PPEAL from the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the District Court of Oklahoma County sustaining a demurrer to the petition and dismissing a suit to have the holders of the legal title to a tract of land in that county decreed to hold that title in trust. *Affirmed.*

See same case below (Okla.) 70 Pac. 383.

The facts are stated in the opinion.

Mr. J. S. Jenkins argued the cause and filed a brief for appellants.

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Messrs. John W. Shartel and James R. Keaton argued the cause, and, with **Mr. Frank Wells**, filed a brief for respondents.

Mr. Justice **Brewer** delivered the opinion of the court:

On June 1, 1901, James L. Hodges filed his petition in the district court of Oklahoma county, Oklahoma territory, praying that the defendants, the heirs of William R. Colcord, deceased, the holders of the legal title by patent from the United States to a tract of land in the county, be decreed to hold that title in trust for him. In it he alleged that on July 22, 1889, he was legally qualified to make a homestead entry of the land; that on that day he settled upon it with intent to acquire title under the homestead laws of the United States, and immediately made permanent and lasting improvements, as required by law. He further alleged "that at the time he entered upon said land, and made settlement thereon, one John Gayman had entered upon and occupied said land; that on the 25th day of April, 1889, the said John Gayman obtained a pretended *homestead entry on said [193] land; that said Gayman was disqualified from ever entering or obtaining any right or title to said land, by reason of his entering upon and occupying a portion of the Oklahoma country declared open to settlement by the President's proclamation of March 23, 1889 [26 Stat. at L. 1544], prior to 12 o'clock noon, April 22, 1889, as shown by a copy of the decision of the Land Department, recorded in vol. 24, page 221 of the United States Land Decisions, hereto attached, marked 'Exhibit A,' and made a part of this petition.

"In the decision above referred to the honorable Secretary of the Interior finds as facts that James L. Hodges has resided on said land since July 22, 1889; that Runyan has resided on said land since May 13, 1890, and William R. Colcord since 1893.

"Said William R. Colcord filed his contest against the said John Gayman on the 23d day of July, 1889, on the ground of disqualification, and the plaintiff James L. Hodges filed his contest against said John Gayman August 23, 1889, on the ground of prior settlement, as shown by the decision of the Hon. Secretary of the Interior, dated December 1, 1894, hereto attached, marked 'Exhibit B,' and made a part hereof."

A demurrer to the petition was sustained by the district court, and the suit dismissed. The decision was affirmed by the supreme court of the territory (70 Pac. 383), whereupon an appeal was taken to this court. Pending the proceedings in the territorial

courts Hodges died, and the suit was revived in the names of his heirs.

The appellants' contention is that Gayman was legally disqualified to make a homestead entry of the land; that his entry was absolutely void; that Hodges was the first person legally qualified to make an entry who actually settled upon the land, and that therefore, upon Gayman's relinquishment, he became entitled to entry and patent. On the other hand, the defendants' contention rests on § 2, chap. 89 (21 Stat. at L. 141, U. S. Comp. Stat. 1901, p. 1392), which provides:

[194] "Sec. 2. In all cases where any person has contested, paid *the land office fees, and procured the cancelation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancelation, and shall be allowed thirty days from date of such notice to enter said lands."

The exhibits attached to the petition show that the Land Department found that Gayman was within the territory at the time of the opening of the lands for settlement; that after the decision in *Smith v. Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634, he filed a relinquishment in the local land office, and that such relinquishment was induced by the contest of Colcord. This finding, being one of fact, is conclusive upon the courts. Colcord was the contestant who procured the cancelation of Gayman's homestead entry. He comes within the terms of the statute. Was this statutory right of entry destroyed by Hodges' settlement, a settlement made intermediate Gayman's homestead entry and the initiation of this contest? We are of the opinion that it was not. Gayman's homestead entry was prima facie valid. There was nothing on the face of the record to show that he had entered the territory prior to the time fixed for the opening thereof for settlement, or that he had in any manner violated the statute or the proclamation of the President. This prima facie valid entry removed the land, temporarily, at least, out of the public domain, and beyond the reach of other homestead entries. The first to contest was Colcord, and as a result of that contest Gayman relinquished his entry. To take from Colcord the benefit of the relinquishment which his contest had secured would be an injustice to him as well as a disregard of the act of 1880.

Some reliance is placed by the appellants on the language of this court in *Calhoun v. Violet*, 173 U. S. 60, 64, 43 L. ed. 614, 615, 19 Sup. Ct. Rep. 324, 325, in which we said in respect to an entry similar to Gayman's "that an entry of land made under

such circumstances was void, and that the ruling by the Land Department so holding was correct;" but that language was used with reference to the claim of the entryman, and what was meant was that such entry *was void as to him,—that is, gave him [195] no rights. So here the entry by Gayman was, as to him, void,—gave him no rights. But that decision did not determine what effect an entry prima facie valid, yet made by one in fact disqualified to make the entry, had upon the status of the land or the rights of other parties. Generally, a homestead entry while it remains uncanceled withdraws the land from subsequent entry. Such has been the ruling of the Land Department. In *Re Cliff*, 3 Land Dec. 216, 218, it was said by Secretary Teller:

"Under the present ruling of this department, entries of record prima facie valid appropriate the lands covered thereby, and, while they remain uncanceled, the land is not subject to further entry. *Graham v. Hastings & D. R. Co.* 1 Land Dec. 362; *Whitney v. Maxwell*, 2 Land Dec. 98; *McAvinney v. McNamara*, 10 C. L. O. 274; *Davis v. Crans*, 11 C. L. O. 20."

The same proposition was affirmed in *Re Laird*, 13 Land Dec. 502, 503. In *McMichael v. Murphy*, 20 Land Dec. 147, 150, the question arose as to an entry in Oklahoma, and Secretary Smith discussed it in these words:

"Although White had entered the Oklahoma country during the prohibitory period, yet his homestead entry was prima facie valid. Its invalidity had to be established by extraneous evidence, and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done, the tract covered by said entry would have remained forever segregated from the public domain; so far, at least, as the unquestioned legality of the entry itself could accomplish that fact. Hence it cannot be regarded as void, but voidable only. True, White lacked one of the essential qualifications of an entryman for Oklahoma lands. But it has been held that the entry of an alien (who also lacks the very essential qualifications of citizenship) is not void, but voidable. *Leary v. Manuel*, 12 Land Dec. 345; *Hollants v. Sullivan*, 5 Land Dec. 115; *Pfaff v. Williams*, 4 Land Dec. 455; *St. Paul, M. & M. R. Co. v. Forseth*, 3 Land Dec. 446. Being voidable only, White's entry segregated the land so long as it remained of record."

*In *Jones v. Arthur*, 28 Land. Dec. 235, it [196] was decided that "land in the actual possession and occupancy of one holding the same under claim and color of title is not subject to homestead entry." See also *Butler v. California*, 29 Land Dec. 610. In

Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339, it was held that "lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained;" and in *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112, it was said by Mr. Justice Lamar (p. 361, L. ed. p. 365, Sup. Ct. Rep. p. 114):

"In the light of these decisions the almost uniform practice of the Department has been to regard land upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale, or grant until the original entry be canceled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

And again, on page 364, L. ed. p. 366, Sup. Ct. Rep. p. 115, after noticing some defects in the form of the entry:

"But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

But it is unnecessary to multiply quotations. The entry of Gayman, though ineffectual to vest any rights in him, and therefore void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside. It was relinquished and removed from the records of the land office as the result of a contest by Colcord. He was entitled under the statute to the benefit of that contest, and was rightfully given an entry of, and patent to, the land.

The judgment of the Supreme Court of Oklahoma is affirmed.

[197]*NORTHERN SECURITIES COMPANY *et al.*, Appts.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 197-406.)

Commerce—combination to acquire controlling interest in competing interstate railway companies—validity of anti-trust act—reserved rights of states—freedom to contract—enforcement—form of decree.

1. A combination by stockholders in two com-

peting interstate railway companies to form a stock-holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, violates the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), which declares illegal every combination or conspiracy in restraint of interstate commerce, and forbids attempts to monopolize such commerce or any part of it.

2. Congress did not exceed its power under the commerce clause of the Federal Constitution in enacting the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, although such statute is construed to embrace a combination of stockholders of two competing interstate railway companies to form a stock-holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies.

3. The enforcement of the provisions of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by a Federal court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the power acquired by such corporation by virtue of its acquisition of such stock, does not amount to an invasion by the Federal government of the reserved rights of the states creating the several corporations.

4. The constitutional guaranty of liberty of contract is not infringed by the enforcement of the provisions of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by a Federal court decree enjoining a corporation formed in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the powers acquired by such corporation by virtue of its acquisition of such stock.

5. A Federal court, by its decree in a suit instituted under the authority of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), § 4, to prevent and restrain violations of the act, may properly enjoin a corporation organized in pursuance of a combination of stockholders of two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from acquiring any further stock therein, from voting such stock as it then holds or may subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings, and may restrain the railway companies from permitting or suffering any such action on the part of the stock-holding corporation,

NOTE.—On the constitutionality of statutes restricting contracts and business—see note to *State v. Loomis*, 21 L. R. A. 789.

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As to restrictions on consolidation of parallel or competing railroads—see note to *State ex rel. Nolan v. Montana R. Co.* 45 L. R. A. 275.

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and from paying any dividends on account of the stock held by it.

[No. 277.]

Argued December 14, 15, 1903. Decided March 14, 1904.

APPEAL from the Circuit Court of the United States for the District of Minnesota to review a decree enforcing, as against the defendants, the provisions of the anti-trust act against combinations in restraint of interstate or foreign commerce. *Affirmed.*

See same case below, 120 Fed. 721.

The facts are stated in the opinions.

Mr. George B. Young argued the cause and filed a brief for appellant the Northern Securities Company:

The government is not entitled to maintain this proceeding, nor had the circuit court jurisdiction of it; for the conspiracy or combination charged in the petition and found by the circuit court, if it ever existed, had done all it was formed to do, and had come to an end, before the proceeding was instituted.

The only combination of which there is any evidence is a combination formed in aid of commerce, to liberate, protect, and enlarge, and not to restrain it, and which has liberated, protected, aided, and enlarged it, and has not restrained, and does not threaten to restrain it.

All the facts and circumstances are to be considered in order to determine the fundamental question whether the necessary effect of the combination is to restrain interstate commerce.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 245, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 68, 22 L. ed. 315, 318.

The law of self-defense and protection applies to one's business as well as to one's person.

United States Chemical Co. v. Provident Chemical Co. 64 Fed. 946.

The combination here is analogous to the covenant of the seller of a business that he will not engage in it, which has been declared not to restrain trade.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 329, 41 L. ed. 1007, 1023, 17 Sup. Ct. Rep. 540.

If this combination is to be adjudged a combination and conspiracy in restraint of commerce, there is scarcely an agreement or contract among business men that cannot be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.

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Hopkins v. United States, 171 U. S. 578, 600, 43 L. ed. 290, 299, 19 Sup. Ct. Rep. 40.

Congress did not attempt by the anti-trust act to limit and restrict the rights of corporations created by the states, or of citizens of the states, in the acquisition or disposition of property, or to make criminal the acts of persons in the acquisition and control of property, which the states of their residence or creation sanctioned or permitted.

United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249.

At common law a cessation or diminution of competition, springing from a unity of ownership,—as, where one competitor sold his business to another, or both sold out to a third person, etc.,—was never regarded as a restraint of trade; such cessation or diminution being incident to the union of property or business in one ownership, and not a restraint imposed by contract.

And so such purchases, or agreements to purchase, have never been held contracts in restraint of trade.

Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L. R. A. 255, 43 Atl. 723; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639, 28 Atl. 973.

The formation of corporations for business or manufacturing purposes has never been regarded as in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership.

United States v. Joint Traffic Asso. 171 U. S. 505, 567, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25.

The only question is, Does the contract or combination itself, or do the things the parties contracted to do, restrain commerce? If they do, the parties are criminals, however good their motives. If they do not, the parties are innocent, however reprehensible their designs.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 234, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96.

The power to suppress competition is not of itself suppression.

State v. Northern Securities Co. 123 Fed. 692.

The position of the government rests on a wholly erroneous view of the relations of the shareholders of a railway company to the commerce of the company, and of the power of a majority of the shareholders to restrain or otherwise control that commerce.

Hoyt v. Thompson, 19 N. Y. 207; *Burrill v. Nahant Bank*, 2 Met. 163, 35 Am. Dec.

193 U. S.

395; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to or the exclusive control of the trade; and (2) the exclusion of all others from that right and control.

United States v. Trans-Missouri Freight Asso. 7 C. C. A. 15, 19 U. S. App. 36, 4 Inters. Com. Rep. 443, 58 Fed. 58.

An attempt to monopolize any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right to such trade or commerce by means which prevent or restrain others from engaging therein.

Re Greene, 52 Fed. 104.

Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for a mutual advantage, which do not amount to a monopoly, but leave the field open to others, are within neither the reason nor the operation of the rule.

Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 23 L. R. A. 639, 28 Atl. 973.

The anti-trust act and the regulative power of Congress under the commerce clause of the Constitution are alike strictly confined to matters which directly and immediately affect interstate or foreign commerce.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 291, 41 L. ed. 1011, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Hopkins v. United States*, 171 U. S. 578, 594, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

A state may not tax railway earnings from transportation as such, for that is taxing the commerce, and is a direct regulation of it.

Fargo v. Michigan, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 338, 30 L. ed. 1200, 1202, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

But it may tax the tolls received by a local railroad company for the use of part of its road by another company engaged in interstate commerce; for this is a tax on property, and not on commerce. Any increase of rates by the carrying company, consequent on a raising of the tolls because

of the tax, is "too remote and indirect" to make the act a regulation of commerce.

New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896.

A state may tax the franchise of a foreign corporation upon a valuation measured by gross receipts from interstate and foreign as well as domestic commerce. This is not a direct regulation; the tax is not laid on the commerce itself.

Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163.

A law imposing a privilege tax of \$50 on every sleeping car running over the railroads of the state is void as to cars used in interstate transportation, for it is a direct regulation of commerce.

Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635.

But the state may tax the same cars, not because used in commerce, but because within the state, as property in the state; and the tax may take the form of a tax on the company's capital. Here the tax is laid directly on the property of the company,—its cars,—and not on the use of the cars in interstate commerce; and if it regulates such commerce at all, it does so indirectly.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 25, 35 L. ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

A state may not tax United States bonds as such. It may not tax an individual or corporation on the value of the bonds held by him, for this would be to tax the bonds directly. But shares in a national bank are taxable by a state at their full value, like other property, no matter how much of the bank's capital is invested in United States bonds. Such tax does not fall directly on the bonds.

Van Allen v. The Assessors, 3 Wall. 575, 18 L. ed. 229.

If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature.

Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Williams v. Fears*, 179 U. S. 270, 278, 45 L. ed. 186, 190, 21 Sup. Ct. Rep. 128.

A complete bar to the government's attempted encroachment on the rights of the

states and their citizens is found in *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705, and *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

Congress, when passing the act, knew that the railway system of the country rested on consolidations, actual or virtual, authorized by state laws, some of them having existed many years.

Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 245, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881.

These are also matters within the judicial knowledge of the court.

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 435, 14 L. ed. 997, 1005; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 469, 22 L. ed. 678, 683; *Brown v. Piper*, 91 U. S. 37, 42, 23 L. ed. 200, 202; *Phillips v. Detroit*, 111 U. S. 604, 606, 28 L. ed. 532, 533, 4 Sup. Ct. Rep. 580; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 201, 36 L. ed. 672, 675, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 699, 40 L. ed. 849, 858, 16 Sup. Ct. Rep. 714; *Preston v. Browder*, 1 Wheat. 115, 121, 4 L. ed. 50, 51; *United States v. Union P. R. Co.* 91 U. S. 72, 79, 23 L. ed. 224, 228; *Platt v. Union P. R. Co.* 99 U. S. 48, 25 L. ed. 424; *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 245, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881.

If Congress had meant to declare such consolidations and stock purchases of competing companies to be illegal, the securities issued by them void, and the state legislation unconstitutional, it would have said so in plain, specific, and apt language.

There can be no question but that every combination declared illegal by the act would have been equally so—no more, no less—before the act.

Re Debs, 158 U. S. 564, 581, 39 L. ed. 1092, 1101, 15 Sup. Ct. Rep. 900; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 229, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96.

Mr. John G. Johnson also argued the cause and filed a brief for appellant the Northern Securities Company:

The acts which can be prevented and restrained by proceedings in equity are those, and those alone, made criminal by the 1st and 2d sections of the Sherman act (26 Stat. at L. 209, chap. 647; U. S. Comp. Stat. 1901, p. 3200). The statute is therefore a penal one, defining a criminal offense, for which it provides a punishment. It is an indispensable prerequisite to a conviction for a criminal misdemeanor,—especially if there be no criminal intent, and such did not exist in the present case,—that

the offense condemned shall be clearly defined.

United States v. Willberger, 5 Wheat. 76, 5 L. ed. 37; *United States v. Whittier*, 5 Dill. 35, Fed. Cas. No. 16,688; *Andrews v. United States*, 2 Story, 213, Fed. Cas. No. 381; *United States v. Hartwell*, 6 Wall. 385, 396, 18 L. ed. 830, 832; *Swearingen v. United States*, 161 U. S. 446, 451, 40 L. ed. 765, 16 Sup. Ct. Rep. 562; *France v. United States*, 164 U. S. 676, 682, 41 L. ed. 595, 597, 17 Sup. Ct. Rep. 219; *The Paulina v. United States*, 7 Cranch, 61, 3 L. ed. 269; *United States v. Reese*, 92 U. S. 219, 23 L. ed. 565; *United States v. Comerford*, 25 Fed. 902; *United States v. Chase*, 135 U. S. 255, 261, 34 L. ed. 117, 119, 10 Sup. Ct. Rep. 756; *United States v. Goldenberg*, 168 U. S. 102, 42 L. ed. 398, 18 Sup. Ct. Rep. 3; *Sarlls v. United States*, 152 U. S. 570, 575, 38 L. ed. 556, 558, 14 Sup. Ct. Rep. 720.

The meaning of the words, "contracts in restraint of trade," was thoroughly understood in jurisprudence and in business when the Sherman act was passed. It was not the intention of Congress to create any new offense.

United States v. Trans-Missouri Freight Asso. 166 U. S. 328, 41 L. ed. 1023, 17 Sup. Ct. Rep. 540.

The Sherman act does not apply to the formation of a corporation to carry on any particular line of business by those already engaged therein, or to a contract of partnership or of employment between two persons previously engaged in the same line of business.

United States v. Joint Traffic Asso. 171 U. S. 567, 43 L. ed. 286, 19 Sup. Ct. Rep. 25.

The idea of monopoly involves something more than a mere acquisition of the whole, or of the major part, of a commodity or of shares of stock. It involves the idea of exclusion of other supply, as well as inclusion of what is actually acquired.

Re Greenc, 52 Fed. 104; *Charles River Bridge v. Warren Bridge*, 11 Pet. 606, 9 L. ed. 847; 20 Am. & Eng. Enc. Law, p. 846; 2 Bouvier, Law Dict. Rawle's ed. p. 435; 4 Bl. Com. 159; Century Dict. Monopoly; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

The purchase by one person of the property of his rival, with the intention thereby to destroy his competition, is not illegal, although by the purchase he will acquire the power to prevent the same.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315.

The power of Congress to regulate commerce does not confer upon it a right to prescribe the persons who may engage therein, or to regulate or control the ownership of

shares of stock of corporations which engage therein.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 294.

That construction of a statute should be adopted which, without doing violence to the fair meaning of the words used, brings it into harmony with the Constitution.

Grenada County v. Brogden, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125.

In interpreting a statute the intention of the law-making power will prevail even against the letter of the statute. A thing may be within the letter of the statute, and not within its meaning, or within its meaning, though not within its letter.

Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

In *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678, a stipulation in the charter of a railroad company, that the company should pay to the state a bonus, or a portion of its earnings, was held, not repugnant to the Constitution of the United States.

In *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865, a state was permitted, in allowing consolidation between corporations of different states, to charge upon the new consolidated company a percentage on its entire authorized stock as a fee, inasmuch as, without the franchises conferred by the state, it could not exist; and such charge was not an interference with interstate commerce.

The relief decreed was improper under any aspect of the case.

United States v. E. C. Knight Co. 156 U. S. 1, 17, 39 L. ed. 325, 331, 15 Sup. Ct. Rep. 249.

Mr. John W. Griggs also filed a brief for appellant the Northern Securities Company:

In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith, while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 702, 40 L. ed. 859, 16 Sup. Ct. Rep. 714.

The courts of the United States since the passage of the Sherman act have been called upon to restrain projected consolidations upon the ground that they were contrary to state statutes, but no suggestion has been made that the legislation of Congress expressed in the Sherman act had any bearing on the subject.

Pearsall v. Great Northern R. Co. 161 U. S. 648, 40 L. ed. 839, 16 Sup. Ct. Rep. 705;

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Louisville & N. R. Co. v. Kentucky, 161 U. S. 702, 40 L. ed. 859, 16 Sup. Ct. Rep. 714.

The power exists in each state, by appropriate enactments not forbidden by its own or the Federal Constitution, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, so as to provide for the public convenience and the public good. State legislation relating to commerce is not to be deemed a regulation of interstate commerce simply because it may, to some extent or under some circumstances, affect such commerce.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, it was held that the authority given by § 5258 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3564) to carry "freight and property" over their respective roads from one state to another state did not authorize a railroad company to carry into a state cattle known, or which by due diligence might be known, to be in such condition as to impart or communicate disease to the domestic cattle of such state.

And it has been expressly adjudged that the above statutory provision was not intended to interfere with the authority of the states to enact such regulations with respect, at least, to a railroad corporation of its own creation, as were not directed against interstate commerce, but which only incidentally or remotely affected such commerce, and were not in themselves regulations of interstate commerce, but were designed reasonably to subserve the convenience of the public.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

All that has been done, even as contended by the government, has been to concentrate the ownership of a majority of the shares of the two companies into one hand, the owner being a corporation controlled by the same men who would own and control a majority of the capital stock of both railroad companies if the holding company had not been formed.

The companies remain distinct; the stockholders are not the corporation; each company is just as much subject to all the requirements of the law as though its stockholders were entirely different.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194.

Where a contract, agreement, or arrangement of any kind is challenged as a com-

bination in restraint of trade or commerce, the court will look at the form of the agreement, and if it appears on its face to have as a necessary and direct result the effect of restraining trade or commerce, no inquiry into the intention or motives of the parties is requisite.

United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

But if the arrangement is one which in itself is lawful, and is claimed to be invalid only because its ultimate object is to restrain commerce or competition, then it is necessary to examine the facts and circumstances to see if the forms of law are being used to further an illegal purpose.

United States v. Trans-Missouri Freight Asso. 166 U. S. 341, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *United States v. Workingmen's Amalgamated Council*, 26 L. R. A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 994; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *State ex rel. Atty. Gen. v. Shippers' Compress & Warehouse Co.* (Tex. Civ. App.) 67 S. W. 1049, 95 Tex. 603, 69 S. W. 58.

In every instance where the Supreme Court has had occasion to pass upon the meaning of the Sherman act, it has been extremely careful to distinguish between acts which directly restrain commerce, and acts which only indirectly or incidentally have that effect.

United States v. E. C. Knight Co. 156 U. S. 1, 12, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; *United States v. Joint Traffic Asso.* 171 U. S. 505, 566, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Over internal commerce and trade Congress has no power of regulation, nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted.

Licence Tax Cases, 72 U. S. 462, 18 L. ed. 497.

The fact that an article was manufactured for export to another state does not make it an article of interstate commerce.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

In *United States v. Boyer*, 85 Fed. 425, acts of Congress empowering the Secretary of Agriculture to make inspection of cattle,

etc., at slaughter houses located in the several states, the products of which were intended for sale in other states or foreign countries, were declared to be without any constitutional warrant, and therefore void, although the government sought to sustain them as a legitimate exercise of the commerce powers.

The sale of the stock of the two railroad corporations, no matter to whom it may be sold, nor how often such sales and transfers of the stock may take place, cannot, in any proper sense, be said to affect the transportation business carried on by the company.

Clarke v. Central R. & Bkg. Co. 66 Fed. 16; *Re Greene*, 52 Fed. 104; *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 671, 40 L. ed. 838, 846, 16 Sup. Ct. Rep. 705; *Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 312.

The Sherman act is a penal statute; every act which may be prevented by injunctive order would, if committed and proved, subject the parties to criminal prosecution. The rule of strict construction must therefore be applied.

United States v. Whittier, 5 Dill. 35, Fed. Cas. No. 16,688; *United States v. Sheldon*, 2 Wheat. 119, 4 L. ed. 199; *United States v. Hartwell*, 6 Wall. 395, 18 L. ed. 832; *United States v. Shackford*, 5 Mason, 445, Fed. Cas. No. 16,262; *United States v. Clayton*, 2 Dill. 219, Fed. Cas. No. 14,814; *United States v. Garretson*, 42 Fed. 22; *Dwarris, Stat.* 641; *Hubbard v. Johnstone*, 3 Taunt. 177.

Acquiescence by the government for more than eleven years in the actual merger and consolidation of many important parallel and competing lines of railroads and steamships engaged in interstate and international commerce has given a practical construction to the act of July 2, 1890 (26 Stat. at L. 209, chap. 647; U. S. Comp. Stat. 1901, p. 3200) to the effect that it was not intended to forbid, and does not forbid, the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock.

Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115.

Mr. Charles W. Bunn argued the cause and filed a brief for appellant the Northern Pacific Railway Company:

The power of Congress has never been more accurately or completely described than by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189, 190, 6 L. ed. 23, 68: "Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all

its branches, and is regulated by prescribing rules for carrying on that intercourse."

This definition has been frequently repeated by the court.

Passenger Cases, 7 How. 283, 394, 462, 12 L. ed. 702, 748, 777; *Henderson v. Wickham*, 92 U. S. 259, 270, 23 L. ed. 543, 548; *Lottery Case*, 188 U. S. 321, 346, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321.

The power of Congress is only to regulate, and is the power to prescribe the rule by which commerce is to be governed.

Gibbons v. Ogden, 9 Wheat. 196, 6 L. ed. 70.

The interstate commerce power of Congress justifies only such regulations as act upon that commerce directly, and does not authorize regulations abridging the police powers of the states or the personal rights and privileges of individuals, if they affect that commerce only indirectly, remotely, incidentally, and collaterally.

Re Greene, 52 Fed. 104; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Gibbons v. Ogden*, 9 Wheat. 203, 6 L. ed. 71; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Hopkins v. United States*, 171 U. S. 592, 43 L. ed. 296, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 615, 43 L. ed. 305, 19 Sup. Ct. Rep. 50; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 701, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

If the decision of the circuit court is correct, all the state laws either forbidding or authorizing consolidations of interstate carriers are and always have been void.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; *Cushing v. The John Fraser*, 21 How. 184, 16 L. ed. 106; *Pound v. Turk*, 95 U. S. 459, 24 L. ed. 525; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 492, 30 L. ed. 695, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *United States v. E. C. Knight Co.* 156 U. S. 11, 12, 39 L. ed. 328, 329, 15 Sup. Ct. Rep. 249; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 230, 44 L. ed. 143, 20 Sup. Ct. Rep. 96.

Except as it punishes contracts, combinations, and conspiracies, the statute introduces no new rule of law. Whatever is a restraint of commerce now was such before this statute. The act is new only in making the preliminary conspiracy a crime.

Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 230, 44 L. ed. 143, 20 Sup. Ct. Rep. 96.

If a thing restrains interstate commerce,

it is immaterial with what innocent intent it may be done. On the other hand, if the thing complained of does not restrain interstate commerce, it is immaterial how evil may be the intent.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540.

If an action be lawful, it is elementary that its purpose is immaterial.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Wood v. Amory*, 105 N. Y. 278, 11 N. E. 636; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L. R. A. 674, 38 N. E. 292; *Adler v. Fenton*, 24 How. 407, 410, 16 L. ed. 696, 697; *United States v. Greenhut*, 51 Fed. 205; *Re Greene*, 52 Fed. 104; *Randall v. Hazelton*, 12 Allen, 412; *Brackets v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *United States v. Isham*, 17 Wall. 496, 21 L. ed. 728; *Dieckman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311; *Fahrney v. Kelly*, 102 Fed. 403; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25, 41; *Allen v. Flood* [1898] A. C. 1.

If buying and voting the stock restrains interstate commerce, it is illegal. If it does not restrain interstate commerce, it is legal; and the conspiracy behind the formation of the company was a conspiracy to do a lawful thing.

Bohn Mfg. Co. v. Hollis, 54 Minn. 223, sub nom. *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119.

A combination may destroy competition without restraining trade.

United States v. Joint Traffic Asso. 171 U. S. 567, 43 L. ed. 286, 19 Sup. Ct. Rep. 25; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 744, 85 Fed. 271.

The business of a rival in trade may be purchased for the very purpose of being rid of his competition.

Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Rafferty v. Buffalo City Gas Co.* 37 App. Div. 618, 56 N. Y. Supp. 288; *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 39 Atl. 923; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639, 28 Atl. 973.

Mr. M. D. Grover filed a brief for appellant the Great Northern Railway Company:

The commerce clause of the Constitution of the United States does not take away from the several states the right to authorize the formation of corporations, define

their business, fix the amount of their capital or purchasing power, and regulate the issue, sale, and ownership of their capital stock.

It has been the practice, since the infancy of railroads in this country, for one railroad company to purchase or lease the railroad of a competing company, or to acquire a majority of the shares of a competing company, or of two companies competing with each other, or to effect the consolidation of competing companies. This has been done without objection from any branch of the Federal government, and has invariably proved beneficial to the railway companies concerned, to their shareholders, and to the public.

Unity of ownership of shares of competing corporations engaged in interstate trade, does not restrain such trade, and is not forbidden by the anti-trust act, nor is such unity of ownership a regulation of interstate commerce, and thus subject to exclusive Federal jurisdiction under the commerce clause of the Constitution.

If the legislature undertakes to define a new offense by statute, and provide for its punishment, its will should be expressed in such language as not to deceive or mislead the common mind.

Tozer v. United States, 4 Inters. Com. Rep. 246, 52 Fed. 917; *The Paulina v. United States*, 7 Cranch, 61, 3 L. ed. 269; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563.

Messrs. Francis Lynde Stetson and David Willecox filed a brief for appellants Morgan, Bacon, and Lamont:

Each individual who has transferred his property to the Securities Company has obtained therefor something entirely different, —namely, an interest in a company holding stock of the other railway company as well. It is manifest that in the fullest possible sense this constituted a sale of the property.

Berger v. United States Steel Corp. 63 N. J. Eq. 809, 53 Atl. 68.

These transactions, being lawful, are not affected by allegations as to the motive which actuated them. As the means employed were lawful, the only question must be whether the result accomplished was unlawful.

Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542.

All the action taken being authorized by law, the motive clearly is unimportant.

United States v. Isham, 17 Wall. 496, 21 L. ed. 728; *Adler v. Fenton*, 24 How. 407, 410, 16 L. ed. 696, 697; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 546, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431; 686

Randall v. Hazelton, 12 Allen, 412; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 190, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; *Strait v. National Harrow Co.* 51 Fed. 819; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Wood v. Amory*, 105 N. Y. 278, 11 N. E. 636; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L. R. A. 674, 38 N. E. 292; *National Protective Assn. v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25, 41, 42; *Allen v. Flood* [1898] A. C. 1; *Pender v. Lushington*, L. R. 6 Ch. Div. 70.

No indirect or remote effect of these lawful transactions upon competition between the railway companies could bring them within the Federal anti-trust act.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 246, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96.

The mere fact that a contract has the effect of restraining trade or suppressing competition in some degree does not render it injurious to the public welfare, and thus bring it within the police power.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Hyer v. Richmond Traction Co.* 168 U. S. 471, 477, 42 L. ed. 547, 549, 18 Sup. Ct. Rep. 114, 366, Affirming 26 C. C. A. 175, 42 U. S. App. 522, 80 Fed. 839; *Continental Ins. Co. v. Fire Underwriters*, 67 Fed. 310; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L. R. A. 674, 38 N. E. 292, 145 N. Y. 601, 40 N. E. 164; *Oakes v. Cattaraugus Water Co.* 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; *Curran v. Galen*, 152 N. Y. 33, 37 L. R. A. 802, 46 N. E. 297; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861, Approved in *Tode v. Gross*, 127 N. Y. 485, 13 L. R. A. 652, 28 N. E. 469; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629.

This act is a criminal statute pure and simple, and its meaning and effect as now determined must also be its meaning and effect when made the basis of a criminal proceeding. Conversely, the act should now receive such construction only as it would receive upon the trial of those indicted for violating its provisions.

Criminal intent is essential to constitute

a crime, and the testimony bearing thereon is always a question for the jury.

People v. Wiman, 148 N. Y. 29, 42 N. E. 408; *People v. Flack*, 125 N. Y. 324, 11 L. R. A. 807, 26 N. E. 267.

Such restraints as result from the sale or the purchase of property are not within the provisions of anti-trust statutes. Indeed, it is the settled law that the transfer of a business is not illegal because it restrains trade, even by an express covenant.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; *Union Sewer-Pipe Co. v. Connelly*, 99 Fed. 354, Affirmed in 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Fisherics Co. v. Lennen*, 116 Fed. 217; *Harrison v. Glucose Sugar Ref. Co.* 53 C. C. A. 484, 116 Fed. 304; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363, 13 L. R. A. 652; *Oakes v. Cattaraugus Water Co.* 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861, Approved in *Tode v. Gross*, 127 N. Y. 485, 13 L. R. A. 652, 28 N. E. 469; *Wood v. Whitehead Bros. Co.* 165 N. Y. 545, 59 N. E. 357; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 54 App. Div. 223, 66 N. Y. Supp. 615, 175 N. Y. 1, 62 L. R. A. 632, 67 N. E. 136; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

So, too, it has been ruled precisely that the formation of associations or corporations is not illegal because the result will be to restrain competition.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. 403; *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Rafferty v. Buffalo City Gas Co.* 37 App. Div. 618, 56 N. Y. Supp. 288; *United States v. Greenhut*, 51 Fed. 205; *Re Terrell*, 51 Fed. 213; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 43 Atl. 723; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25; *Lough v. Outerbridge*, 143 N. Y. 283, 25 L. R. A. 674, 38 N. E. 292; *State ex rel. Crow v. Continental Tobacco Co.* (Mo.) 75 S. W. 737.

If the result of restricting competition should follow from the lawful transactions involved herein, it would not be their direct result, but only an incidental and collateral result, such as must always follow when business interests of a similar character pass into the same ownership. It would be precisely such a result as those recognized as lawful by the court in *United States v.* **193 U. S.**

Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

It has been denied, and it is very doubtful whether in any case the 2d section of the anti-trust act applies to railroads.

16 Harvard Law Rev. 545, June, 1903.

It has generally been deemed wise and safe to use rather a process of exclusion, and determine what is not a monopoly, so far as the case in hand required.

Laredo v. International Bridge Co. 14 C. C. A. 1, 30 U. S. App. 110, 66 Fed. 246.

Corporations can invoke the benefits of the provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 28, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207.

Corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 592, 41 L. ed. 560, 565, 17 Sup. Ct. Rep. 198; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 690, 43 L. ed. 858, 861, 19 Sup. Ct. Rep. 565; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722.

This constitutional provision protects the right to acquire property, equally with the right to hold the same after it has been acquired.

Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.

These rights are not affected by the statute now invoked.

United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249.

The 5th Amendment to the Federal Constitution secures all persons in their "liberty," and invalidates any legislation by Congress depriving them of liberty "without due process of law."

As thus used, "liberty" means not merely bodily liberty,—freedom from physical duress,—but in effect comprehends substantially all those personal and civil rights of the citizen which it is meant to place beyond the power of the general government to destroy or impair.

Slaughter-House Cases, 16 Wall. 36, 122, 127, 21 L. ed. 394, 423, 425; *Munn v. IL*

Illinois, 94 U. S. 113, 142, 24 L. ed. 77, 90; *People ex rel. Annan v. Walsh*, 117 N. Y. 621, 22 N. E. 682; *Reg. v. Druitt*, 10 Cox C. C. 592; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *United States v. Joint Traffic Asso.* 171 U. S. 505, 572, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228, 229, 41 L. ed. 136, 143; 20 Sup. Ct. Rep. 96; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354.

As used in the 5th constitutional Amendment, "liberty" includes equality of rights under the law, and secures citizens similarly situated against discriminations between them, which are arbitrary and without foundation in reason.

United States v. Cruikshank, 92 U. S. 542, 554, 555, 23 L. ed. 588, 592; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 160, 41 L. ed. 666, 670, 17 Sup. Ct. Rep. 255.

This court has held invalid statutes singling out railroad companies and requiring them to pay attorneys' fees to successful adverse litigants (*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255), and singling out a single stockyard company, under pretense of classification, for reduction of charges (*Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30), and permitting two or more live-stock raisers to combine to prevent competition, while making it criminal for two or more persons holding property for sale or exchange to combine for the same purpose (*Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431).

One of the objects of this suit is to annul all sales of stock of the railway companies to the Securities Company, and to cancel all certificates of stock of the latter company issued in purchase thereof. Even if there were any prohibition in the premises on the railway companies, it would not apply to their stockholders.

A corporation and its stockholders are entirely different entities.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 157; *American Preservers' Co. v. Norris*, 43 Fed. 711; *Electric R. Co. v. Jamaica & B. R. Co.* 61 Fed. 655.

Any effort to limit the right to sell would necessarily deprive these defendants of their property without due process of law.

Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 445, 38 L. ed. 1041, 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; *People ex rel. Manhattan R. Co. v. Barker*, 146 N. Y. 304, 40 N. E. 996; *Ingersoll v. Nassau Electric R. Co.* 157 N. Y. 453, 43 L. R. A. 236, 52 N. E. 545; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976; *Purdy v. Erie R. Co.* 162 N. Y. 42, 48 L. R. A. 669, 56 N. E. 508; *Buffalo v. Collins Baking Co.* 39 App. Div. 432, 57 N. Y. Supp. 347; *Rochester & C. Turnp. Co. v. Joel*, 41 App. Div. 43, 58 N. Y. Supp. 346; *People v. Meyer*, 44 App. Div. 1, 60 N. Y. Supp. 415; *Ingraham v. National Salt Co.* 72 App. Div. 582, 76 N. Y. Supp. 1016; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128.

Whatever view be taken of the character of the transaction, the decree of the circuit court transcended the authority of the court under the statute, which was the sole ground and source of its jurisdiction.

Thorndike on the Merger Case (Boston, 1903).

Attorney General Knox argued the cause, and, with Mr. W. A. Day, filed a brief for appellee:

The anti-trust act is not primarily a criminal statute.

The civil remedy by injunction, and the liability to punishment under the criminal provisions of the act, are entirely distinct.

United States v. Trans-Missouri Freight Asso. 166 U. S. 342, 41 L. ed. 1028, 17 Sup. Ct. Rep. 540.

In its remedial aspect it ought to be construed liberally and given the widest effect consistent with the language employed. It ought not to be frittered away by the refinements of criticism.

Broom, Legal Max. 5th Am. ed. 3d London ed. 80; Potter's Dwarr. Stat. & Const. p. 234.

And it makes no difference in the application of these rules that the statute has a penal as well as a remedial side.

Dwarris, Stat. 653, 655; Sedgw. Stat. & Const. Law, 2d ed. p. 309, 310; *Hyde v. Cogan*, 2 Dougl. 702.

Every contract, combination, or conspiracy in restraint of interstate or foreign commerce is illegal. The method adopted in bringing about the combination is immaterial; and the device of a holding corporation for the purpose of circumventing the law

can be no more effectual than any other means.

Noyes, *Intercompany Relations*, § 393.

The anti-trust act applies to and covers common carriers by railroad, as well as all other persons, natural or artificial.

United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

The words, "in restraint of trade or commerce," as used in the anti-trust act, are not confined to unreasonable or total restraints only, but extend to any and all direct restraints of trade or commerce, even if reasonable or only partial.

Ibid.; *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

And while this rule applies with equal force to restraints upon individuals, private corporations, and quasi-public corporations, such as railroads, there is a peculiar reason for its application to restraints upon the latter.

United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

In exercising the powers over commerce vested in the Federal government, Congress may to some extent limit the right of private contract, the right to buy and sell property, without violating the 5th Amendment. It may declare that no contract, combination, or monopoly which restrains trade or commerce by shutting out the operation of the general law of competition shall be legal.

United States v. Joint Traffic Assn. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Any combination "for the purpose of avoiding the effects of competition" in interstate or international trade or commerce is within the prohibition of the act.

United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

As used in the act, the word "monopoly" is not confined to its common-law meaning of an exclusive grant to one or a few to do that which before had been free and open to all in common.

United States v. Trans-Missouri Freight Assn. 166 U. S. 342, 41 L. ed. 1028, 17 Sup. Ct. Rep. 540.

The term, as used by modern legislators and judges, signifies the combining or bringing together, in the hands of one person or

set of persons, of the control, or the power of control, over a particular business or employment, so that competition therein may be suppressed.

People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 294, 8 L. R. A. 497, 22 N. E. 798; *People v. North River Sugar Ref. Co.* 54 Hun, 377, 2 L. R. A. 33, 3 N. Y. Supp. 401; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

A combination or consolidation of two competing railroads, brought about by transferring to one road a majority of the stock of the other, is such a monopoly.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

To prove that a combination or monopoly exists within the meaning of the act, it is not necessary to show that the immediate effect of the acts complained of is to suppress competition or to create a complete monopoly. It is sufficient to show that they tend to bring about those results.

People v. North River Sugar Ref. Co. 54 Hun, 377, 3 N. Y. Supp. 401; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672.

The very existence of the power to restrain trade constitutes a restraint.

United States v. Joint Traffic Assn. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705.

It is not necessary in order to bring a combination or conspiracy within the operation of the act, that the members bind themselves each with the other to do the acts alleged to be in restraint of trade. It has always been held to be enough that they act together in pursuance of a common object, and while, of course, this presupposes agreement between them in a broad sense, an agreement or contract in the technical sense is not at all essential.

Reg. v. Murphy, 8 Car. & P. 397.

If in point of law the effect or the tendency of the combination is to restrain trade or commerce the combination is unlawful, and the motive behind it, however beneficial, does not alter that fact in the slightest degree.

United States v. Trans-Missouri Freight Asso. 166 U. S. 341, 342, 41 L. ed. 1023, 17 Sup. Ct. Rep. 540; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 234, 44 L. ed. 145, 20 Sup. Ct. Rep. 96; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 623.

The anti-trust act, prohibiting combinations and monopolies in restraint of interstate and foreign commerce, is an exercise of the power granted to Congress to regulate commerce.

Lottery Case, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

The term "commerce," as used in that grant, embraces the instrumentalities by which commerce is or may be carried on.

Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 568, 21 L. ed. 710, 714; *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. ed. 347, 349; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. ed. 153, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

The commerce powers of the Federal government are broad and ample enough to prevent the restraint or obstruction of interstate commerce by combinations and monopolies of competing lines or instrumentalities of interstate transportation.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Lottery Case*, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 11; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Noyes, Intercompany Relations*, § 19; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 701, 40 L. ed. 859, 16 Sup. Ct. Rep. 714.

Of the various reasons for investing the Federal government with the power to regulate commerce among the several states, the one uppermost in the minds of the members of the constitutional convention was to keep the channels of such commerce open and free from obstructions and restraints.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

The exclusive jurisdiction of the Federal government over commerce with foreign nations and among the states, and over the instrumentalities of such commerce, includes the power of police, or that which is its equivalent, over those subjects in all its undefined breadth and fullness.

Cooley, Const. Lim. 722, 723; *Thayer, Cases on Const. Law*, p. 742, note.

The police power—or equivalent power—of the Federal government over interstate

and foreign commerce is not less plenary and complete because, as to those commercial subjects which are local and do not admit of uniform regulation, the states are permitted to exercise the power until Congress, by its legislation, covers the same field.

Cooley, Const. Lim. 723.

Laws against combinations for the purpose of restricting production, maintaining prices, or suppressing competition have a relation to the end of all police regulations,—the comfort, welfare, or safety of society.

Noyes, Intercompany Relations, § 409.

Anti-trust statutes therefore are enacted in the exercise of the police, or an analogous, power.

State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 46, 45 L. R. A. 363, 52 S. W. 363; *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 715, 59 S. W. 1033; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936.

The police powers or the reserved powers of the states, are not, for any purposes, paramount to the powers of Congress in fields wherein the Federal government has been invested by the Constitution with complete and supreme authority.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252.

When, in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714, the court said that to the states remains the power to regulate the instruments of interstate commerce, it had in mind those regulations of a local character which the states are permitted to make in the absence of Federal legislation covering the same subjects, and did not intend to change any old principle, or to enunciate any new principle, of constitutional construction.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Cooley v. Port Wardens*, 12 How. 299, 320, 13 L. ed. 996, 1005; *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 821; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 463, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488.

Ownership of a majority of its stock constitutes the control of a corporation, when the inquiry is whether a combination or monopoly has been formed to stifle competition between two or more rival and competing railroads.

Noyes, Intercorporate Relations, § 294; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 410, 34 L. R. A. 76, 44 N. E. 1043; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 671, 40 L. ed. 838, 846, 16 Sup. Ct. Rep. 705; *Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 495, 7 Atl. 368.

There is no great difficulty in getting at what Congress meant by a "trust."

Century Dict.; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; Eddy, Combinations, § 582; Noyes, Intercorporate Relations, § 304; Dodd, Combinations; Their Uses & Abuses.

The trustee in a trust combination may be either a natural or an artificial person.

Beach, Monopolies & Industrial Trusts, § 159; Eddy, Combinations, § 582; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 275, 8 L. R. A. 497, 22 N. E. 798.

The charter of a corporation is the unanimous agreement of its stockholders, declaring the nature and conditions of the trust relation between them and the corporate entity.

Morawetz, Priv. Corp. § 237.

While a written trust agreement between the stockholders is a usual element of the trust form of combination, it is not an essential one. It is sufficient to show that the stockholders acted in pursuance of any understanding, plan, or scheme, written, verbal, or otherwise.

Harding v. American Glucose Co. 182 Ill. 551, 55 N. E. 577.

The Securities Company constitutes a "combination in the form of a trust."

Beach, Monopolies & Industrial Trusts, § 159; Noyes, Intercorporate Relations, §§ 310, 393; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Harding v. American Glucose Co.* 182 Ill. 551, 55 N. E. 577.

The disguise by which the defendants sought to hide the fact of a combination of the Great Northern and Northern Pacific, and their connection therewith, appears so thin and transparent that it is a cause of wonder that they should ever have adopted it.

Atty. Gen. v. Great Northern R. Co. 6 Jur. N. S. 1006, 1 Drew. & S. 159; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

Devices of exactly the same character had

already been repudiated by courts of high standing.

Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 41 L. ed. 188.

Fictions of law, invented to promote justice, can never be invoked to accomplish its defeat.

Mostyn v. Fabrigas, Cowp. 177; *Morris v. Pugh*, 3 Burr. 1243.

It is well settled that, when it is in the interest of the administration of justice to do so, courts may and will ignore the fiction that a corporation is a legal being apart from the stockholders, and will consider its acts as the acts of its constituent members; and this is emphatically the case when the state—the sovereign authority—is the complaining party.

People v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 834; *Morawetz, Priv. Corp.* §§ 1, 227; *Taylor, Priv. Corp.* § 50; *Clark & M. Private Corp.* pp. 17, 22; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Atty. Gen. v. Great Northern R. Co.* 6 Jur. N. S. 1006, 1 Drew & S. 157; *Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 495, 7 Atl. 368; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

"To monopolize" signifies the combining or bringing together, in the hands of one person or set of persons, of the control of, or the power to control, several rival and competing businesses, to the end that competition between them may be suppressed.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

By acquiring a majority of the shares of the Great Northern and Northern Pacific the Securities Company has obtained the control of, and therefore the power to suppress competition between, two rival and competing lines of railway engaged in interstate commerce, and in that way has monopolized a part of interstate commerce.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798.

In the exercise of its regulative and police powers over interstate commerce, Congress may suppress monopolies in restraint thereof, by whomsoever created, notwithstanding that in doing so it restricts the right of private contract to some extent.

United States v. Joint Traffic Asso. 171

U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Even if a natural person could lawfully have done what the Securities Company has done, that would be no argument to prove that the Securities Company, in so doing, has not violated the law against monopolies.

People v. North River Sugar Ref. Co. 121 N. Y. 625, 9 L. R. A. 33, 24 N. E. 834.

Because a person has the right to purchase stock it does not follow that stockholders of two or more competing corporations can combine among themselves and with such person to sell him their stock and induce others to do the same, so as to center the controlling stock interests of the several corporations in a single head, in violation of statutes against combinations, consolidations, and monopolies.

Noyes, *Intercorporate Relations*, § 36; *Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 495, 7 Atl. 373.

The failure to observe the distinction between an actual, bona fide sale, and what is nominally a sale, but in reality only a cloak under which to accomplish a combination of corporate properties or interests, has sometimes led to confusion of language, if not of thought, in the discussion of trade combinations.

Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L. R. A. 255, 43 Atl. 723; Noyes, *Intercorporate Relations*, § 354.

Even if it were true that the government had acquiesced for eleven years in the creation of combinations like the one now in issue, it would not thereby be estopped from prosecuting the case at bar; nor could its inaction for that period be considered a contemporaneous or practical construction of the act.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 689, 690, 40 L. ed. 849, 855, 16 Sup. Ct. Rep. 714.

That a combination or monopoly of competing interstate carriers affects interstate commerce directly, and not incidentally or remotely, is universally conceded.

Noyes, *Intercorporate Relations*, § 392.

The court below, as a court of equity, had ample power to decree the relief it did, and in the form it did.

Pomeroy, *Eq. Jur.* 2d ed. § 111, p. 115; § 170, p. 192; *Taylor v. Salmon*, 4 Myl. & C. 141; *Chicago, R. I. & P. R. Co. v. Union P. R. Co.* 47 Fed. 15.

Mr. Justice **Harlan** announced the affirmation of the decree of the circuit court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Com-

pany, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the statute of July 2d, 1890, commonly known as the anti-trust act, and entitled "An Act to Protect Trade and Commerce Against [318] Unlawful Restraints and Monopolies." 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a consideration of the scope and meaning of most of its provisions, it is here given in full:

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia, and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding

[319] five thousand dollars, *or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"§ 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

"§ 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

[320] "§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district *in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"§ 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country."

Is the case as presented by the pleadings
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and the evidence one of a combination of a conspiracy in restraint of trade or commerce among the states, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled, and operated separate lines of railway,—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9000 miles in length, were and are parallel and competing lines across the continent through the northern tier of states between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with sea-going vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and *sale a majority of its [321] bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705, to be illegal under the statutes of Minnesota which forbade any railroad corporation, or the purchasers or managers of any corporation, to consolidate the stock, property, or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Minn. Gen. Laws, 1874, chap. 29, 1881, chap. 109.

Early in 1901 the Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington, & Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Rail-

way Companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of \$107,000,000 of the \$112,000,000 total capital stock of the Chicago, Burlington, & Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific Railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington, & Quincy main line and branches.

[322] Prior to November 13th, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, *under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of \$400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in article 6 of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power, but the duty, to pursue a policy which "by making the stockholders of each system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination, and to effect its objects, the defendant, the North-

ern Securities Company, was organized November 13th, 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company was formed were: "1. To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the *state of New Jersey, or [323] of any other state, territory, or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations association or associations, of the state of New Jersey, or of any other state, territory, or country, and while owner thereof to exercise all the rights, powers, and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory, or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business."

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other states and in foreign countries, and to have one or more offices, and hold, purchase, mortgage, and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at \$400,000,000, divided into 4,000,000 shares of the par value of \$100 each. The amount of the capital stock with which the corporation should commence business was fixed at \$30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and *Morgan [324] and associate stockholders of the Northern Pacific Railway Company, assigned to the

Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management, and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depository, custodian, holder, or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but \$30,000, and its authorized capital stock of \$400,000,000 was just sufficient, [325] when all issued, to represent *and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about \$122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire, as owner and proprietor, substantially all the capital stock of the Great Northern and Northern Pacific Railway Companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or
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would receive and hold about 55 per cent, the balance going to the former stockholders of the Northern Pacific Railway Company.

The government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the national government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed, the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the states or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this *record that under the [326] leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi river to the Pacific ocean at Puget sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should hold the shares of the stock of the constituent companies; such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine tenths of the stock of the Northern Pacific, and more than three fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for

the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held in *one ownership*. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry

[327] out the purpose of the original *combination, under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and, as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company, to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act,—“combination in the form of a trust or otherwise . . . in restraint of commerce among the several states or with foreign nations,”—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a “trust;” but if not, it is a *combination in restraint of interstate and international commerce*; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the pub-

lic is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget sound will be at the mercy of a single holding corporation, *organized in a state distant from [328] the people of that territory.

The circuit court was undoubtedly right when it said — all the judges of that court concurring—that the combination referred to “led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroys every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies.” 120 Fed. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the states or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the states? Does the act of Congress prescribe, as a *rule for interstate or international commerce*, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination, or *conspiracy? How [329] far may Congress go in regulating the af-

fairs or conduct of state corporations engaged as carriers in commerce among the states or of state corporations which, although not directly engaged themselves in such commerce, yet have control of the business of interstate carriers? If state corporations, or their stockholders, are found to be parties to a combination in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the anti-trust act was *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. The next case was that of *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. That was followed by *United States v. Joint Traffic Asso.* 171 U. S. 505, 569, 571, 43 L. ed. 259, 287, 288, 19 Sup. Ct. Rep. 25; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, and *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, ante, 608, 24 Sup. Ct. Rep. 307. To these may be added *Pearsall v. Great N. R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705, which, although not arising under the anti-trust act, involved an agreement under which the Great Northern and Northern Pacific Railway Companies should be consolidated and by which competition between those companies was to cease. In *United States v. E. C. Knight Co.* it was held that the agreement or arrangement there involved had reference only to the *manufacture or production* of sugar by those engaged in the alleged combination; but if it had directly embraced interstate or international commerce, it would then have been covered by the anti-trust act and would have been illegal; in *United States v. Trans-Missouri Freight Asso.* that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules, [330] and regulations in respect *of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the anti-trust act; in *United States v. Joint Traffic Asso.* that an arrangement between certain railroad com-

panies in reference to railroad traffic among the states, by which the railroads involved were not subjected to competition among themselves, was also forbidden by the act; in *Hopkins v. United States* and *Anderson v. United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different states, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co. v. United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different states in the manufacture, sale, and transportation of iron pipe, whereby competition among them was avoided; and in *W. W. Montague & Co. v. Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates, and mantels, in different states, whereby they controlled or sought to control the price of such articles in those states, was condemned by the act of Congress. In *Pearsall v. Great Northern R. Co.* which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway Companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the state of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly *reflected the gen-[331]eral sentiment of the public,—that their best security is in competition."

We will not encumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be par-

ties to it, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations;

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, are equally embraced by the act;

That Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the anti-trust act, has prescribed the rule of free competition among those engaged in such commerce;

That every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce;

[332] *That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce; and,

That under its power to regulate commerce among the several states and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in obiter dicta. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of

the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case, are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that, as the Northern Securities Company is a state corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway Companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the states creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose *to interfere with the internal af-[333] fairs of the states, nor, in our opinion, is there any ground whatever for the contention that the anti-trust act regulates their domestic commerce. By its very terms the act regulates only commerce among the states and with foreign states. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding,"—supreme over the states, over the courts, and even over the people of the United States,—the source of all power under our governmental system in respect of the objects for which the national government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. *Cohen v. Virginia*, 6 Wheat. 264, 385, 414, 5 L. ed. 257, 286, 293. These views have been often expressed by this court.

It is said that whatever may be the power of a state over such subjects, Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in in-

terstate and international commerce; that the holding or purchase by a state corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens, or state corporations, may dispose of their property and invest their money in any way they choose; [334] and that in regard to all *such matters, citizens and state corporations are subject, if to any authority, only to the lawful authority of the state in which such citizens reside or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the government is that the acquisition and ownership of stock in a state railroad corporation is itself interstate commerce if that corporation be engaged in interstate commerce. This suggestion is made in different ways; sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other state corporations. Still further, it is asked, generally, whether the organization or ownership of railroads is not under the control of the states under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted, and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate [335] and that are lawful, and not prohibited *by the Constitution. It does contend that no

state corporation can stand in the way of the enforcement of the national will, legally expressed. What the government particularly complains of—indeed, all that it complains of here—is the existence of a combination among the stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee, designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the anti-trust act? May not Congress declare that combination to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs, when effected by a powerful combination, are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan v. Wilson*, 127 U. S. 540, 556, 32 L. ed. 223, 228, 8 Sup. Ct. Rep. 1301. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to “regulate commerce with foreign nations and among the several states, and with the Indian tribes.” In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Lottery Case*, 188 U. S. 321, 355, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321 and authorities there cited. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in *Gibbons v. Ogden*, 9 Wheat. 1, 196, 197, 6 L. ed. 23, 70, that the power of Congress to regulate commerce among the states and with foreign nations is the power “to prescribe the rule by which commerce is to be governed;” that such power “is complete *in itself, may be exer- [336] cised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;” that “if, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in

Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States;" that a sound construction of the Constitution allows to Congress a large discretion "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, are constitutional." *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Sinnot v. Davenport*, 22 How. 227, 238, 16 L. ed. 243, 246; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 472, 24 L. ed. 527, 530; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; *Lottery Case*, 188 U. S. 321, 348, 47 L. ed. 492, 498, 23 Sup. Ct. Rep. 321. In *Cohen v. Virginia*, 6 Wheat. 264, 413, 5 L. ed. 257, 293, this court said that the United States were, for many important purposes, "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several states was a unit, and subject to national control. Previously, in *M'Culloch v. Maryland*, 4 Wheat. 316, 405, 4 L. ed. 579, 601, the court had said that the government ordained and established by the Constitution was, within the limits of the powers granted to it, "the government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *Re Debs*, 158 U. S. 564, 582, 39 L. ed. 1092, 1101, 15 Sup. Ct. Rep. 900, 905, this court, every member of it concurring, said: "The entire strength of the nation may be used to en-

[357] force in any part of the land the *full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

The means employed in respect of the combinations forbidden by the anti-trust act, and which Congress deemed germane to the end to be accomplished, was to pre-

scribe as a rule for interstate and international commerce (not for domestic commerce) that it should not be vexed by combinations, conspiracies, or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because, in all the prior cases in this court, the anti-trust act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As, in the judgment of Congress, the public convenience and the general welfare* will be [338] best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a state can only be consolidated with the authority of the state. Why that suggestion is made in this case we cannot understand, for there is no pretense that the combination here in question was under the authority of the states under whose laws these railroad corporations were created. But even if the state allowed consolidation, it would not follow that the stockholders of two or more state railroad corporations, having competing lines and engaged in interstate commerce, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between

them, in violation of the act of Congress, restrain commerce among the states and with foreign nations.

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States v. Joint Traffic Asso.*: "Has not Congress, with regard to interstate commerce, and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit." pp. 569, 571, L. ed. pp. 287, 288, Sup. Ct. Rep. p. 32. That such a rule was applied to interstate commerce *should not have surprised anyone. Indeed, when Congress declared contracts, combinations, and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several states when dealing with combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive, but they show the circumstances under which the anti-trust act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain, such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare.

In *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 186, the supreme court of Pennsylvania dealt with a combination of coal companies seeking the control, within a large territory, of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said: "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the com-

panies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer all feel the restraint, while many dependent hands are *paralyzed and hungry mouths are stint-[340]ed. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. . . . In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the combination of many what, severally, no one could accomplish, and even what, when done by one, would be innocent. . . . There is a potency in numbers when combined which the law cannot overlook, where injury is the consequence." The same principles were applied in *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 565, 23 Am. Rep. 190, 194, which was the case of a combination of two coal companies in order to give one of them a monopoly of coal in a particular region, the court of appeals of New York holding that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." They were also applied by the supreme court of Ohio in *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

So, in *Craft v. McConoughy*, 79 Ill. 346, 350, 22 Am. Rep. 171, 174, which was the

case of a combination among grain dealers by which competition was stifled, the court saying: "So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required; but the secret combination created by the contract destroyed all competition, [341] and created a monopoly *against which the public interest had no protection." Again, in *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 269, 297, 8 L. R. A. 497, 506, 22 N. E. 798, 804, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the city of Chicago by buying the stock of four other gas companies, it was said: "Of what avail is it that any number of gas companies, may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?" To the same effect are cases almost too numerous to be cited. But among them we refer to *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus to obtain control of the business of manufacturing matches; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 390, 18 Pac. 391, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Assn. v. Kock*, 14 La. Ann. 164, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases just cited, it is true, relate to the domestic commerce of the states. But they serve to show the authority which the states possess to guard the public against combinations that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within its limits. They serve also to give point to the declaration of this court in *Gibbons v. Ogden*, 9 Wheat. 197, 6 L. ed. 70,—a principle never modified by any subsequent decision,—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several states is vested in Congress as absolutely [342] as *it would be in a single government hav-

ing in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any state over its domestic commerce? If a state may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now, the court is asked to adjudge that, if held to embrace the case before us, the anti-trust act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the anti-trust act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the states in iron pipe (as in *Addyston Pipe & Steel Co. v. United States*) or in tiles, grates, and mantels (as in *W. W. Montague & Co. v. Lowry*), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the states, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates, and mantels that restrain commerce among the states in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several states. If private parties may not, by combination among themselves, restrain interstate *and international commerce in [343] violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed, upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound, why may not *all* the railway companies in the United States, that are engaged, under state charters, in interstate and international commerce, enter into a combination such as the one here in question, and, by the device of a holding corporation, obtain the absolute control through-

out the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the states and with foreign states by declaring illegal all contracts, combinations, conspiracies, or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, How far may the courts go in reaching and suppressing the combination [344] *described in the bill? All will agree that if the anti-trust act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the states and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any state to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the 10th Amendment of the Constitution, which

declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people;" and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway Companies will be an invasion of the rights of the state under which the Securities Company was chartered, as well as of the rights of the states creating the other companies. In other words, if the state of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a combination under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other states, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow *such [345] restraint to continue, to the detriment of the public, because, forsooth, the corporations concerned or some of them are state corporations. We cannot conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the states when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the state of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant states of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the national government and the states composing the Union as that for which the defendants contend. Such a view cannot be

maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the national government over matters committed to it. No state can, by merely creating a corporation, or in any other mode, project its authority into other states, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for [346] such commerce. *It cannot be said that any state may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a state is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the states, in violation of an act of Congress, is hostile to the reserved rights of the states. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase, its capital stock. All these and like matters are to be regulated by the state which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the states. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the states. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law, or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal

enactment of Congress, is to attack the reserved rights of the states. It *would mean [347] that the government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skilfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination, by its operation, directly restrains commerce among the states or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of the *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 473, 22 L. ed. 678, 684. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a state has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the states, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every state has, in a general sense, plenary power over its corporations. But is it conceivable that a state, when exerting power over a corporation of its creation, may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists in a state to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the states, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the government *as from the words of the Constitu- [348] tion. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 627, 42 L. ed. 878, 883, 18 Sup. Ct. Rep. 488. In *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, the court remarked "that 'the people of each state compose a state, having its own government,

and endowed with all the functions essential to separate and independent existence,' and that 'without the states in union, there could be no such political body as the United States.' *Lane County v. Oregon*, 7 Wall. 76, 19 L. ed. 104. Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government." These doctrines are at the basis of our constitutional government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 702, 40 L. ed. 849, 859, 16 Sup. Ct. Rep. 714, 724. In that case it was contended by the railroad company that the assumption of the state to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the states in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the states remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is any [349] thing in that case which *even intimates that a state or a state corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the general government with the states is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several states to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no [349] 193 U. S.

harm. So far as the Constitution of the United States is concerned, a state may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind,—domestic, interstate, and international. The regulation or control of purely domestic commerce of a state is, of course, with the state, and Congress has no direct power over it so long as what is done by the state does not interfere with the operations of the general government, or any legal enactment of Congress. A state, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the nonaction of the state or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the states or with foreign nations; for, as we have seen, interstate and international commerce is, by the Constitution, under the control of Congress, and it belongs to the legislative department of the government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution *of its supremacy, and of the [350] supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress. No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted, or not forbidden, by the state under whose authority it came into existence. We repeat that no state can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm, and only harm, can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly af-

fect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says, but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States v. Lee*, 106 U. S. 196, 220, 27 L. ed. 171, 181, 1 Sup. Ct. Rep. 240, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it *did not so declare. But if nothing more can be said than that Congress has erred,—and the court must not be understood as saying that is has or has not erred,—the remedy for the error and the attendant mischief is the selection of new senators and representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the anti-trust act would, in the end, prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the states and even behind the constitutional guaranty of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the states, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge,

it could not refuse to respect the action of the legislative branch of the government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin *in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce, shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect, declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy, or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original states was subject to vexatious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the states and with foreign *nations. In *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688, it was said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a

single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the *Trans-Missouri Freight Asso. Case*, "are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 657, 34 L. ed. 295, 302, 10 Sup. Ct. Rep. 965; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 90, 35 L. ed. 97, 102, 11 Sup. Ct. Rep. 490; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 332, 41 L. ed. 1007, 1024, 17 Sup. Ct. Rep. 540; *Smyth v. Ames*, 169 U. S. 466, 544, 42 L. ed. 819, 848, 18 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465. When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the states, they become—even if they be state corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations,—a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company, and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. [354] *If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If anyone had full knowledge of what was designed to be accomplished, and as to what was actually

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accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies,—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing, or (to use the words of this court in *United States v. Joint Traffic Asso.*) "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the government by the decree below.

By the decree in the circuit court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several states, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such combination *or conspiracy, in[355] restraint of trade and commerce among the several states. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants, and employees, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the North-

ern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies, which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said The Northern Securities Company may have heretofore received [356] from such stockholders *in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the circuit court to this effect: "That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of \$50,000, conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the

Northern Pacific Railway Companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which, being done, would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless to *protect the rights of the public as against [357] that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted to the government. This same view was pressed upon the circuit court and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire,—namely, to restrain commerce by suppressing competition,—and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously, the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when, by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence; doing so, of course, under the direction of the very individuals who promoted it." The circuit court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy not the property interests of the original stockholders of the con-

[358]stituent companies, but *the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical, or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of *King v. Hodnett*, 1 T. R. 96, 101, Mr. Justice Buller said: "It is not true that the courts, in the exposition of penal statutes, are to narrow the construction." In *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42, Chief Justice Marshall, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said: "It is a modification of the ancient maxim, and amounts to this; that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In *United States v. Morris*, 14 Pet. 464, 475, 10 L. ed. 543, 548, this court, speaking by Chief Justice Taney, said: "In expounding a penal statute the court certainly will not extend it beyond

[359]*the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95, 5 L. ed. 42." So, in *The Industry*, 1 Gall. 114, 117, Fed. Cas. No. 7,028, Mr. Justice Story said: "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to

interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." In another case the same eminent jurist said: "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. . . . In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States v. Winn*, 3 Sumn. 209, 211, 212, Fed. Cas. No. 16,740. In *People v. Bartow*, 6 Cow. 290, the highest court of New York said: "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. . . . It is well settled that a statute which is made for the good of the public ought although it be penal, to receive an equitable construction." So, in *Com. v. Martin*, 17 Mass. 359, 362, the highest court of Massachusetts said: "If a statute creating or increasing a penalty be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this any more than in any other case, to imagine ambiguities merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms as to *preclude the exercise of in-[360] genuity in raising doubts about its construction." There are cases almost without number in this country and in England to the same effect.

Guided by these long-established rules of construction, it is manifest that if the anti-trust act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4; and the court, in virtue of a well-settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results,—such results as law and justice demand. The defendants have no just cause to complain of the de-

cree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require

Affirmed.

Mr. Justice **Brewer**, concurring:

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, followed by the cases of *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, and *W. W. Montague & Co. v. Lowry* (decided at the present term) 193 U. S. 38, ante, 608, 24 Sup. Ct. Rep. 307, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were [361] rightly decided, *I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of

every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company, he could not, by any act of Congress, be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right which all other citizens had, of purchasing Northern Pacific stock, could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705, in which this court said (p. 671, L. ed. p. 847, Sup. Ct. Rep. 712), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the *Northern Pacific Railway Com-[362] pany: "Doubtless these stockholders could lawfully acquire, by individual purchases, a majority or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals, separately owning stock in two competing railroad companies, to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of \$400,000,000, had no means of its own; \$30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person, and, for purposes of jurisdiction, as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere inci-

dent, the manner in which the combination to destroy competition, and thus unlawfully restrain trade, was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the [363] counsel for the appellants, could *the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of \$201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation, holding the majority of the stock in the Northern Securities Company, and acting in obedience to the wishes of a majority of its stockholders, would control the action of the Securities Company and through it the action of the two railroad companies; and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads; or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with state control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the state which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the state are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly; and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce,—one in conflict with state law, and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance.

[364] *I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate busi-

ness enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation.

Mr. Justice **White**, with whom concur Mr. Chief Justice **Fuller**, Mr. Justice **Peckham**, and Mr. Justice **Holmes**, dissenting:

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company, a Wisconsin corporation. Whilst in the argument at bar the government referred to the subject, nevertheless it expressly disclaimed predicated any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway Companies are both transcontinental, that is, trunk lines to the Pacific Ocean,—and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one third of the stock, the confidence reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company. *Under these cir-[365] cumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter and the acts done

under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were competent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the state of its domicile.

The government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That, as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the anti-trust act. 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200. The clauses of the act which it was charged were violated were the 1st section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations;" and the provisions of the 2d section, making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several [366] states *or with foreign nations." The court below sustained the contentions of the government. It, therefore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to re-transfer the stock in both railroads to the persons from whom it had been acquired. The correctness of the decree below is the question presented for decision.

Two questions arise. Does the anti-trust act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads? and, second, If it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case, I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider two questions of fact. It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did

not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. It would suffice to point out (a), that the proof shows that nearly nine million dollars were paid by the Securities Company for a portion of the stock acquired by it, and that, moreover, nearly thirty-five million dollars were expended by the Securities Company in the purchase of bonds of the Northern Pacific Company, which have been converted by the Securities Company into the stock of that railroad, *which the Securities Company now [367] holds; and (b), that the market value of the railroad stocks is, moreover, indisputably shown by the proof to have been equal to the value fixed on them for the purpose of the exchange or purchase of such stock by the Northern Securities Company. Be this as it may, it is manifest that these considerations can have no possible influence on the question of the power of Congress in the premises; and therefore the suggestions can serve only to obscure the controversy. If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If, on the contrary, the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the 8th section of the first article of the Constitution, "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The proposition upon which the case for the government depends, then, is that the ownership of stock in railroad corporations created by a state is interstate commerce, wherever the railroads engage in interstate commerce.

At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, that the power of Congress to regulate commerce [368] among the *states and with foreign nations "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, are constitutional."

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons v. Ogden*; for in that case the great Chief Justice was careful to define the commerce the power to regulate which was conferred upon Congress, and, in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Congress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons v. Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its [369] branches, and is regulated *by prescribing rules for carrying on that intercourse." (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the states embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if

such question is to be governed by the definition of commerce just quoted from *Gibbons v. Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more,—it is intercourse;" that is, traffic between the states and intercourse between the states. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the states or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations?" And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a state, in a corporation created by it, is within the power to prescribe rules for the regulation of intercourse between citizens of different states?

But if the question be looked at with reference to the powers of the Federal and state governments,—the general nature of the one and the local character of the other which it was the purpose of the Constitution to create and perpetuate,—it seems to me evident that the contention that the authority of the national government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority is absolutely destructive of the 10th Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Constitution, *nor prohibited [370] by it to the states, are reserved to the states respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can, in reason, alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the states from the beginning if Congress deemed that the rights conferred by such state charters tended to restrain commerce between the states or to create a monopoly concerning the same.

Besides, if the principle be acceded to it must in reason be held to embrace every consolidation of state railroads which may

do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the states creating the corporations.

It would likewise overthrow every state law forbidding such consolidations; for if the ownership of stock in state corporations be within the regulating power of Congress under the commerce clause, and can be prohibited by Congress, it would be within the power of that body to permit that which it had the right to prohibit.

But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the states or create a monopoly thereof, is, in my opinion, in conflict with the most elementary conceptions of rights of property. For it would follow if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated.

[371] *In the argument at bar many of the consequences above indicated as necessarily resulting from the contention made were frankly admitted, since it was conceded that, even although the holding of the stock in the two railroads by the Northern Securities Company which is here assailed was expressly authorized by the laws of both the states by which the railroad corporations were created, as it was by the law of the state of New Jersey, nevertheless, as such authority, if exerted by the states, would be a regulation of interstate commerce, it would be repugnant to the Constitution as an attempt on the part of the states to interfere with the paramount authority of Congress on that subject. True, this assertion, made in the oral argument, in the printed argument is qualified by an intimation that the rule would not apply to state action taken before the adoption of the anti-trust act, since up to that time, in consequence of the inaction of Congress on the subject, the states were free to legislate as they pleased regarding the matter. But this suggestion is without foundation to rest on. It has long since been determined by this court that where a particular subject-matter is national in its character and requires uniform regulation, the absence of legislation by Congress on the subject indicates the will of Congress that the subject should be free from state control. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 493, 30 L. ed. 694, 1 Inters. 714

Com. Rep. 45, 7 Sup. Ct. Rep. 592; *United States v. E. O. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

It is said, moreover, that the decision of this case does not involve the consequences above pointed out since the only issue in this case is the right of the Northern Securities Company to acquire and own the stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize the distinction. The only premise by which the power of Congress can be extended to the subject-matter of the right of the Securities Company to own the stock must be the proposition that such *ownership is within the [372] legislative power of Congress, and if that proposition be admitted it is not perceived by what process of reasoning power of Congress over the subject-matter of ownership is to be limited to ownership by particular classes of corporations or persons. If the power embraces ownership, then the authority of Congress over all ownership which, in its judgment, may affect interstate commerce, necessarily exists. In other words, the logical result of the asserted distinction amounts to one of two things: Either that nothing is decided, or that a decree is to be entered having no foundation upon which to rest. This is said because, if the control of the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress, it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. Besides the incongruity of the conclusion, resulting from the alleged distinction, to admit it would do violence to both the letter and spirit of the Constitution; since it would in effect hold that, although a particular act was a burden upon interstate commerce or a monopoly thereof, that individuals could lawfully do the act, provided only they did not use the instrumentality of a corporation. But this court long since declared that the power to regulate commerce, conferred upon Congress, was "general and includes alike commerce by individuals, partnerships, associations, and corporations." *Paul v. Virginia*, 8 Wall. 168, 183, 19 L. ed. 357, 361.

Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the principle itself is wrong. That admonition, I sub-

mit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the confusion, contradiction, and denial of rights of property which the decree exemplifies, [373] let me see *if, in effect, it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monopoly thereof, alleged to have been brought about through the acquisition, by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership. If the conspiracy and combination existed and was illegal, my mind fails to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into.

It may, however, be said that even if the results which I have indicated be held necessarily to arise from the principles contended for by the government, it does not follow that such power would ever be exerted by Congress, or, if exerted, would be enforced to the detriment of charters granted by the states to railroads or consolidations thereof, effected under state authority, or the ownership of stock in such railroads by individuals, or the rights of individuals to acquire property by purchase, lease, or otherwise, and to make any and all contracts concerning property which may thereafter become the subject-matter of interstate commerce. The first suggestion is at once met by the consideration that it has been decided by this court that, as the anti-trust act forbids any restraint, it therefore embraces even reasonable contracts or agreements. If, then, the ownership of the stock of the two railroads by the Northern Securities Company is repugnant to the act, it follows that ownership, whether by the individual or another corporation, would be equally within the prohibitions of the act. As to the second, true it is that by the terms of the anti-trust act the power to put its provisions in motion is, as to many particulars, confided to the highest law officer [374] of the government; *and if that officer did not invoke the aid of the courts to restrain the rights of the railroads previously chartered by the states to enjoy the benefits conferred upon them by state legislation, or to prevent individuals from exercising their right of ownership and contract, the law in these respects would remain a dead letter.

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But to indulge in this assumption would be but to say that the law would not be enforced by the highest law officer of the government,—a conclusion which, of course, could not be indulged in for a moment. In any view, such suggestion but involves the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect to enforce the law,—a conclusion repugnant to every principle of liberty and justice.

Having thus by the light of reason sought to show the unsoundness of the proposition that the power of Congress to regulate commerce extends to controlling the acquisition and ownership of stock in state corporations, railroad or otherwise, because they may be doing an interstate commerce business, or to the consolidation of such companies under the sanction of state legislation, or to the right of the citizen to enjoy his freedom of contract and ownership, let me now endeavor to show, by a review of the practices of the governments, both state and national, from the beginning, and the adjudications of this court, how wanting in merit is the proposition contended for. It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the anti-trust act in 1890, there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by railroads, manifested by the adoption of the Interstate Commerce Act (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), it sedulously confined the provisions of that act to the *carrying on of interstate [375] commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matters undeniably concerning the fact of interstate commerce. The same conception was manifested subsequently in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. 27 Stat. at L. 531, chap. 106, U. S. Comp. Stat. 1901, p. 3174. It also may not be doubted that from the beginning the various states of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the states, universally prevailing and always acted up-

on, the entire railroad system of the United States has been built up. Charters, leases, and consolidations under the sanction of state laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under state authority, sometimes by such leases made where there was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston & Maine system, the New York, New Haven, & Hartford, the New York Central, the Reading, and the Pennsylvania systems.

[376] *One of the illustrations—as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson river and the West Shore Railroad on the other,—both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable, if the whole subject was within the paramount power of Congress, and not within the authority of the states, that there should have been a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount, concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the states, and not Congress, had control of the subject-matter of the organization and ownership of railroads created by the states. And the same inference is applicable to the condition of things which has existed since the adoption of the anti-trust act in 1890. Who can deny that from that date to this, consolidations and unification of management, by means of leases, stock ownership by individuals or corporations, have been carried on, when not prohibited by state laws, to a vast extent, and that during all this time, despite the

energy of the government in invoking the anti-trust law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the Interstate Commerce Act by provisions deemed essential to make its prohibitions more practically operative, and yet no one of such provisions lends itself even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the states have not so considered it. As a matter of public history it is to be observed that not long since by authority of the legislature of the state of Massachusetts, a controlling interest by lease of the Boston & Albany road passed to the New York Central system.

*The decisions of this court to my mind[377] leave no room for doubt on the subject. As I have already shown, the very definition of the power to regulate commerce, as announced in *Gibbons v. Ogden*, excludes the conception that it extends to stock ownership. I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary that the effect of the power over commerce between the states was not to deprive the states of their right to legislate concerning the ownership of property of every character or to create railroad corporations and to endow them with such powers as were deemed appropriate, or to deprive the individual of his freedom to acquire, own, and enjoy property by descent, contract, or otherwise, because railroads or other property might become the subject of interstate commerce.

In *Paul v. Virginia*, 8 Wall. 168, 19, L. ed. 357, the question was as to the power of the state of Virginia to license a foreign insurance company, and one of the contentions considered was whether the contract of insurance, since it was related to commerce, was within the regulating power of Congress, and not of the state of Virginia. The proposition was disposed of in the following language (p. 183, L. ed. p. 361):

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are

[378] not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties, which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled *in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia, would constitute a portion of such commerce.”

In other words, the court plainly pointed out the distinction between interstate commerce as such and the contracts concerning, or the ownership of property which might become the subjects of, interstate commerce. And the authority of *Paul v. Virginia* has been repeatedly approved in subsequent cases, which are so familiar as not to require citation.

In *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678, the question was this: The state of Maryland had chartered the Baltimore & Ohio Railroad Company, and in the charter had imposed upon it the duty of paying to the state a certain proportion of all its receipts from freight, which applied as well to interstate as domestic freight. The argument was that these provisions were repugnant to the commerce clause because they necessarily increased the sum which the railroad would have to charge, and thereby constituted a regulation of commerce. The court held the law not to be repugnant to the Constitution, and in the course of the opinion said (p. 473, L. ed. p. 684):

“In view, however, of the very plenary powers which a state has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts.”

True it is that some of the expressions used in the opinion in the case just cited, giving rise to the inference that there was power in the state to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4. But that case also in the fullest manner pointed out the fact that the power to regulate commerce, conferred on Congress

[379] by the *Constitution, related not to the mere ownership of property or to contracts con-

cerning property, because such property might subsequently be used in interstate commerce or become the subject of it. For instance, the definition given of interstate commerce in *Gibbons v. Ogden*, previously referred to, was reiterated, and in addition the definition expounded in *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238, was approvingly quoted. That definition was as follows (p. 574, L. ed. p. 250, Inters. Com. Rep. p. 37, Sup. Ct. Rep. p. 12):

“Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not therefore permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.”

In *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865, this was the question: The property of various railroad corporations operating in the state of Ohio, Michigan, Indiana, Illinois, and Missouri had been sold under decrees of foreclosure. The purchasers of the respective lines availed themselves of the Ohio statutes and consolidated all the corporations into one so as to form a single system,—the Wabash. On presenting the articles of consolidation to the secretary of state of Ohio, that officer demanded a fee imposed by the Ohio statutes, predicated upon the sum total of the capital stock of the consolidated company. This was refused on the ground that the state of Ohio had no right to make the charge, and that its doing so was repugnant to the commerce clause of the Constitution of the United States and to the 14th Amendment. This court decided against this contention. It held that, as the right to consolidate could *alone arise from the Ohio law, the [380] corporation could not avail of that law and avoid the condition which the law imposed. Speaking of the consolidation, the court said (p. 440, L. ed. p. 776, Inters. Com. Rep. p. 668, Sup. Ct. Rep. p. 866):

“The rights thus sought could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without that state’s consent they could not have been procured.”

And, after a copious review of the authorities concerning the power of the state over the consolidation, the case was summed up by the court in the following passage (p. 446, L. ed. p. 778, Inters. Com. Rep. p. 670, Sup. Ct. Rep. p. 868):

"Considering, as we do, that the payment of the charge was a condition imposed by the state of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of that state,*" (italics mine) "and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the state to extend its taxing power beyond its territorial limits."

How a right which was thus decided to depend *solely* upon the authority of the states can now be said to depend solely upon the will of Congress, I do not perceive.

In *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, the facts and the relief based on them were thus stated by Mr. Chief Justice Fuller, delivering the opinion of the court (p. 9, L. ed. p. 328, Sup. Ct. Rep. p. 252):

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations, contrary to the act of Congress of July 2, 1890."

[381] *After referring, in a general way, to what constituted a monopoly or restraint of trade at common law, the question for decision was thus stated (p. 11, L. ed. p. 329, Sup. Ct. Rep. p. 253):

"The fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

Examining this question as to the power of Congress, it was observed (p. 11, L. ed. p. 329, Sup. Ct. Rep. p. 253):

"It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals,—the power to govern men and things within the limits of its dominion,—is a power originally and al-

ways belonging to the states; not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Next, pointing out that the power of Congress over interstate commerce and the fact that its failure to legislate over subjects requiring uniform legislation expressed the will of Congress that the state should be without power to act on that subject, the court came to consider whether the power of Congress to regulate commerce embraced the authority to regulate and control the ownership of stock in the state sugar refining companies, because the products of such companies, when manufactured, might become the subject of interstate commerce. Elaborately passing upon that question and reaffirming the definition of Chief Justice Marshall of commerce, in the constitutional sense, it was held that, whilst the power of Congress extended to commerce as thus defined, it did not embrace the ownership of stock in state corporations because the products of such manufacture might subsequently become the subjects of interstate commerce.

The parallel between the two cases is complete. The one corporation acquired the stock of other and competing corporations by exchange for its own. It was conceded, for the *purposes of the case, that in doing [382] so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and, indeed, that part of it would certainly become so. But the power of Congress was decided not to extend to the subject, because the ownership of the stock in the corporations was not itself commerce.

In *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705, the question was whether the acquisition by the Great Northern road of a controlling interest in the stock of the Northern Pacific Railway Company was a violation of a Minnesota statute prohibiting the consolidation of competing lines. It is at once evident that if the subject of consolidation was within the authority of Congress, as Congress had not expressed its will upon the subject, the act of the legislature of Minnesota was void because repugnant to the Constitution of the United States. But the possibility of such a contention was not thought of by either party to the cause or by the court itself. Treating the power of the state as undoubted, the court, speaking through Mr. Justice Brown, decided that the Minnesota law should be enforced. It was jointed out in the opinion that, as the charter was one granted by the state, the railroad company and the ownership of

stock therein was subject to the state law, and this was made the basis of the decision. Whilst, however, resting its conclusion upon the power of the state over the corporation by it created, the court was careful to recognize that the authority in the state was so complete, as the company was a state corporation, that the state had the right, *if it chose to do so, to authorize the consolidation, even although the lines were competing.*

[383] In *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714, the power of the state to pass a law forbidding the consolidation of competing state railroad corporations doing in part an interstate commerce business was again considered and a state statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of *state railroad corporations, because they did in part an interstate commerce business, was within the paramount authority of Congress, that authority was exclusive and the state regulation which the court upheld was void. And this question, vital to the consideration of the case, and without passing upon which it could not have been decided, did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice Brown, said (pp. 701, 702, L. ed. pp. 859, 860, Sup. Ct. Rep. pp. 723, 724):

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways.

"It has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce, and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such

commerce, so far as necessary to the conservation of the public interests."

How one case could be more completely decisive of another than the ruling in the case just quoted is of this, I am unable to perceive.

*The subject was considered at circuit in [384] *Re Greene*, 52 Fed. 105. The case was this: A person was indicted in one state for creating a monopoly in violation of the anti-trust act of Congress, and was held in another state for extradition. The writ of habeas corpus was invoked, upon the contention that the face of the indictment did not state an offense against the United States, since the matters charged did not involve interstate commerce. The case is referred to, although it arose at circuit and was determined before the decisions of this court in the *Pearsall* and *Louisville & Nashville Cases*, because it was decided by Mr. Justice Jackson, then a circuit judge, who subsequently became a member of this court. The opinion manifests that the case was considered by Judge Jackson with that care which was his conceded characteristic, and was stated by him with that lucidity which was his wont. In discharging the accused on the grounds stated in the application for the writ, Judge Jackson said (p. 112):

"Congress may place restriction and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause or any other provision of the Constitution, to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and control of property which the states of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the *subject of trade or commerce among the [385] several states or with foreign nations. Commerce among the states, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale,

and exchange of commodities.' *Mobile County v. Kimball*, 102 U. S. 691-702, 26 L. ed. 238-241; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. In the application of this comprehensive definition, it is settled by the decision of the Supreme Court that such commerce includes not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation.

"That neither the production nor manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce."

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, was this: A large number of railway companies who were made defendants in the cause had formed themselves into an association, known as the Trans-Missouri Freight Association, and the companies had bound themselves by the provisions contained in the articles of agreement. Many [386] stipulations relating to *the carrying on of interstate commerce over the roads which were parties to the agreement were contained in it, and § 3 provided as follows:

"A committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7."

The government sought to dissolve the as-

sociation on the ground that the agreement restrained commerce between the states, and therefore was in violation of the anti-trust act. On the hearing in this court, as the agreement directly related in many particulars to interstate transportation and the charge to be made therefor, it was conceded on all hands that it embraced subjects which came within the power of Congress to regulate commerce. The contentions on behalf of the association were these: First. That the movement of interstate commerce by railroads was not within the anti-trust act, since Congress had regulated that subject by the Interstate Commerce Act, and did not intend to amplify its provisions in any respect by the subsequent enactment of the anti-trust law. Second. That even if this were not the case, and the movement of interstate commerce by railroads was affected by the anti-trust statute, the particular agreement in question did not violate the act, because the agreement did not unreasonably restrain interstate commerce. Both these contentions were decided against the association, the court holding that the anti-trust act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable.

The same subject was considered in a subsequent case *(*United States v. Joint Traf-* [387] *fic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25). In that case also there was no question that the agreement between the railroads related to the movement of interstate commerce, but it was insisted that the particular agreement there involved did not seek to fix rates, but only to secure the continuation of just rates which had already been fixed, and hence was not within the anti-trust law. If this were held not to be true, a reconsideration of the questions decided in the *Freight Association Case* was invoked. The court reviewed and reiterated the rulings made in the *Freight Association Case* and held that the particular agreement in question came within them.

I mention these two last cases, not because they are apposite to the case in hand, for they are not, since the contracts which were involved in them confessedly concerned interstate commerce, whilst in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce. The cases are referred to in connection with the decisions previously cited, because, taken together, they illustrate the distinction which this court has always maintained between the power of Congress over interstate commerce and its want of authority to regulate subjects not

embraced within that grant. The same distinction is aptly shown in subsequent cases.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, involved whether a particular agreement entered into between persons carrying on the business of selling cattle on commission exclusively at the Kansas City stock yards was valid. At those yards cattle were received in vast numbers through the channels of interstate commerce, and from thence were distributed through such channels. For these reasons the business of those engaged exclusively in the sale of cattle on the stock yards was asserted to be interstate commerce and within the power of Congress to regulate. In the opinion of the court, delivered by Mr. Justice Peckham, it was at the outset said (p. 586, L. ed. 294, Sup. Ct. Rep. p. 43):

[388] "The relief sought in this case is based exclusively on the *act of Congress approved July 2, 1890, chap. 647, entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' commonly spoken of as the anti-trust act. (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200.)

"The act has reference only to that trade or commerce which exists, or may exist, among the several states or with foreign nations, and has no application whatever to any other trade or commerce.

"The question meeting us at the threshold, therefore, in this case is, What is the nature of the business of the defendants, and are the by-laws or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several states or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several states or with foreign nations?"

Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stock yards constituted interstate commerce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce.

And on the day the decision just referred to was announced another case under the anti-trust act was decided. *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50. The difference between that case and the *Hopkins Case* was thus stated by Mr. Justice Peckham, in delivering the opinion of the court, 193 U. S.

ing the opinion of the court (p. 612, L. ed. p. 304, Sup. Ct. Rep. 52).

"This case differs from that of *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the *Hopkins Case* were only commission merchants who sold the cattle upon commission as a compensation for their services.

*"Counsel for the government assert that [389] any agreement or combination among buyers of cattle coming from other states, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce."

The court, however, said it did not deem it necessary to decide whether the fact that the merchants who entered into the agreement bought cattle in other states and shipped them to other states, caused their business to be interstate commerce, because, in any event, the court was of opinion that the agreement which was assailed, even if it involved interstate commerce, was not in violation of any of the provisions of the anti-trust act.

The *Anderson Case* was followed by *Ad-dyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. The case involved deciding whether a particular combination of pipe manufacturers, looking to the control of the sale and transportation of such pipe over a large territory, embracing many states and a division of the territory between the members of the combination, was within the prohibitions of the anti-trust act. Coming to consider the subject, the court, through Mr. Justice Peckham, analyzed the contract and pointed out its monopolistic features. In answer to the argument that the matter complained of was not commerce, because it related only to a sale of pipe, and therefore was within the rule announced in the *Knight* and *Hopkins Cases*, the *Knight Case* was approvingly reviewed, and its doctrine in effect was reaffirmed, the court observing (p. 240, L. ed. p. 147, Sup. Ct. Rep. p. 107):

"The direct purpose of the combination in the *Knight Case* was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce.

"We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, *but as a direct and immediate result of the combination engaged in by the defendants. . . .

The defendants, by reason of this combina-

tion and agreement, could only send their goods out of the state in which they were manufactured for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, Was not this a direct restraint upon interstate commerce in those goods?" (Italics mine.)

Having thus found that the agreement concerned interstate commerce because it directly purported to control the movement of goods from one state to the other, and, besides, sought to prohibit that movement or restrict the same to particular individuals, it was held that the contract was, for these reasons, within the prohibitions of the act of Congress, and was therefore void. I do not pause to consider the case of *W. W. Montague & Co. v. Lowry* (decided at this term), 193 U. S. 38, *ante*, 608, 24 Sup. Ct. Rep. 307, since on the face of the opinion it is patent that the contract directly concerned the shipment of goods from one state to another and this was the sole and exclusive basis of the decision.

Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. It is, indeed, suggested that the cases establish a contrary doctrine. This is sought to be demonstrated by quoting passages from the opinions separated from their context, apart from the questions which the cases involved. But as the issues which were decided in the *Knight*, in the *Pearsall*, in the *Louisville & Nashville Case* and in the *Hopkins Case* directly exclude the significance attributed to the passages from the opinions in those cases relied upon, it must follow that if such passages could, when separated from their context, have the meaning attributed to them the expressions would be mere *obiter*. And this consideration renders it unnecessary for me to analyze the passages to show that when they are read in connection with

[391] their context *they have not the meaning now sought to be attached to them. But other considerations equally render it unnecessary to particularly review the sentences relied upon. There can be no doubt that it was expressly decided in the *Knight Case* that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce*. If, then, the passage from the *Knight Case* could be given the meaning sought to be affixed to it, the result would be but to say that that

ease overruled itself. And this would be the result in the *Pearsall Case*, since in that case it was decided that the states had the power to forbid the consolidation of competing railroads, even by means of the acquisition of stock. Besides, as in the *Louisville & Nashville Case*, immediately following the *Pearsall*, it was expressly decided that the interstate commerce power of Congress did not embrace such consolidation, and Congress, therefore, could not restrain a state from either forbidding or permitting it to take place, it would follow that if the sentences in the *Pearsall Case* had the import now applied to them, that that case not only overruled itself, but was besides overruled by the *Louisville & Nashville Case*, and this although the two cases were decided on the same day, the opinions in both cases having been delivered by the same justice.

The same confusion and contradiction arises from separating from their context and citing as applicable to this case passages from the opinions in the *Freight Association* and *Joint Traffic Cases*. Those cases, as I have previously stated, related exclusively to a contract admittedly involving interstate commerce, and it was decided that any restraint of such commerce was forbidden by the anti-trust act. Now, in the *Hopkins Case*, decided subsequent to the *Freight Association* and *Joint Traffic Cases*, the contract considered unquestionably involved a restraint, but, as such restraint did not concern interstate commerce, it was held not to come within the power of Congress. *It [392] would follow then, if the sentences quoted from the opinions in the *Freight Association* and *Joint Traffic Cases*, which cases concerned only that which was completely interstate commerce, applied to that which was not such commerce, that the *Hopkins Case* overruled both these cases, although the opinions in all of the cases were delivered by the same justice, and no intimation was suggested of such overruling. It would also result that, after having overruled those cases in the *Hopkins Case*, the court, in expressing its opinion through the same justice, proceeded in the *Addyston Pipe Case*, which related only to interstate commerce, to overrule the *Hopkins Case* and reaffirm the prior cases.

Of course, in my opinion, there is no ground for holding that the decided cases embody such extreme contradictions or produce such utter confusion. The cases are all consistent, if only the elementary distinction upon which they proceeded be not obscured,—that is, the difference which arises from the power of Congress to regulate interstate commerce, on the one hand, and its want of authority, on the other, to regulate that which is not interstate com-

merce. Indeed, the confounding and treating as one, things which are wholly different, is the error permeating all the contentions for the government.

What has been previously said suffices to show the reasons which control my judgment, and I might well say nothing more. There were, however, three propositions so earnestly pressed by the government at bar upon the theory that they demonstrate that common ownership of a majority of the stock of competing railroads is subject to the regulating power of Congress that I propose to briefly give the reasons which cause me to conclude that the contentions relied upon are without merit.

1. This court, it is urged, has frequently declared that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce, and the following cases are cited: *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710; *Welton v. Missouri*, 91 [393] U. S. 275, 23 L. ed. 347; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. To these cases might be added many others, including some of those which have been previously referred to by me. The argument now made is, as the power extends to instrumentalities, and railroads are such instrumentalities, therefore the acquisition and ownership of railroads by persons or corporations is commerce and subject to the power of Congress to regulate. But this involves a *non sequitur*, and a confusion of thought arising from again confounding as one things which are wholly different. True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the states on the other. All the rights of ownership in railroads belonging to corporations organized under the state

law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease and the contract relations concerning them, have, from the foundation, had their sanction in the legislation of the several states. One may search in vain in the acts of Congress for any legislation even suggesting that the power over these subjects was deemed to be in Congress. On the contrary, the legislation of Congress concerning the instrumentalities of railroads under the interstate commerce power clearly refutes the contention, since that legislation relates only to such instrumentalities *during their actual [394] use in interstate commerce, and not otherwise. How, consistently with the proposition, can the great number of cases be explained which, in both the Federal and state courts, have dealt with the ownership of railroads and their instrumentalities by foreclosure and otherwise under the assumption that the rights of the parties were controlled by state laws governing the subject? And here again it would follow, if the proposition was adopted, that all the vast body of state legislation on the subject would be void from the beginning and the enormous sum of property rights depending upon such legislation would be impaired and lost, since, if the subject were within the power of Congress, it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the states over the subject.

2. The court, it is urged, has in a number of cases, declared that the several states were without power to directly burden interstate commerce. The acquiring and ownership by one person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress, and not in the states. Undoubtedly, not only in the decisions referred to, but in many others, including most of those which have been by me quoted, the absolute want of power in the states to legislate concerning interstate commerce or to burden it directly has been declared, and the doctrine in its fullest scope is too elementary to require citation of authority. But to decide this case upon the assumption that the acquisition and ownership of stock in competing railroads engaged in interstate commerce is a regulation of commerce, or, what is the same thing, a direct burden on it, would be but to assume the question arising for decision.

Where an authority is exerted by a state which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by

[395]reason of the reflex and remote results *of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the states if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce. The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If, in a given case, the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although, as an indirect result of the exertion of the lawful power, some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.* The distinction is well illustrated by the cases which have been referred to, and was very lucidly pointed out by Judge Jackson in the *Greene Case*. Take the *Knight Case*. There, as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held, as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the *Addyston Pipe Case*, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and, if it did, whether it created a direct

[396]burden. In doing so, as it *found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the *Knight Case*. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the

stock there may arise, in the operation of the roads, a burden of interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of property, if acquired, may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. That the proposition, if adopted, would extend the power of Congress to all subjects essentially local, as already stated in considering the previous proposition, is to my mind manifest. So clearly is this the result of the particular proposition now being considered, that, *at[397] the risk of repetition, I again illustrate the subject. Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power, if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Con-

gress to regulate concerning the aptitude, the character, and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. If the principle were adopted, and the power which would arise from so doing were exercised, the result would be not only to destroy the state and Federal governments, but, by the implication of authority, from which the destruction would be brought about, there would be erected upon the ruins of both a government endowed with the arbitrary power to disregard the great guaranty of life, liberty, and property and every other safeguard upon which organized civil society depends. I say the guaranty, because in my opinion the three are indissolubly united, and one cannot be destroyed without the other. Of course, to push propositions to the extreme to which they naturally lead is often an unsafe guide. But at the same time the conviction cannot be escaped by me that principles and conduct bear a relation one to the other, especially in matters of public concern. The [398] fathers *founded our government upon an enduring basis of right, principle, and of limitation of power. Destroy the principles and the limitations which they impose, and I am unable to say that conduct may not, when unrestrained, give rise to action doing violence to the great truths which the destroyed principles embodied.

The fallacy of all the contentions of the government is, to my mind, illustrated by the summing up of the case for the government made in the argument at bar. The right to acquire and own the stock of competing railroads involves, says that summing up, the power of an individual "*to do*" (italics mine) absolutely as he pleases with his own, whilst the claim of the government is that the right of the owner of property "*to do*" (italics mine) as he pleases with his own may be controlled in the public interest by legitimate legislation. But the case involves the right to *acquire and own*, not the right "*to do*" (italics mine). Confusing the two gives rise to the errors which it has been my endeavor to point out. Undoubtedly the states possess power over corporations created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the state,

and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the state, may lawfully impose upon its creature, the corporation. Moreover, irrespective of the relation of creator and creature, it is, of course, true in a general sense that government possesses the authority to regulate, within certain just limits, what an owner *may do* with his property. But the first power which arises from the authority of a grantor to exact conditions in making a grant or to regulate the conduct of the grantee gives no sanction to the proposition that a government, irrespective of its power to grant, has the general authority to *limit the character and quantity of property which may be acquired and owned. And the second power, the general governmental one, to reasonably control the use of property, affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government, restrained by law, an absolute government, unrestrained by any of the principles which are necessary for the perpetuation of society, and the protection of life, liberty, and property. [399]

It cannot be denied that the sum of all just governmental power was enjoyed by the states and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The Constitution, whilst distributing the pre-existing authority, preserved it all. With the full power of the states over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree, I cannot conceive that if these powers, admittedly possessed by both, be fully exerted, a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that, by the effect of the mere distribution of power made by the Constitution, partial impotency of governmental authority has resulted. But if this be conceded, *arguendo*, the Constitution itself has pointed out the method by which, if changes are needed, they may be brought about. No remedy, in my opinion, for any supposed or real infirmity, can be afforded by disregarding the Constitution, by destroying the lines which separate state and Federal authority, and by implying the existence of a power which is repugnant to all those fundamental

rights of life, liberty, and property upon which just government must rest.

[400] *If, however, the question of the power of Congress be conceded, and the assumption as to the meaning of the anti-trust act which has been indulged in for the purpose of considering that power be put out of view, it would yet remain to be determined whether the anti-trust act embraced the acquisition and ownership of the stock in question by the Northern Securities Company. It is unnecessary for me, however, to state the reasons which have led me to the conclusion that the act, when properly interpreted, does not embrace the acquisition and ownership of such stock, since that subject is considered in an opinion of Mr. Justice Holmes, which explains the true interpretation of the statute, as it is understood by me, more clearly than I would be able to do.

Being of the opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been exercised by the anti-trust act, as is shown in the opinion of Mr. Justice Holmes, I dissent.

I am authorized to say that the **Chief Justice**, Mr. Justice **Peckham**, and Mr. Justice **Holmes** concur in this dissent.

Mr. Justice **Holmes**, with whom concur the **Chief Justice**, Mr. Justice **White**, and Mr. Justice **Peckham**, dissenting:

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate

[401] interests *exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try—I have tried—to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight

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of consequences, yet, when their task is to interpret and apply the words of a statute, their function is merely academic to begin with,—to read English intelligently,—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed, but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one *of the other sort. I am [402] no friend of artificial interpretations because a statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful, it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again, the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several states. There is a natural inclination to assume that it was directed against certain great combinations, and to read it in that light. It does not say so. On the contrary, it says "every," and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether it included railroads until the point was decided by this court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality, but, so far as is consistent with

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a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of discussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce, or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce, not shown to be certain and very great, would not justify such a law. The point decided in *United States v. E. C. Knight Co.* 156 U. S. 1, 17, 39 L. ed. 325, 331, 15 Sup. Ct. Rep. 249, 255, was that "the fact . . . that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument [403] for the government, which I do *not believe that it will be, I can see no part of the conduct of life with which, on similar principles, Congress might not interfere.

This act is construed by the government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the states that may not be made a crime by the finding of a jury or a court. The personal ascendancy of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from; but I do not need them for my own opinion, because, when I read the act I cannot feel sufficient doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The 1st section makes "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations" a misdemeanor, punishable by fine, imprisonment, or both. Much trouble is made by substituting other

phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two,—contracts in restraint of trade and combinations or conspiracies in restraint of trade,—and we have to consider what *these respectively are. Contracts [404] in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although, in some cases, carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was, primarily, on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel v. Reynolds*, 1 P. Wms. 181. Of course, this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized, or attempted to monopolize, some portion of the trade or commerce of the realm. See *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. All that is added to the 1st section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes, or attempts to monopolize, commerce among the states; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation *of the words of [405] § 1 is shown by the words "in the form of

trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement, and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, ante, 608, 24 Sup. Ct. Rep. 307. How effective the section may be or how far it goes is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come; and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, following and affirming *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge. But the provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which

[406] competition is ended through community *of interest,—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the states shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of

union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime, punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison,—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind,—a consideration which was the turning point of the *Trans-Missouri Freight Association's Case*.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the states, or, what comes to the same thing, in my opinion, because the defendants, or some or one of them, are monopolizing, or attempting to monopolize, some part of the commerce between the states. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two states it monopolizes a part of the trade among the states. Of course, the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed, every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that *the statute forbids a combination[407] of men into a corporation to build and run such a railroad between the states.

I assume that the Minnesota charter of the Great Northern, and the Wisconsin charter of the Northern Pacific, both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the states, had created a railroad company authorized singly to build all the lines in the states now actually built, owned, or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly, the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the states is unlawful. The supposed company would have owned lines

that might have been competing; probably the present one does. But the act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place, size, in the case of railroads, is an inevitable incident; and [408] if it were an *objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place, in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from the greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case, and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 701, 40 L. ed. 849, 859, 16 Sup. Ct. Rep. 714, that since the statute, as before, the states have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a state at the

present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete; and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a state for charters; one for each of two new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests *on a popular instead of an ac-[409] curate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and degree. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the states to legislation by Congress. So, according to the intimation of this

court, is the question of liability under the [410] present statute. **Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly, if not quite, contradicts the decision in *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the *Trans-Missouri Freight Association's Case*, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well-known words are to be given a new meaning, invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, but, as I have said, that was in connection with a contract with a stranger to the defendant's business,—a true contract in restraint of trade. To suppress competition in that way is one thing; to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the states, whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination, caused by their entering into partnership, is a re- [411] straint of *trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur, in the main, with his views. I am happy
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to know that only a minority of my brethren adopt an interpretation of the law which, in my opinion, would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not intrusted by the Constitution with the power to make it, and I am deeply persuaded that it has not tried.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice **White**, and Mr. Justice **Peckham** concur in this dissent.

LAFAYETTE B. EATON, *Appt. and Plff. in Err.*,
v.

HARRISON H. BROWN and Ira Dorrance.

(See S. C. Reporter's ed. 411-416.)

Wills—when not conditional.

A holographic will of an illiterate testatrix is not conditional, although beginning "I am going on a journey and may not ever return. And if I do not, this is my last request," where the objects of her bounty were a church and her adopted son, and she concludes her will with the statement that all she has is her own hard earnings, which she proposes to leave to whom she please.

[No. 171.]

Submitted March 3, 1904. Decided March 14, 1904.

APPEAL from, and IN ERROR to, the Court of Appeals of the District of Columbia, to review a decree which affirmed a decree of the Supreme Court of the District, refusing to admit a will to probate. *Reversed.*

The facts are stated in the opinion.

See same case below, 20 App. D. C. 453.

Messrs. **J. Altheus Johnson** and **Joseph A. Burkart** submitted the cause for appellant and plaintiff in error:

The cardinal rule in the construction of wills is the intent of the testator.

Finlay v. King, 3 Pet. 377, 7 L. ed. 712.

The courts are slow to regard a testator as having hung his will upon a condition, unless his intention to do so is plainly and unequivocally manifest.

Bradford v. Bradford, 4 Ky. L. Rep. 947; *Likelihood v. Likelihood*, 82 Ky. 595, 56 Am. Rep. 908; *French v. French*, 14 W. Va. 459; *Re Thorne*, 4 Swabey & T. 36; *Dobson's*
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Goods, L. R. 1 Prob. & Div. 88; *Ex parte Lindsay*, 2 Bradf. 204; *Skipwith v. Cabell*, 19 Gratt. 758; *Cody v. Conly*, 27 Gratt. 313; *Thompson v. Connor*, 3 Bradf. 366; Schouler, Wills, ed. 1900, § 290, p. 297; *Mayd's Goods*, L. R. 6 Prob. Div. 17.

Mr. Thomas Watts submitted the cause for appellees and defendants in error:

It appears plainly that testatrix intended the disposition of her property to become effectual only in case of the happening of the contingency specified in the will.

Parsons v. Lanoe, 1 Ves. Sr. 190, Ambler 557; *Sinclair v. Hone*, 6 Ves. Jr. 607; *Winn's Goods*, 2 Swabey & T. 147; *Roberts v. Roberts*, 8 Jur. N. S. 220; *Porter's Goods*, L. R. 2 Prob. & Div. 22; *Robinson's Goods*, L. R. 2 Prob. & Div. 171; *Lindsay v. Lindsay*, L. R. 2 Prob. & Div. 459; *Re Ward*, 4 Hag. 179; *Re Todd*, 2 Watts & S. 145; *Morrow's Appeal*, 116 Pa. 440, 2 Am. St. Rep. 616, 9 Atl. 660; *Wagner v. McDonald*, 2 Har. & J. 346; *Maxwell v. Maxwell*, 3 Met. (Ky.) 101; *Robnett v. Ashlock*, 49 Mo. 171; *Magee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354; *Dougherty v. Dougherty*, 4 Met. (Ky.) 25.

Intention is not matter of speculation or arbitrary conjecture. It is sought for in the language used; and when language or a certain collocation of words has once received judicial construction, precedents are formed which are followed in later cases. It is a general rule of construction that when a testator uses technical words he is presumed to employ them in their legal sense, and that words in general are to be taken in their ordinary and grammatical sense, unless the context clearly indicates the contrary.

Keteltas v. Keteltas, 72 N. Y. 312, 28 Am. Rep. 155.

Words and limitations may be transposed, supplied, or rejected where warranted by the immediate context or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument.

3 Jarman, Wills, 708, rule 19.

Mr. Justice Holmes delivered the opinion of the court:

The question in this case is whether the following instrument is entitled to probate:

Washington, D. C. Aug. 31"/001.

I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, which is in the possession of Mr. H. H. Brown to go to the Methodist Church at Bloomingburgh All the rest of my proper-

day both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C. All I have is my one hard earnings and and I propose to leave it to whome I please.

Caroline Holley.

The case was heard on the petition, an answer denying the allegations of the same, except on a point here immaterial, and *set-[413] ting up that the residence of the deceased was in New York, and upon a stipulation that the instrument was written and signed by the deceased on August 31, 1901, and that she went on her journey, returned to Washington, resumed her occupation there as a clerk in the Treasury Department, and died there on December 17, 1901. Probate was denied by the supreme court, with costs against the appellant, and this decree was affirmed by the court of appeals upon the ground that the will was conditioned upon an event which did not come to pass. It will be noticed that the domicil of the testatrix in Washington was not admitted in terms. But the court of appeals assumed the allegation of the petition that she was domiciled in Washington to be true, and obviously it must have been understood not to be disputed. The argument for the appellee does not mention the point. The petition also sets up certain subsequent declarations of the deceased as amounting to a republication of the will after the alleged failure of condition; but, as these are denied by the answer, they do not come into consideration here.

It might be argued that logically the only question upon the probate was the *factum* of the instrument. *Pohlman v. Untzellman*, 2 Lec Eccl. Rep. 319, 320. But the practice is well settled to deny probate if it clearly appears from the contents of the instrument, coupled with the admitted facts, that it is inoperative in the event which has happened. *Parsons v. Lanoe*, 1 Ves. Sr. 189, Ambler, 557, 1 Wils. 243; *Sinclair v. Hone*, 6 Ves. 607, 610; *Roberts v. Roberts*, 2 Swabey & T. 337; *Lindsay v. Lindsay*, L. R. 2 P. & D. 459; *Todd's Will*, 2 Watts & S. 145. The only question, therefore, is whether the instrument is void because of the return of the deceased from her contemplated journey. As to this, it cannot be disputed that grammatically and literally the words "if I do not" [return] are the condition of the whole "last request." There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix *would have[414] said if her attention had been directed to a particular point, for what she has said in

fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention, to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of opinion that the will should be admitted to proof.

"Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed." *Damon v. Damon*, 8 Allen, 192, 197. Lord Penzance puts the same proposition perhaps even more strongly in *Porter's Goods*, L. R. 2 Prob. & Div. 22, 23; and it is almost a commonplace. In the case at bar we have an illiterate woman writing her own will. Obviously the first sentence, "I am going on a journey and may not ever return," expresses the fact which was on her mind as the occasion and inducement for writing it. If that had been the only reference to the journey the sentence would have had no further meaning. *Cody v. Conly*, 27 Gratt. 313. But with that thought before her, it was natural to an uneducated mind to express the general contingency of death in the concrete form in which just then it was presented to her imagination. She was thinking of the possibility of death or she would not have made a will. But that possibility at that moment took the specific shape of not returning from her journey, and so she wrote "if I do not return," before giving her last commands. We need not consider whether, if the will had nothing to qualify these words, it would be impossible to get away from the condition. But the two gifts are both of a kind that indicates an abiding and unconditioned intent,—one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipwith v. Cabell*, 19 Gratt. 758, 783. And then she goes on to say that

[415] all that *she has is her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property; not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty,—an hypothesis which is to the last degree improbable in the absence of explanation,—it is not to be

believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend, instead of going on to give a reason which, on the face of it, has reference to an unconditioned gift.

It is to be noticed that in the leading case cited for the opposite conclusion from that which we reach (*Parsons v. Lanoe*), Lord Hardwicke emphasizes the proposition that under the circumstances of that case no court of equity would give any latitude to support such a will. There the will began "in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland." The testator then was married but had no children. He afterwards returned from Ireland and had several children. If the will stood, the children would be disinherited; and that was the circumstance which led the Lord Chancellor to say what we have mentioned, and to add that courts would take hold of any words they could to make the will conditional and contingent. *Ambler*, 561; 1 Ves. Sr. 192. It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, "my wish, desire, and intention now is that if I should not return (which I will, no preventing Providence)." *Todd's Will*, 2 Watts & S. 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word "now." Somewhat similar was *Porter's Goods*, L. R. 2 [416] Prob. & Div. 22, where Lord Penzance said, if we correctly understand him, that if the only words adverse to the will had been "should anything unfortunately happen to me while abroad," he would not have held the will conditional. See *Mayd's Goods*, L. R. 6 Prob. Div. 17, 19.

On the other hand, we may cite the following cases as strongly favoring the view which we adopt. It hardly is worth while to state them at length, as each case must stand so much on its own circumstances and words. The latest English decisions which we have seen qualify the tendency of some of the earlier ones. *Mayd's Goods*, L. R. 6 Prob. Div. 17; *Dobson's Goods*, L. R. 1 Prob. & Div. 88; *Thorne's Goods*, 4 Swabey & T. 36; *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908; *Bradford v. Bradford*, 4 Ky. L. Rep. 947; *Skipwith v. Cabell*, 19 Gratt. 758, 782-784; *French v. French*, 14 W. Va. 458, 502.

Decree reversed.

UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and the Rapid Transit Underground Railroad Company, Appts.,

v.

CITY OF NEW YORK, Robert A. Van Wyck, Individually and as Mayor of the City of New York, Bird S. Coler, *et al.*

(See S. C. Reporter's ed. 416-430.)

Jurisdiction of Federal circuit court—case involving construction or application of the Federal Constitution.

The assertion in a suit to enjoin municipal construction of an underground railway that complainants had a prior exclusive right to the use of the city streets for that purpose does not bring the cause within the jurisdiction of a Federal circuit court as really and substantially involving a dispute or controversy respecting the Federal Constitution, where such contention is based upon the effect claimed for the filing of a map and profile of the proposed route and for the payment of an incorporation tax, and involves the unfounded assumption that the determination by the rapid transit board created by N. Y. Laws 1891, chap. 4, to construct an underground railway, together with the consents of the municipal authorities and abutting owners to the municipal construction of such road, was the equivalent of the requisite consents to the construction of complainants' proposed road, which had never been obtained.

[No. 150.]

*Argued January 29, February 23, 24, 1904.
Decided March 21, 1904.*

APPPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree dismissing, for want of jurisdiction, a bill to enjoin the municipal construction of an underground railway in the city of New York. *Affirmed.*

See same case below, 116 Fed. 952.

The facts are stated in the opinion.

Mr. Roger Foster argued the cause and filed a brief for appellants:

It has been repeatedly held that, on error from a state court to this court, where the Federal question asserted to be contained in the record manifestly lacks all color of merit, the writ of error should be dismissed. But the doctrine referred to has no application to a case brought in a Federal court, where the very subject-matter of the controversy is Federal, however much wanting in

merit may be the averments which it is claimed establish the violation of the Federal right.

Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783.

All it is necessary to show in order to secure a reversal of the decree is that the complainants claim a franchise, and that all of their objections to the constitutionality of the rapid transit act are not so manifestly frivolous and without color of right as conclusively to prove bad faith upon their part.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 563, 41 L. ed. 1114, 1116, 17 Sup. Ct. Rep. 653.

Mr. Edward M. Shepard argued the cause, and, with *Messrs. George W. Wickersham* and *De Lancey Nicoll*, filed a brief for appellees:

The court below was without jurisdiction.

Defiance Water Co. v. Defiance, 191 U. S. 184, *ante*, 140, 24 Sup. Ct. Rep. 63; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 2; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 88, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142; *Illinois C. R. Co. v. Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Swafford v. Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17.

Messrs. George L. Rives and *Theodore Connolly* also filed a brief for certain appellees:

A complainant who alleges that the circuit court of the United States has jurisdiction of a controversy by reason of the infringement of a right of complainant under the Constitution of the United States must show that such right is a real one.

Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *Starin v. New York*, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 662, 42 L. ed. 315, 316, 17 Sup. Ct. Rep. 925; *McCain v. Des Moines*, 174 U. S. 168, 176, 43 L. ed. 936, 939, 19 Sup. Ct. Rep. 644; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 243, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867;

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308; and *Re Buchanan*, 39 L. ed. U. S. 884.

Swafford v. Templeton, 185 U. S. 487, 493, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill filed on behalf of the [422] Underground Railroad of *the city of New York and the Rapid Transit Underground Railroad Company, corporations organized under the laws of New York, against the city of New York, the mayor, the comptroller, and the rapid transit commissioners of New York, and contractors engaged in the construction of an underground railway and subway in that city, all of the state of New York to enjoin payment for work done and further construction. The bill was demurred to for the reason, among others, that the circuit court was without jurisdiction in that the averments of the bill did not present a case arising under the Constitution or laws of the United States, which was the sole ground on which jurisdiction was invoked. The demurrer was sustained and the bill dismissed for want of jurisdiction (116 Fed. 952), and, the question of jurisdiction being certified, the case was brought directly to this court.

If, on the face of complainants' statement of their own case, it does not appear that the suit really and substantially involved a dispute or controversy as to the effect or construction of the Constitution, on the determination of which the result depended, the circuit court was right and its decree must be affirmed. *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63, and cases cited.

The bill refers to the rapid transit acts of 1891 (Laws 1891, chap. 4), 1894 (Laws 1894, chap. 752), and 1895 (Laws 1895, chap. 529), and sets forth their provisions for a rapid transit board empowered to construct an underground railroad in the city of New York; for the submission to the electors of the city of the question whether there should be municipal construction of railroads; for the power of the board, in case a majority vote favored municipal construction, to grant the right to maintain and operate the municipal railroad for not less than thirty-five years nor more than fifty years; for the advance by the city of the funds to construct the railroad; for the borrowing of money and the issuing of bonds therefor; for the laying out of the routes and the adoption of the plan of construction by the board; for the requisite consent of the local authorities,

[423] *consisting of the mayor and common council, and of a majority in value of the abutting owners, or, in lieu thereof, of the su-

preme court of the state; for the various steps of procedure after the popular vote in favor of municipal construction; and for details of the contract for the construction and operation of the municipal road.

The bill further alleges that the rapid transit board had determined on the construction of an underground railroad; that the local authorities have duly given their consent, and that the appellate division of the supreme court has, on application of the board, appointed three commissioners to determine whether the railroad ought to be constructed and operated; that said commissioners have duly determined that it ought to be; that their determination has been duly approved by the court, and has been taken in lieu of the consent of the property owners; that the city of New York, the municipal authorities, and board have entered into a contract, February, 1900, with defendant contractors, to construct the road over the routes determined on, and that the railroad is now in process of construction, and large sums of money have been paid out by the city therefor.

But it is asserted that the complainants had a prior exclusive right under contract with the state to the use for underground railroad purposes of the streets now sought to be used for the municipal rapid transit road, and that the legislation is in conflict with the 14th Amendment, and § 10 of article 2 of the Constitution.

No rights created by the Constitution are asserted, and if the facts set up by the complainants are, as matter of law, wholly inadequate to show possession of contract rights as between them, or either of them, and the state, then no dispute or controversy arises in respect of an unconstitutional invasion of such rights.

The bill avers that the Underground Railroad of the city of New York, one of the complainants, was formed August 21, 1896, by the consolidation of the Central Tunnel Railway *Company, the New York & New[424] Jersey Tunnel Railway Company, and the Terminal Underground Railway Company, as to the two latter of which no claim is made and no question arises.

And it alleges that the Central Tunnel Company was organized March 26, 1881, "under the so-called general railroad and tunnel law of the state of New York, namely, chapter 140 of the Laws of 1850, and of the various acts amendatory of and supplemental to the same, and chapter 582 of the Laws of 1880."

That company's articles of association declared its purpose to be "constructing and maintaining and operating a railroad for

public use in the conveyance of persons and property."

Chapter 140 of the Laws of New York of 1850, as amended by chapter 133 of the Laws of 1880, provided that railroad corporations formed under it should possess, in addition to "the powers conferred on corporations in the 3d title of the 18th chapter of the first part of the Revised Statutes" (which did not include power to construct railroads or to use the streets of a city), the power "to construct their road across, along, or upon any . . . street, highway, . . . which the route of its road shall intersect or touch. . . . Nothing in this act contained shall be construed . . . to authorize the construction of any railroad not already located in, upon, or across any streets in any city, without the assent of the corporation of such city." Laws 1850, p. 211; Laws 1880, p. 242.

By chapter 10 of the Laws of 1860 it was provided: "It shall not be lawful hereafter to lay, construct, or operate any railroad in, upon, or along any or either of the streets or avenues of the city of New York, wherever such railroad may commence or end, except under the authority, and subject to the regulations and restrictions, which the legislature may hereafter grant and provide" (Laws 1860, p. 16), which was carried forward into the charter of the city of New York of 1882. Laws 1882, chap. 400, § 1943. This was held by the court of [425] appeals to *render the general railroad act inapplicable to the city of New York. *Re Washington Street Asylum & P. R. Co.* 115 N. Y. 442, 22 N. E. 356.

The Constitution of the state contained, by amendment adopted in 1874, the following provision:

"But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of the street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or, in case the consent of such property owners cannot be obtained, the general term of the supreme court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

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This was continued by the Constitution of 1894, which changed the words "general term" to "appellate division," and the word "district" to "department."

The court of appeals ruled in *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692, that in order for a railroad corporation to acquire authority to construct or operate a railroad upon the streets of any municipality, not only the consent of the municipal authorities was indispensable, but that they were empowered to grant such consent on such terms and conditions as they chose to impose.

The 1st section of chapter 582 of the Laws of 1880 provided:

"Whenever such road, or any part of the same, is intended to be built within the limits of any city or incorporated village of this state and to run by means of a tunnel underneath any of the streets, roads, or public places thereof, the said company, before building the same underneath any of said streets, roads, or public places, shall obtain the consent of the owners of one-half *in value of the property bounded [426] on the line, and the consent of the board of trustees of the village by resolution adopted at a regular meeting and entered on the records of said board, and of the proper authorities having control of said streets, roads, or public places; or in case such consent of the owners of property bounded on the line cannot be obtained, the general term of the supreme court in the district in which such city or village is situated may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built underneath said street, roads, and public places, or any of them, . . . and the determination by said commissioners, confirmed by the court, may be taken in lieu of the consent of said authorities and property owners." Laws 1880, p. 872.

In *Re New York District R. Co.* 107 N. Y. 42, 14 N. E. 187, decided in 1887, the court of appeals held that street underground roads were street railways and that the constitutional provision applied to them; that the act of 1850 had no application to street railroads, and, if it had, the authority to construct had been taken away by the act of 1860; and that the provision of the act of 1880, allowing the action of the supreme court commissioners to stand in the place of the consent of the municipal authorities, was unconstitutional, and also as to the consent of the abutting owners, because indivisible; but that perhaps the act might stand as authority for

the construction of an underground street railway on condition of the assent of the city authorities and the half of abutting values, rejecting all the provisions for the appointment of commissioners.

It follows that the Central Terminal Company could have acquired no right to build the proposed railroad without the consent of the municipal authorities and the consent of the abutting property owners; yet no such consents are asserted to have been given it, and the contrary appears on the face of the bill. But, after setting forth the provisions for a rapid transit board by the rapid transit act of 1891, as amended, [427]*especially in 1894, and the proceedings thereunder, which showed that the consent of the municipal authorities and of the supreme court in lieu of the property owners had been given to the municipal construction sought to be enjoined, the bill argues that the determination and consents in favor of such municipal construction amounted to authority to construct the railroad of the Central Tunnel Company because it was an underground railroad, which it had been proposed should occupy the same route or part of it, notwithstanding the railroad of that company had not been consented to by either the local authorities or the abutting property owners or the supreme court acting for them.

We quite agree with the circuit court that this contention is wholly inadmissible. The determination of the rapid transit board and the consents of the municipal authorities and the abutting owners to municipal construction could not be regarded as inuring to the benefit of private parties who had endeavored to acquire the franchise twenty years before and had failed to perform the conditions essential to the right to construct such a road.

The bill also avers that the consent of the abutting property owners could not be obtained by the Central Tunnel Company, and that the company applied to the general term of the supreme court for the appointment of three commissioners, and that on February 2, 1883, commissioners were appointed, one of whom declined to serve, whereupon the court appointed another commissioner, who also declined to serve; that the company thereupon applied for another appointment, and "said application was duly granted by said court;" but that the said general term, and its successor, the appellate division, had not yet entered said order, and that, by reason of the inaction of the supreme court, the Central Tunnel Company and its successor, the Underground Railroad Company, had not been able to

continue the proceedings before commissioners, and neither of said corporations had been able to commence the construction of its line of railroad. If this *imputation of [428] laeas could, in any view, be entertained, it is enough to say that the general term in 1886 adjudged the act of 1880, under which the application was made, to be unconstitutional in respect of obtaining consents (*Re New York District R. Co.* 42 Hun, 621), and, as already mentioned, this decision was affirmed by the court of appeals. 107 N. Y. 42, 14 N. E. 187.

The general railroad law of 1850 provided for the filing of a map and profile of the proposed route, and this was done by the Central Tunnel Company, March 28, 1882, and the bill claims that thereby the company obtained a contract right. But the mere filing of a map and profile by a company incorporated under that law could not give an exclusive right to the occupancy of the space included in such map and profile, as against the state. In some instances it might give priority as between railroad corporations whose corporate existence had not lapsed for nonconstruction, but only until the legislature otherwise provided. And so it was held in *People v. Adirondack R. Co.* 160 N. Y. 225, 54 N. E. 689, where, among other things, it was observed: "There is no property in a naked railroad route, existing on paper only, that the state is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation." The judgment was affirmed by this court in *Adirondack R. Co. v. New York*, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460, and we said:

"But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be, in itself, a vested right, surviving the existence of the franchise, or an authorized circumscription of its scope." . . .

"We agree with the court of appeals, as has already been indicated, that the railroad company occupies no position entitling it to raise the question. The steps it had taken had not culminated in the acquisition of any property or vested right."

*Where certain routes have been deter-[429] mined according to law, and the necessary consents have been obtained, and real estate has been acquired by condemnation, the situation would be entirely different. *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 510, 28 N. E. 525. But without the consents the right to construct and operate

could not become vested. *Re Rochester Electric R. Co.* 123 N. Y. 351, 25 N. E. 381.

The Underground Railroad, one of the complainants, was, as before stated, formed by the consolidation of the Central Tunnel Company with two other companies under chapter 676 of the Laws of 1892, which provided for the consent of the proper city authorities and of the owners of one half in value of the abutting property, or, as to the latter, the determination of commissioners, affirmed by the supreme court. Neither of these consents is alleged to have been obtained.

It is averred, however, that the company paid, when its articles of consolidation and incorporation were filed in August, 1896, the incorporation tax of $\frac{1}{8}$ of 1 per cent on its capital stock, required to be paid by chapter 908 of the Laws of 1896; but the payment of a tax for the privilege of being a corporation did not carry with it the right to occupy any street of New York with its proposed railroad.

And the fact, also asserted, that this company filed a map or profile did not, as we have seen, in itself create a contract right.

The company is alleged to have leased its road to the Rapid Transit Underground Railroad Company, the other complainant, which was incorporated in 1897, subject to the rapid transit law of the state and the railroad law under which it was incorporated. The consent of the municipal authorities and the consent of the abutting property owners, or the substituted consent of the supreme court, were essential to the right to construct a railroad, and these it never obtained. It paid the incorporation tax under the tax law of 1896, but that gave no right of construction, nor did its filing [430] of a map or *profile. There is also an averment that this company "paid taxes duly assessed against it by the city, county, and state of New York," but none that any tax was paid on the right to construct a railroad in the streets of New York.

The result is that it appeared on the record that complainants possessed no contract rights which were impaired, or of which they were deprived, and that the suit did not really and substantially involve a dispute or controversy as to the application or construction of the Constitution.

We, therefore, do not deem it necessary to further unfold the convolutions of this lengthy bill. Many matters attacking the validity of the rapid transit acts, and the proceedings in municipal construction thereunder, were put forward, but we are not called on to consider them in view of the conclusion that the circuit court did not acquire jurisdiction.

Decree affirmed.

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CHARLES T. BARNEY, *Appt.*,
v.

CITY OF NEW YORK, The Board of Rapid Transit Railroad Commissioners for the City of New York, *et al.*

(See S. C. Reporter's ed. 430-441.)

Jurisdiction of Federal circuit court—case involving due process of law.

The averment in a bill to enjoin the construction of a rapid transit railroad tunnel under a city street that, by such construction, complainant, as an abutting owner, is deprived of his property without due process of law, does not bring the case within the jurisdiction of a Federal circuit court, where the bill, on its face, proceeds on the theory that the action sought to be enjoined was not only unauthorized, but was forbidden by state legislation.

[No. 159.]

Argued March 3, 4, 1904. Decided March 21, 1904.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree which dismissed, for want of jurisdiction, a bill to enjoin the construction of a tunnel under a city street. *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

This was a bill to enjoin the city of New York, the board of rapid transit commissioners for New York, John B. McDonald, and the administratrix of Shaler, deceased, from proceeding with the construction of the rapid transit railroad *tunnel under Park ave-[431] nue, New York, adjacent to the premises of Charles T. Barney, "until the easements appurtenant thereto shall have been acquired according to law and due compensation made therefor to complainant;" and from constructing such railroad otherwise than in accordance with the routes and general plan adopted and approved by the local authorities and by the owners of abutting property, or the appellate division of the supreme court, in lieu thereof.

From the bill it appeared that the rapid transit board had, on behalf of the city, devised routes and general plans, and entered into a contract for the construction of a rapid transit railroad with McDonald, of whom Ira A. Shaler was a sub-contractor, under the rapid transit acts of the state (Laws 1891, chap. 4; Laws 1892, chaps. 102, 556; Laws 1894, chaps. 528, 752; Laws

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308; and *Re Buchanan*, 39 L. ed. U. S. 884.

1895, chap. 519; Laws 1900, chap. 729; Laws 1901, chap. 587; Laws 1902, chaps. 533, 542, 544, 584).

Park avenue was one of the streets under which the railroad was authorized to be built, and the routes and general plan of the road were prescribed by the board by resolutions of January 14 and February 4, 1897, which received the assent of the local authorities and of the appellate division of the supreme court in lieu of the consent of the abutting property owners.

Complainant alleged that he "consented to the construction of the said rapid transit railroad in accordance with the said routes and general plan of construction, and did not oppose the proceedings herein-after mentioned, which the said board of rapid transit railroad commissioners instituted for the purpose of obtaining the determination of three commissioners appointed by the said appellate division that such rapid transit railroad ought to be constructed and operated; nor did your orator oppose the confirmation of said determination by the said appellate division."

[432] But complainant averred that the portion of the railroad under Park avenue and in front of his premises was being built 27 feet nearer to his premises than was authorized *by the routes and general plan; and that the work was "being thus performed by said defendant McDonald and the said Shaler without any authority other than certain directions given by the chief engineer employed by the board of rapid transit commissioners and embodied in certain so-called working drawings, or detail drawings, prepared by him or at his instance, and recently approved informally by said board. And . . . that the fact that such directions had been given by the chief engineer and that said work was being thus performed by the contractor, as aforesaid, was not until recently specifically known to said board; that such action of said chief engineer and contractor has never been formally or specifically approved by said board; that there has been no change made or authorized by said board in the said 'routes and general plan,' nor has there been any modification of the contract or specifications with reference to the construction of that part of the tunnel lying under Park avenue between Thirty-third and Forty-first streets; that no notice was given to any of the property owners along said street that it was proposed by the defendants or any of them to change the position of the tunnel to any material extent from the position shown and described in the said 'routes and general plan,' nor was any opportunity ever given to said property owners or the citizens generally to be heard with respect to any such change."

Complainant further averred "that at none of the times herein mentioned did the said board of rapid transit railroad commissioners have authority (if at all) to enter into any contract for the construction of any rapid transit railroad under or upon the said Park avenue, except in accordance with the said 'routes and general plan' contained in the said resolutions of January 14th and February 4th, 1897, and that at no time did the said board have authority to prepare detailed plans and specifications, except (if at all) in accordance with the said general plan of construction, or to alter any plans or specifications prepared by them, excepting in accordance with said general plan of construction. That the act of the *said board in permitting the defendants [433] McDonald and the said Shaler to enter upon that part of Park avenue between Thirty-third and Forty-first streets where the tunnel is now in process of construction, as aforesaid, was illegal and unauthorized, and the defendants McDonald and the said Shaler have entered upon the same unlawfully and without authority; and for the further reason that the construction of the rapid transit railway on the easterly side of Park avenue, in front of your orator's said premises, takes his property without due process of law, in violation of the provisions of the 14th Amendment to the Constitution of the United States, and that said rapid transit act, so far as it purports to authorize the construction of a tunnel and railway in said Park avenue without the consent of abutting owners or compensation therefor, is void, because it deprives your orator of his property without due process of law, in violation of the provisions of the said amendment."

On the bill and affidavits, complainant moved for an injunction *pendente lite*, and defendants resisted the motion, submitting, in pursuance of stipulation, affidavits filed in their behalf in the case of *Huntington v. New York*,—the same defendants,—since brought here, numbered at this term 173, and argued with this case. The opinion in that case (118 Fed. 683) was adopted in this, and the court, of its own motion, under § 5 of the act of March 3, 1875, chap. 137 [18 Stat. at L. 472, U. S. Comp. Stat. 1901, p. 511], entered a decree dismissing the bill for want of jurisdiction, and certified that question to this court.

Messrs. Maxwell Evarts and Arthur H. Masten argued the cause and filed a brief for appellant:

Any act of an agent of a state, done pursuant to the powers derived by him from the legislature and by virtue of his public position as such agent, whether specifically

authorized by the statute appointing him or not, is an act of the state within the meaning of the 14th Amendment of the Constitution.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 113; *Pacific Gas Improv. Co. v. Elbert*, 64 Fed. 421.

Mr. Edward M. Shepard argued the cause and filed a brief for appellees the Rapid Transit Board and its members:

The controversy is one between parties all of whom are citizens of the state of New York, in the course of which the sole question is whether the laws of that state have or have not been violated by the acts of the defendants. Such a controversy belongs to the courts of the state itself.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357.

We do not dispute that the state may act by executive officers as well as by its courts or its legislature.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The act of the officer becomes the act of his state, only if he is clothed with the state's power to do the act; that is to say, if what he does is done by virtue of the public authority of the state.

Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; *Arrowsmith v. Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Kiernan v. Multnomah County*, 95 Fed. 849; *Re Storti*, 169 Fed. 807; *Manhattan R. Co. v. New York*, 18 Fed. 195.

Where a person, being a public officer, seizes property,—acting not *virtuti officii*, but *colore officii* and without lawful right,—the claim lies against him individually, and not against the state or other government of which he was a public officer.

Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *United States v.*

Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 452, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609; *Stanley v. Schwalby*, 147 U. S. 508, 518, 37 L. ed. 259, 263, 13 Sup. Ct. Rep. 418; *Stanley v. Schwalby*, 162 U. S. 255, 271, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754; *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443.

Mr. Pratt A. Brown argued the cause, and, with **Mr. De Lancey Nicoll**, filed a brief for appellee McDonald:

The provision of the Constitution which the complainant invokes is, "nor shall any state deprive any person of life, liberty, or property without due process of law." This provision is a prohibition against improper action by a state, and not against wilfully erroneous or improper acts of state officers or private individuals.

Conthrie's 14th Amendment, p. 72; *United States v. Cruikshank*, 92 U. S. 542, 554, 23 L. ed. 588, 592; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *United States v. Harris*, 106 U. S. 629, 638, 27 L. ed. 290, 293, 1 Sup. Ct. Rep. 601.

When the legislature of a state has enacted laws which, if followed, will furnish citizens the necessary constitutional protection of life, liberty, and property, the state has performed its constitutional duty; and the Federal courts are without jurisdiction to entertain suits based upon infractions of such laws, until after the state, through its courts, has denied the rights which the Constitution guarantees.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Re Storti*, 169 Fed. 807, Affirmed in 183 U. S. 141, 46 L. ed. 122, 22 Sup. Ct. Rep. 72; *Kiernan v. Multnomah County*, 95 Fed. 849.

Federal courts will not entertain jurisdiction to prevent acts of state officers done without authority of or contrary to state law. That is for the state courts to remedy.

Missouri v. Dockery, 191 U. S. 165, ante, 133, 24 Sup. Ct. Rep. 53.

Until the state courts have denied redress, the state cannot be said to have acted, and the powers of the Federal courts cannot properly be invoked.

Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Missouri v. Dockery*, 191 U. S. 165, ante, 133, 24 Sup. Ct. Rep. 53.

*Mr. Chief Justice **Fuller** delivered the[437] opinion of the court:

The jurisdiction of the circuit court was invoked upon the ground that, by the tunnel

construction sought to be enjoined, complainant was deprived of his property without due process of law, in violation of the 14th Amendment. But that amendment prohibits deprivation by a state, and here the bill alleged that what was done was without authority and illegal.

The city acts through the rapid transit board, which possesses the powers specifically vested. It is empowered to prescribe the routes and general plan of any proposed rapid transit railroad within the city, and every such plan must "contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue, or other public place is to be encroached upon and the property abutting thereon affected." Consents of the municipal authorities and the abutting property owners to construction on the routes and plans adopted must be obtained, and any change in the detailed plans and specifications must accord with the general plan of construction, and, if not, like consents must be obtained to such change.

The bill asserted that the easterly tunnel section under Park avenue was not within the routes and general plan consented to, and that the construction was unauthorized. And this is the view taken by the supreme court of New York. *Barney v. Rapid Transit R. Co.* 38 Misc. 549, 77 N. Y. Supp. 1083; *Barney v. New York*, 39 Misc. 719, 80 N. Y. Supp. 972, 83 App. Div. 237, 82 N. Y. Supp. 124.

Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the 14th Amendment, and the circuit court was right in dismissing it for want of jurisdiction.

[438] Controversies over violations of the laws of New York are *controversies to be dealt with by the courts of the state. Complainant's grievance was that the law of the state had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law. *Missouri v. Doekery*, 191 U. S. 165, ante, 133, 24 Sup. Ct. Rep. 53; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667.

In *Virginia v. Rives*, referring to an alleged denial of civil rights on account of race and color in the impaneling of a jury, the laws of Virginia in respect of the selection of juries appearing to be unobjection-

able, Mr. Justice Strong, speaking for the court, said:

"It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a state, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which § 641 (U. S. Comp. Stat. 1901, p. 520) speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the state, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial, or an inability resulting from it. . . .

"When a statute of the state denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of § 641. But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the state' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has *commenced. If, as in this case, the sub-[439] ordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,—it can with no propriety be said the defendant's right is denied by the state and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of § 641. Denials of equal rights in the action of the judicial tribunals of the state are left to the revisory powers of this court."

In the *Civil Rights Cases*, in which the court was dealing with the act of March 1, 1875, 18 Stat. at L. 335, chap. 114 (U. S. Comp. Stat. 1901, p. 1260), Mr. Justice Bradley said:

"In this connection it is proper to state

that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress."

[440] There are many cases in this court involving the application of the 11th Amendment which draw the distinction between acts of public officers *virtute officii*, and their acts without lawful right, *colore officii*; and in *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699, Mr. Justice Lamar defined the two classes to be, "those brought against officers of the state as representing the state's action and liability, and those against officers of the state when claiming to act as such without lawful authority. The subject is discussed at length and the cases cited in *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770, and *Fittz v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269. Appellant's counsel rely on certain expressions in the opinion in *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, but that was a case in which what was regarded as the final judgment of a state court was under consideration, and Mr. Justice Strong also said: "Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state."

And see *Manhattan R. Co. v. New York*, 18 Fed. 195; *Kiernan v. Multnomah County*, 95 Fed. 849; *Re Storti*, 109 Fed. 807.

Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, and *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, are cited by appellant, but in those cases judgments of the highest judicial tribunals of the state were treated as acts of the state, and no question of the correctness of that view arises here.

And so in *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, the general assembly of Texas had established

a railroad commission and given it power to fix reasonable rates, with discretion to determine what rates were reasonable. The act provided that suits might be brought by individuals against the commission "in a court of competent jurisdiction in Travis county, Texas," and a citizen of another state sued them in the circuit court of the United States for the district which embraced Travis county, and this was held to be authorized by the state statute.

And as the establishment of rates by the commission was the establishment of rates by the state itself, and the determination of what was reasonable was left to the discretion of the *commission, their action could[441] not be regarded as unauthorized, even though they may have exercised the discretion unfairly.

Similarly in *Pacific Gas Improv. Co. v. Ellert*, 64 Fed. 421, where a public board was given power to improve streets, and proceeded in excess of its powers, but not in violation of them, its action was regarded by Mr. Justice McKenna, then circuit judge, as state action.

In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions.

Section 5 of the act of March 3, 1875, 18 Stat. at L. 470, chap. 137 (U. S. Comp. Stat. 1901, p. 508), provided that if, in any suit in the circuit court, it should appear, to the satisfaction of the court, at any time, that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, the court should proceed no further, but dismiss the suit. The last paragraph of this section was in terms repealed by the act of March 3, 1887, 24 Stat. at L. 552, chap. 373, re-enacted August 13, 1888, 25 Stat. at L. 433, chap. 866 (U. S. Comp. Stat. 1901, p. 515) (the part repealed not being material here), but otherwise the section remained and remains in full force. This case went off on the motion for preliminary injunction, and the bill was properly dismissed, whether treated as if heard on demurrer, or on the proofs by affidavit.

Decree affirmed.

ARABELLA D. HUNTINGTON, *Appt.*,
v.

CITY OF NEW YORK *et al.*

(See S. C. Reporter's ed. 441.)

Jurisdiction of Federal circuit court—case involving due process of law.

This case is governed by the decision in *Barney v. New York*, *ante*, 737.

[No. 173.]

See same case below, 118 Fed. 683.

THE CHIEF JUSTICE: This case is governed by the decision just announced [*Barney v. New York*, 193 U. S. 430, *ante*, 737, 24 Sup. Ct. Rep. 502], and the decree is accordingly affirmed.

[442]*JOHN D. BOERING and Mearlin G. Boering, His Wife, *Plffs. in Err.*,
v.

CHESAPEAKE BEACH RAILWAY COMPANY.

(See S. C. Reporter's ed. 442-451.)

Carriers—assumption of risk by free passenger—knowledge of condition in railway pass.

A stipulation in a free railway pass, requiring the user to assume the risk of injury due to the carrier's negligence, is binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her.

[No. 174.]

Argued March 4, 1904. Decided March 21, 1904.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment affirming a judgment of the Supreme Court of the District in favor of defendant in an action to recover damages for personal injuries sustained by a passenger on a railway, riding upon a free pass. *Affirmed.*

NOTE.—*Validity and effect of stipulation, in free pass, releasing carrier from liability for negligence.*

In some jurisdictions a carrier remains liable for its negligence toward a person riding on a free pass in which he "assumed all risk." *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360, Gil. 110; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 643; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *Buffalo, P. & W. R. Co. v. O'Hara*, 12 W. N. C. 473; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Missouri, K. & T. R. Co. v. Flood* (Tex. Civ. App.) 70 S. W. 331; *Farmers' Loan & T. Co. v. Baltimore & O. S. W. R. Co.* 102 Fed. 17.

A similar holding in *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246, is in part rested on a state statute providing that railroad companies are liable, notwithstanding any contract to the contrary, for all damages caused by the negligence of their agents or employees in the conduct or operation of their railroads.

By the provisions of Va. Code, § 1296, no agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own negligence or misconduct is valid. The policy of the state as declared by this statute is violated by an agreement in a free pass in which the user assumed all risk of injuries occurring from the carrier's negligence.

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See same case below, 20 App. D. C. 500.

The facts are stated in the opinion.

Messrs. Charles F. Carusi and Charles H. Merillat argued the cause, and, with *Messrs. Eugene Carusi & Sons*, filed a brief for plaintiffs in error:

Passenger carriers are liable for the consequences of negligent acts to all passengers, gratuitous or otherwise.

The New World v. King, 16 How. 469, 14 L. ed. 1019; *Philadelphia & R. R. Co. v. Derby*, 14 How. 485, 14 L. ed. 509.

This liability cannot be evaded by private agreements, all such agreements being *per se* unreasonable in character and void as against public policy.

New York C. R. Co. v. Lockwood, 17 Wall. 363, 21 L. ed. 635.

The three classes of persons on trains are passengers, trespassers, and employees, or quasi-employees. Plaintiff was on the train by invitation, and belongs to the first class.

Philadelphia & R. R. Co. v. Derby, 14 How. 485, 14 L. ed. 509; *The New World v. King*, 16 How. 469, 14 L. ed. 1019.

By the great weight of authority in this country, stipulations against liability of common carriers for negligence are void, even in the case of gratuitous passengers.

Bryan v. Missouri P. R. Co. 32 Mo. App. 228; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360, Gil. 110; *Flint & P. M. R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 643; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Alabama G. S. R. Co. v. Little*, 71 Ala. 614; *Rose v. Des*

Norfolk & W. R. Co. v. Tanner, 100 Va. 379, 41 S. E. 721.

But other cases hold that the carrier is not liable to a passenger using a free pass with a stipulation assuming all risk. *Grissold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205; *Kinney v. Central R. Co.* 32 N. J. L. 407, 90 Am. Dec. 675; *Kinney v. Central R. Co.* 34 N. J. L. 513, 3 Am. Rep. 265; *Perkins v. New York C. R. Co.* 24 N. Y. 196, 82 Am. Dec. 282; *Wells v. New York C. R. Co.* 24 N. Y. 181, *Affirming* 26 Barb. 641; *Sutherland v. Great Western R. Co.* 7 U. C. C. P. 409; *Duncan v. Maine C. R. Co.* 113 Fed. 508; *Rogers v. Kennebec S. S. Co.* 86 Me. 261, 25 L. R. A. 491, 29 Atl. 1069.

The same is true where the stipulation is in the form of a release. *Payne v. Terre Haute & I. R. Co.* 157 Ind. 616, 56 L. R. A. 472, 62 N. E. 472.

One who accepts a free pass on a street railway, with a printed condition that the company shall not be liable under any circumstances, whether by negligence of agents or otherwise, for personal injuries, is bound by that condition. *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 795, 38 Am. St. Rep. 901, 35 Pac. 422.

And while a carrier cannot limit his liability

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Moines Valley R. Co. 39 Iowa, 246; *Illinois & C. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *Buffalo, P. & W. R. Co. v. O'Hara*, 12 W. N. C. 473; *Camden & A. R. Co. v. Bauseh* (Pa.) 7 Atl. 731; *Burnett v. Pennsylvania R. Co.* 176 Pa. 45, 34 Atl. 972; *Farmers' Loan & T. Co. v. Baltimore & O. S. W. R. Co.* 102 Fed. 17; *Rocsner v. Hermann*, 10 Biss. 486, 8 Fed. 782; *Flinn v. Philadelphia, W. & B. R. Co.* 1 Houst. (Del.) 471; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Indiana C. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339; *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Welsh v. Pittsburgh, Ft. W. & C. R. Co.* 10 Ohio St. 76, 75 Am. Dec. 490; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Knowlton v. Erie R. Co.* 19 Ohio St. 261, 2 Am. Rep. 395.

The text-writers are almost unanimous in opposition to the carriers' right to limit liability on a free pass.

Redf. Carr. 268; Thomp. Carr. of Pass. p. 200, §§ 4, 7, 9; Shearm. Redf. Neg. §§ 268 *et seq.*; Cooley, Torts, 686; Wharton, Neg. 589, 592, 641; 1 Parsons, Contr. 771, note; Sehoulter, Bailments & Carriers, 2d ed. § 656.

This is not a case where a presumption of knowledge will apply.

Sehoulter, Bailments & Carriers, 2d ed. § 468, p. 497; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed.

ity in Ohio, he may in New York, and such a contract made in New York will be upheld in Ohio. *Knowlton v. Erie R. Co.* 19 Ohio St. 260, 2 Am. Rep. 395.

Some authorities hold that the company is not exempted from gross negligence, where the passenger is injured while riding on a free pass with a proviso that the holder assumes all risk. *Illinois C. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613.

A limitation of the doctrine of exemption to the ordinary negligence of the carrier's employees might be inferred from the language in the opinion in *Northern P. R. Co. v. Adams*, 192 U. S. 440, *ante*, 513, 24 Sup. Ct. Rep. 408.

In Wisconsin a railroad company is not liable for the death of a party holding a free pass containing a proviso "assuming all risk," when the injury was caused by want of ordinary care, unless the same was made a crime or was caused by wilful neglect. Under Wis. Rev. Stat. §§ 4357-4393, a carrier cannot stipulate against negligence which is a crime. *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282.

The purchase by the traveler of a ticket entitling him to a seat in a drawing-room car will not change the exemption of the railroad com-

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297; *Brown v. Eastern R. Co.* 11 Cush. 97; *Newell v. Smith*, 49 Vt. 255; *Ayres v. Western R. Corp.* 14 Blatchf. 9, Fed. Cas. No. 689.

And this, notwithstanding the face of the ticket or document refers the reader to the back.

Malone v. Boston & W. R. Corp. 12 Gray, 388, 74 Am. Dec. 598; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297.

The true issue is whether a certain special contract was entered into, and of this the proof required conforms to the ordinary rules of evidence.

American Transp. Co. v. Moore, 5 Mich. 368; *Cooper v. Berry*, 21 Ga. 526, 68 Am. Dec. 468; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183.

If a carrier claims that by contract his common-law liability has been limited, the burden is on him clearly to show it, and all such contracts will be interpreted most strictly against the carrier. Assent will not be presumed from facts and circumstances which do not clearly show an assent to such conditions in the contract on which the action is founded. In the absence of satisfactory proof showing that the shipper by assent and acquiescence has agreed to limit the liability of the carrier, the presumption is that he intended to insist on his common-law rights. Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve the carrier from his common-law liability.

Pittsburgh, C. & St. L. R. Co. v. Barrett,

pany. Ulrich v. New York C. & H. R. R. Co. 108 N. Y. 80, 2 Am. St. Rep. 369, 15 N. E. 60, Reversing 13 Daly, 129.

And the rule is no less applicable because the giving of the pass may have been a breach of the Federal statutes in reference to interstate traffic. *Duncan v. Maine C. R. Co.* 113 Fed. 508.

A passenger need not sign the contract of exemption. *Wells v. New York C. R. Co.* 24 N. Y. 181; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205.

A person receiving and using a ticket for free transportation is bound to see and know a condition printed on the back, requiring the user to assume all risk of injury from negligence. *Muldoon v. Seattle City R. Co.* 10 Wash. 311, 45 Am. St. Rep. 787, 38 Pac. 995.

One traveling with a friend by invitation, knowing that they are riding on a free pass held by the latter, although not seeing the pass or knowing its contents, is bound by a condition therein that the passengers traveling upon it assume all risk of injury. *Rogers v. Kennebec S. S. Co.* 86 Me. 261, 25 L. R. A. 491, 29 Atl. 1069.

For a discussion of the rights of person riding on pass or contract for free passage, see note to *Muldoon v. Seattle City R. Co.* 22 L. R. A. 794.

36 Ohio St. 448; *Rosenfeld v. Peoria, D. & E. R. Co.* 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; *Jennings v. Grand Trunk R. Co.* 127 N. Y. 438, 28 N. E. 394; *American Transp. Co. v. Moore*, 5 Mich. 368; *Edsall v. Camden & A. R. & Transp. Co.* 50 N. Y. 661.

So strong is this principle that in *Mauritz v. New York, L. E. & W. R. Co.* 23 Fed. 765, it is held that a passenger unable to read the language in which a ticket is printed and to whom no explanation is made by the agent is not bound by special terms and conditions, as it is not, *per se*, negligence in him not to know them.

See also *Blossom v. Dodd*, 43 N. Y. 269, 3 Am. Rep. 701; *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481.

The burden of proof lies on the carrier; and nothing short of an express stipulation, by parol or in writing, should be permitted to discharge him from duties which the law has annexed to his employment.

New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. 344, 12 L. ed. 465; *Michigan C. R. Co. v. Hale*, 6 Mich. 243.

Even those states which permit a common carrier to limit its liability to gratuitous passengers require an express contract to that effect by the passenger.

Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75. See also *Brewer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483, 21 Am. St. Rep. 647, 26 N. E. 324; *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 119, 51 Am. St. Rep. 206, 30 N. E. 424; *Coppock v. Long Island R. Co.* 89 Hun, 186, 34 N. Y. Supp. 1039.

Mr. Frederic D. McKenney argued the cause, and, with **Mr. John Spalding Flannery**, filed a brief for defendant in error:

Whether the passenger had actual knowledge of the conditions and their effect was immaterial.

Muldoon v. Seattle City R. Co. 10 Wash. 310, 45 Am. St. Rep. 787, 38 Pac. 995.

For, even though the conditions by their terms require that the party using the pass should sign the same, if he does not in fact sign, and yet uses the pass, he will be estopped to deny that he made the agreement specified thereon.

Quimby v. Boston & M. R. Co. 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205; *Illinois C. R. Co. v. Read*, 37 Ill. 486, 87 Am. Dec. 260.

Mr. Justice Brewer delivered the opinion of the court:

This was an action brought in the supreme court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one

of the coaches of the defendant, and caused, as alleged, by the negligence of the company. Her husband was joined with her as plaintiff, but no personal injury to him was alleged. The defense was that she was riding upon a free pass, which contained the following stipulation: "The person accepting and using this pass thereby assumes all risk of accident and damage to person and property, whether caused by negligence of the company's agents or otherwise." A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the court of appeals of the district (20 App. D. C. 500), and thereupon the case was brought here on error.

The contention of the plaintiffs is that the company was liable in any event for injuries caused by its negligence to one *rid-[449] ing on its trains; and further, that if it were not liable for such negligence to one accepting a free pass containing the stipulation quoted, it was liable to Mrs. Boering, because it did not appear that she knew or assented to the stipulation. The trial court submitted to the jury the question whether she was, in fact, a free passenger, and as the verdict was in favor of the defendant, that question of fact was settled in favor of the company. Under those circumstances the recent decision of this court in *Northern P. R. Co. v. Adams*, 192 U. S. 440, *ante*, 513, 24 Sup. Ct. Rep. 408, disposes of the first contention.

With reference to the second contention, the testimony of the two plaintiffs showed that the husband had attended to securing transportation; that he obtained passes for himself and wife, and that they had traveled on these passes before; that she knew the difference between passes (she called them "cards") and tickets, for on that day her husband had purchased a ticket for a friend who was traveling with them, and she had seen him use both ticket and passes. They further testified that she had not had either pass in her possession, and that her attention had not been called to the stipulation. Now, it is insisted that the exemption from liability for negligence results only from a contract therefor; that there can be no contract without knowledge of the terms thereof and assent thereto, and that she had neither knowledge of the stipulation nor assented to its terms; that therefore there was no contract between her and the company exempting it from liability for negligence. Counsel refer to several cases in which it has been held that stipulations in contracts for carriage of persons or things are not binding unless notice of those stipulations is brought home to such passenger or shipper. We do not propose in any manner to qualify

or limit the decisions of this court in respect to those matters. They are not pertinent to this case. They apply when a contract for carriage and shipment is shown. When that appears it is fitting that any claim of limitation of the ordinary liabilities arising from such a contract should not be recognized unless both parties to the *contract assent, and that assent is not to be presumed, but must be proved. Here there was no contract of carriage, and that fact was known to Mrs. Boering. She was simply given permission to ride in the coaches of the defendant. Accepting this privilege, she was bound to know the conditions thereof. She may not, through the intermediary of an agent, obtain a privilege—a mere license—and then plead that she did not know upon what conditions it was granted. A carrier is not bound, any more than any other owner of property, who grants a privilege, to hunt the party to whom the privilege is given, and see that all the conditions attached to it are made known. The duty rests rather upon the one receiving the privilege to ascertain those conditions. In *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205, a case of one traveling on a free pass, and in which the question of the assent of the holder of the pass was presented, the court said (p. 367, L. R. A. p. 847, N. E. p. 205):

"Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284, 10 N. E. 836; *Boston & M. R. Co. v. Chipman*, 146 Mass. 107, 14 N. E. 940."

So in *Muldoon v. Seattle City R. Co.* 10 Wash. 311, 313, 38 Pac. 995, 996:

"We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case from that where a carrier attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought, at least, to take the trouble to look on both sides of the paper before he attempts to use them."

See also *Griswold v. New York & N. E. R. Co.* 53 *Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Illinois C. R. Co. v. Read*, 37 Ill. 484, 193 U. S. U. S., Book 48.

510, 87 Am. Dec. 260. As was well observed by Circuit Judge Putnam in *Duncan v. Maine C. R. Co.* 113 Fed. 508, 514, in words quoted with approval by the court of appeals in this case:

"The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted."

We see no error in the record, and the judgment of the Court of Appeals is affirmed.

CHARLES GAGNON, *Appt.*,
v.

UNITED STATES and the Sioux and Cheyenne Indians.

(See S. C. Reporter's ed. 451-459.)

Judgments—entry nunc pro tunc where no record exists.

A judgment of naturalization which has never been recorded, or, if recorded, the record of which has been lost, cannot be entered by a common-law court *nunc pro tunc*, thirty-three years after its rendition, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered,—especially where the declaration of intention was made before another court, in another state, and the territorial court which is alleged to have entered the judgment has itself been abolished and a state court substituted in its place.

[No. 163.]

Argued February 29, 1904. Decided March 21, 1904.

APPEAL from the Court of Claims to review a judgment dismissing a petition filed under the Indian depredation act to recover the value of certain property taken by Indians in amity with the United States. *Affirmed.*

See same case below, 38 Ct. Cl. 10.

Statement by Mr. Justice **Brown**:

This was a petition filed in the court of claims in 1894 and amended in 1902, to recover the value of one half of certain property taken in 1866 from the firm of which the petitioner was a member by Indians then in amity with the United States.

The facts found in the case were substantially as follows: Charles Gagnon was a British subject. In March, 1858, he de-

NOTE.—On the entry of judgments *nunc pro tunc*—see note to *O'Sullivan v. People*, 20 L. R. A. 143.

clared before the district court of Woodbury county, Iowa, his intention to become a citizen of the United States. He *alleged that in 1863 he was admitted by the district court of Richardson county, in the territory of Nebraska, as a citizen of the United States, but no entry of this fact appeared in the records of that court for the year 1863.

It appeared Hosford & Gagnon, under which firm name they traded, owned horses and cattle of the aggregate value of \$15,500 and in 1866, without just cause or provocation on their part, Indians belonging to the defendant tribes, then in amity with the United States, took them away. Hosford filed his claim for one half of the amount and obtained judgment, which has been satisfied. Gagnon's claim was for the remaining half.

It further appeared that in the prosecution of his claim Gagnon failed to produce his certificate of naturalization, or a duly authenticated copy thereof. To meet the requirements of the law, providing that only citizens of the United States can recover under the Indian depredation act, Gagnon relied exclusively on a record of the district court for the first judicial district of the state of Nebraska (successor of the district court of the territory), purporting to enter *nunc pro tunc* a judgment of naturalization of the territorial court as of the date of September 25, 1863.

No paper, memorandum, or entry of any kind was found in the records of the court tending to show that a certificate of naturalization had been issued to Gagnon in that year. It also appeared that the persons who held the offices of judge and clerk of the territorial court in 1863 were both dead.

The record of the state court recited that it had been made to appear "by competent evidence" that the alleged application for naturalization had been granted by the territorial court, but that the "judgment of naturalization was never recorded, and if recorded, the record is lost and cannot be found in the records of this court, and it being legal and proper that said record should be supplied, and this court being willing that said error and omission be corrected, it is ordered and adjudged that said judgment so rendered by this court at its [453] *September term, 1863, be entered at large on the journal of this court as of the date when it should have been entered, to wit, on the 25th day of September, 1863, and that the clerk issue to the said Charles Gagnon the proper certificate of naturalization," etc.

It further appeared that on March 19, 1897, Gagnon's attorneys wrote the Attor-

ney General that application would be made to the district court of Richardson county, Nebraska, on March 29, 1897, "for restoration of certain lost records relative to the naturalization of said Gagnon."

Upon the facts thus found the court of claims decided that Gagnon was not a citizen of the United States at the time the depredation was committed, and the petition was dismissed. 38 Ct. Cl. 10. Thereupon an appeal was taken to this court.

Messrs. William E. Harvey and George A. King argued the cause, and, with *Mr. William B. King*, filed a brief for appellant:

Naturalization judgments are conclusive.

Spratt v. Spratt, 4 Pet. 393, 407, 408, 7 L. ed. 897, 902; *People ex rel. Smith v. Pease*, 30 Barb. 588; *People ex rel. Brackett v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254; *State ex rel. Kickbush v. Hoeflinger*, 35 Wis. 393; *United States v. Gleason*, 78 Fed. 396; *Campbell v. Gordon*, 6 Cranch, 176, 3 L. ed. 190; *State ex rel. Brown v. Macdonald*, 24 Minn. 48; *Re Christern*, 11 Jones & S. 523; *Re Coleman*, 15 Blatchf. 406, Fed. Cas. No. 2,980.

The validity of a judicial record cannot be questioned by a court not sitting in review, except upon the ground that the court lacked jurisdiction.

Voorhees v. Jackson ex dem. Bank of United States, 10 Pet. 449, 474, 475, 9 L. ed. 490; *Cooper v. Reynolds*, 10 Wall. 308, 315, 316, 19 L. ed. 931, 932; *Robinson v. Fair*, 128 U. S. 53, 32 L. ed. 415, 9 Sup. Ct. Rep. 30.

If the record was improperly supplied, it was not a matter of usurpation of jurisdiction, but error.

United States v. Arredondo, 6 Pet. 691, 709, 8 L. ed. 547, 554; *Rhode Island v. Massachusetts*, 12 Pet. 657, 718, 9 L. ed. 1233, 1258; *Ex parte Watkins*, 7 Pet. 568, 572, 8 L. ed. 786, 788.

Whether it be a question of the power of the court to supply a record of proceedings unrecorded by the clerk, or to supply a lost record, the authorities are equally clear.

Re Wight, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; *Gonzales v. Cunningham*, 164 U. S. 612, 623, 41 L. ed. 572, 576, 17 Sup. Ct. Rep. 182; *United States v. Vigil*, 10 Wall. 423, 19 L. ed. 954; *Blythe v. Hinckley*, 84 Fed. 228; *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; *Batch v. Shaw*, 7 Cush. 282; *Frink v. Frink*, 80 Am. Dec. 189, 43 N. H. 508; *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349; *State v. Major*, 38 La. Ann. 642; *Hershey v. Baer*, 45 Ark. 240; *State v. King*, 27 N. C. (5 Fred. L.) 203; *Parsons v. McBride*, 49 N. C. (4 Jones L.) 99; *Perry v. Adams*, 83 N.

C. 266; *Taylor v. McElrath*, 35 Ala. 330; *Souvais v. Leavitt*, 53 Mich. 577, 19 N. W. 261; *Van Etten v. Test*, 49 Neb. 725, 68 N. W. 1023.

No time limit can be drawn upon the exercise of the power.

United States v. Vigil, 10 Wall. 423, 19 L. ed. 954; *Balch v. Shaw*, 7 Cush. 282; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189; *Whiting v. Equitable Life Assur. Soc.* 8 C. C. A. 558, 13 U. S. App. 597, 60 Fed. 197; *Fuller v. Stebbins*, 49 Iowa, 377; *People ex rel. Schmidt v. Arapahoe County Ct.* 9 Colo. App. 41, 47 Pac. 471; *Re Limerick*, 18 Me. 187; *Odell v. Reynolds*, 17 C. C. A. 317, 37 U. S. App. 447, 70 Fed. 656; *Rugg v. Parker*, 7 Gray, 172; *Lawrence v. Richmond*, 1 Jac. & W. 241; *Taylor v. McElrath*, 35 Ala. 330; *Parsons v. McBride*, 49 N. C. (4 Jones L.) 99.

The record may be restored upon any evidence.

United States v. Vigil, 10 Wall. 423, 19 L. ed. 954; *Parsons v. McBride*, 49 N. C. (4 Jones L.) 99; *Taylor v. McElrath*, 35 Ala. 330; *Cleghorn v. Johnson*, 69 Ga. 369; *Balch v. Shaw*, 7 Cush. 282; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189; *Rugg v. Parker*, 7 Gray, 172; *Parker v. Rugg*, 9 Gray, 209; *Re Limerick*, 18 Me. 187; *Sprague v. Litherberry*, 4 McLean, 442, Fed. Cas. No. 13,251.

Assistant Attorney General **Thompson** argued the cause, and, with Mr. Harry Peyton, filed a brief for appellees.

A judgment cannot be rendered *nunc pro tunc*, where there is no record to amend, and no memorial paper or memoranda of what transpired at the time.

Lynch v. Reynolds, 6 Bush, 547.

There must be a basis for an order *nunc pro tunc*, in that there must be something in the record to amend by.

Bank of Hamilton v. Dudley, 2 Pet. 522, 7 L. ed. 506; *Mitchell v. Lincoln*, 78 Ind. 531; *Bilansky v. State*, 3 Minn. 427, Gil. 313; *Coughran v. Gutehus*, 18 Ill. 390; *Lynch v. Reynolds*, 6 Bush, 547; *Shackelford v. Levy*, 63 Miss. 128; *Burney v. Boyett*, 1 How. Miss. 39; 17 Enc. of Pl. & Pr. p. 930; *Cromwell v. Bank of Pittsburg*, 2 Wall. Jr. 586, Fed. Cas. No. 3,409; *Russell v. McDougall*, 3 Smedes & M. 234; *Moody v. Grant*, 41 Miss. 565; *Smith v. Hood*, 25 Pa. 218, 64 Am. Dec. 692; *Culver v. Cogle*, 165 Ill. 417, 46 N. E. 242; *Boyd v. Blaisdell*, 15 Ind. 73; *Albers v. Whitney*, 1 Story, 310, Fed. Cas. No. 137; *State ex rel. Graves v. Primm*, 61 Mo. 166.

The court wherein the judgment of a sister state is introduced may always inquire into the question of the jurisdiction of the court in which the judgment was rendered over the subject-matter or the parties af-

ected by it, and into the facts necessary to give such jurisdiction.

Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

Mr. Justice **Brown** delivered the opinion of the court:

This case raises the simple question whether thirty-three years after a judgment naturalizing an alien is alleged to have been rendered but not recorded, or, if recorded, the record lost, a common-law court has jurisdiction to enter such judgment of naturalization *nunc pro tunc*, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered. If there be no jurisdiction to enter such judgment, it may be attacked collaterally.

The power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice, and was recognized by this court in *Re Wight*, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; *Gonzales v. Cunningham*, 164 U. S. 612, 623, 41 L. ed. 572, 576, 17 Sup. Ct. Rep. 182, and *United States v. Vigil*, 10 Wall. 423, 19 L. ed. 954. It is also conferred upon courts of the United States by Rev. Stat. §§ 899, 900, and 901 (U. S. Comp. Stat. 1901, p. 675). This power, however, must be distinguished from that disensed by the court in *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797, wherein we held that the authority of the court to set aside or modify an existing judgment or order ceased with the expiration of the term, and from that time all final judgments and decrees passed beyond its control, and that if such errors existed they could only be corrected by writ of error or appeal to a superior tribunal. An exception was there made of certain mistakes of fact not put in issue or passed upon, such as that a party died before judgment, or was a married woman, or was an infant and no guardian appeared or was appointed, or that there was error in the process through the default of the clerk. In the Federal courts the power to amend is given in general language in the final clause of Rev. Stat. § 954 (U. S. Comp. Stat. 1901, p. 696), which declares that such courts "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." As above indicated, however, this power has been restricted to amendments made during the progress of the case, or, at least, during the continuance of the term in which the judgment is rendered.

This power to amend, too, must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. If a house or vessel, for instance, be burned or otherwise lost, it can only be rebuilt, and the word "repair" is wholly inapplicable to its subsequent reconstruction. The word "repair," as the word "amend," contemplates an existing structure which has become imperfect by reason of the action of the elements, or otherwise. In the cases of vessels particularly, this distinction is one which cannot be ignored, as it lies at the basis of an important diversity of jurisdiction between the common-law and maritime courts.

[458] The power to recreate a record, no evidence of which exists, *has been the subject of much discussion in the courts, and the weight of authority is decidedly against the existence of such power. We have examined a large number of authorities upon this point, and while they do not altogether harmonize in their conclusions, the practice in some states being much more rigid than in others, we have found none which supports the contention that a record may be created to take the place of one of which no written memorandum was made or entered at the time the original judgment was supposed to have been rendered. The following cases contain instructive discussions of the principles involved, but an epitome of them would subserve no useful purpose: *Bilansky v. Minnesota*, 3 Minn. 427, Gil. 313; *Schoonover v. Reed*, 65 Ind. 313; *Smith v. Hood*, 25 Pa. 218, 64 Am. Dec. 692; *State ex rel. Graves v. Primm*, 61 Mo. 166; *Brown v. Coward*, 3 Hill, 4; *Lynch v. Reynolds*, 69 Bush, 547; *Coughran v. Gutcheus*, 18 Ill. 390; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189; *Rugg v. Parker*, 7 Gray, 172; *Balch v. Shaw*, 7 Cush. 282.

The power of the court to amend existing records is also considered at length in the following cases from the Federal courts, *Filghman v. Werk*, 39 Fed. 680; *Whiting v. Equitable Life Assur. Soc.* 8 C. C. A. 558, 13 U. S. App. 597, 60 Fed. 197, 200; *Odell v. Reynolds*, 17 C. C. A. 317, 37 U. S. App. 447, 70 Fed. 656, 659; *Blythe v. Hinckley*, 84 Fed. 228, 244.

It may be gathered from these cases that, if a memorandum be entered upon the cal-

endar that a certain document has been filed, such document, if lost, may be supplied by a copy in the hands of counsel; or where a judgment or order has been entered upon the calendar, which does not appear upon the journal, the court may order a new one to be entered *nunc pro tunc*. In such cases there is often a memorandum of some kind entered upon the calendar, or found in the files, and there is no impropriety in ascertaining the fact even by parol evidence and supplying the missing portion of the records. But the exercise of a power to recreate a record where no memorandum whatever exists of such record is evidently a dangerous one, and, although such power may have been occasionally *given by the legislature in cases of [459] overwhelming necessity, as, for instance, by the "lost record act" passed by the general assembly of Illinois after the great fire in Chicago in 1870 (Laws of Illinois, 1871-2, p. 650), such power has not been hitherto supposed to be inherent in courts of general jurisdiction. As the evidence upon which such restoration is made cannot be inquired into, if the jurisdiction to recreate the record exists, it might well happen that, upon the testimony of a single interested witness, the court would order a new record to be entered after a lapse, as in this case, of over thirty years, and when the judge and clerk have both died, and there was no possibility of contradicting the testimony of such single witness.

Additional complications may also be properly referred to in this case in the fact that the declaration of intention was made before another court, in another state, and that the territorial court which is alleged to have entered the judgment of naturalization had itself been abolished and a state court substituted in its place. Did the jurisdiction exist to make this order of naturalization, there is nothing to prevent any person from applying to any competent court for a similar judgment of naturalization, or even a judgment for damages, and to have the same entered *nunc pro tunc* as of any date it would be for his interest to have it rendered. It is true that in this case notice was given to the Attorney General by the petitioner of his proposed application to the court for the restoration of "certain lost records," but if the jurisdiction to enter this judgment *nunc pro tunc* did not exist, it could not be given by this notice.

As there was no competent evidence of the citizenship of the petitioner, there was no error in the action of the court below, and its judgment is therefore *affirmed*.

[460]*COSMOPOLITAN MINING COMPANY,
Plff. in Err.,
v.

THOMAS F. WALSH.

(See S. C. Reporter's ed. 460-473.)

Appcal—direct review of circuit court decree in Federal Supreme Court—case involving construction or application of the Federal Constitution.

1. The record, and not a certificate of the trial judge, furnishes the basis for determining whether the suit is one which involves the construction or application of the Constitution of the United States, within the meaning of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, authorizing the taking of appeals or writs of error in such cases from district or circuit courts of the United States direct to the Supreme Court.
2. The contention by a foreign corporation that the rendition of certain judgments in the state courts, sought to be introduced in evidence against it, was without due process of law, does not make the suit one involving the construction or application of the Federal Constitution, within the meaning of the provisions of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, for a direct review of a Federal circuit court judgment in the Supreme Court, where this claim is based solely upon the theory that, under the circumstances, the service of process in the suits in the state courts upon the corporation's designated agent was unauthorized either by the state Constitution and laws or the principles of general jurisprudence.

[No. 134.]

Argued January 20, 21, 1904. Decided March 21, 1904.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment entered on a verdict directed for defendant in a suit to recover possession of real property. *Dismissed* for want of jurisdiction.

Statement by Mr. Justice **White**:

The Cosmopolitan Mining Company was incorporated under the laws of the state of Maine in June, 1884, for the purposes of "buying, selling, leasing, working, developing, and improving gold, silver, copper, or other mines, and purchasing and holding such other property as may be necessary or convenient." Soon after such incorporation the mining company—as we shall hereafter

call the plaintiff in error—became the owner of mining claims, consisting of lodes and millsites, situated in the county of Ouray, Colorado.

The Constitution of Colorado (art. 15, § 10) provided that "no foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served." The statutes of the state required that before *a foreign corporation should be [461] permitted to do any business in Colorado it should make a certificate, signed by its president and secretary, duly acknowledged, and file the same with the secretary of state and in the office of the recorder of deeds in each county in which business was to be carried on, designating the principal place where the business of such corporation was to be conducted in the state, and also naming an authorized agent or agents in the state, residing in the principal place of business of the corporation, upon whom process might be served. Mills' Anno. Stat. § 499. In compliance with the foregoing requirements the mining company filed on February 10, 1886, a certificate in the office of the secretary of state of Colorado and in the office of each of the recorders of Ouray and Cumberland counties, designating the county of Ouray as the principal place where the business of the corporation was to be carried on, and naming J. M. Jardine as the agent upon whom process might be served.

In the months of April and May, 1895, actions were brought in the county court of Ouray county by the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell, and William C. Fulton, to recover from the mining company sums aggregating about \$1,250, alleged to be due for labor performed and merchandise furnished to the mining company in the state of Colorado in the years 1893 and 1894. In each complaint it was alleged that the mining company was a corporation "duly incorporated and organized under and by virtue of the laws of the state of Maine, with its principal office in the state of Colorado, in the city of Ouray, in said Ouray county." The Begole action was first instituted, and an attachment was issued and levied upon the real property of the mining company in Ouray county, being the mining claims heretofore referred to. In the complaints in the Ashenfelter and Fennell actions the fact of the levy of an attachment in the Begole case was recited, and the court was asked to make Ashenfelter and Fennell parties plaintiff in that action, and to give them like remedies against the mining *company "as the law gives to [462] the original plaintiff in said action." Writs of attachment were also issued in the Ash-

NOTE.—On direct review by the United States Supreme Court of circuit or district court judgments or decrees under the circuit court of appeals act—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

enfelter and Fennell actions, and were levied in the same manner as was the writ of attachment in the Begole case. In each of the three actions last referred to a copy of the writ of attachment and of the summons and complaint were served in San Miguel county, Colorado, upon J. M. Jardine, described in the return of the sheriff as the "duly authorized agent for the within-named company" (the Cosmopolitan Mining Company). The complaint in the Fulton case contained no reference to the levy of an attachment in the Begole action, and the plaintiff did not ask to be made a party to action. Although a writ of attachment was issued in the Fulton case, it was not shown to have been levied. A copy, however, of the writ, as also of the summons and complaint, was served upon Jardine, described as in the returns in the other cases.

Judgments were entered in each of these county court actions, and in each judgment there was embodied an order "that the attachment herein be sustained, and a special execution issue." On the files, in the Begole action, was placed what was termed a "pro rating order," entitled in the Begole action, and therein was recited the recovery of judgments in the Ashenfelter, Fennell, and Fulton actions, and that it appeared to the court that property belonging to the defendant company "was attached for the purpose of satisfying such judgments as might be obtained by the several plaintiffs against the said company." There was also contained therein direction to the sheriff of Ouray county "to sell the above-described property or so much thereof as shall be necessary to satisfy said several judgments, together with the costs and interest thereon." Special writs of execution were issued, and the attached property was sold to one J. C. Marsh, as trustee for the several judgment creditors. In each case it was stated on the return on the writ of execution that the particular judgment had been fully satisfied.

[463] Marsh received a certificate of purchase, and afterwards assigned the same to Stephen A. Osborn, and on May 25, 1896, the period of redemption having expired, a sheriff's deed was executed and delivered to Osborn. On June 16, 1896, Osborn conveyed the property to Walsh, the defendant in error herein.

On March 1, 1897, Walsh brought an action against the mining company and Jardine in a district court of Ouray county, Colorado, to quiet his title to the property thus acquired. It was alleged that the mining company was a corporation of the state of Maine, organized for the purpose, among others, of carrying on the mining business in the county of Ouray and state of Colo-

rado, and that by certificate, dated December 16, 1885, and recorded January 21, 1886, Jardine had been "duly appointed as the authorized agent of the defendant company, upon whom process might be served." The proceedings in the Begole, Ashenfelter, and Fennell actions were set forth, as also the acquisition by Walsh under the same title to the property in question. It was averred that the defendants claimed an interest in the property and it was prayed that they might be required to set up such claims, and that it might be adjudged that the defendants did not have any interest in the property. Return was made of service of the summons and complaint on Jardine individually, and on the mining company, "by delivering to John M. Jardine, the duly authorized agent of the defendant company, and designated by it as the person upon whom service would be served." Jardine filed a disclaimer of interest, and judgment was entered against the mining company by default. In that judgment it was recited that entry of the default of the mining company had been made "for the failure of the said defendant to plead as required by law, after due service of summons upon it in manner and form as by law provided;" that the plaintiff had been sworn as a witness in the case; and that the court had heard the testimony given by the plaintiff, and inspected the records, deeds, and documents offered in evidence. After next finding the facts to be as they were averred in the complaint of Walsh, the court decreed as follows:

"It is, therefore, considered, adjudged, [464] and decreed by the court that the said defendants have not, nor have either of them, any right, title, interest, claim, or demand in or to any part of the premises above described, and that the pretended claim of the defendant, The Cosmopolitan Mining Company, in and to said premises is wholly without right or justification in law. That the plaintiff is the owner and in the possession of the premises and mining claims above described, and entitled to the quiet and peaceable possession of said mining claims and each of them."

The present action was brought on November 3, 1900, in the circuit court of the United States for the district of Colorado by the mining company, to recover possession of the real property purported to have been sold under the judgments in the county court actions. Diversity of citizenship of the parties was alleged in the complaint, and the property in controversy was averred to exceed \$2,000 in value. It was further charged that the plaintiff had been ousted of the possession of the property claimed by it on May 25, 1896, the date of the sher-

iff's deed, under the sales on execution. The answer contained a general denial, and special defenses, one of which set out the various proceedings in the county court actions brought by Begole *et al.* and the other proceedings by which title to the property in dispute was claimed to be vested in Walsh. The judgment rendered in the action to quiet title was also specially pleaded, and there were averments of facts alleged to constitute estoppel. A replication and amended replication were filed to this answer. It was alleged in substance that prior to the service made upon Jardine, in the actions referred to in the answer of Walsh, the mining company was not doing business in the state of Colorado, and that in those actions no service of process had been made upon it, hence the Colorado courts acted without jurisdiction, and consequently "the plaintiff has been and is being deprived of its property, viz., the property sought to be recovered in this action, without notice, hearing, [465] opportunity to be heard, or due *process of law, and in violation of the 14th Amendment to the Constitution of the United States."

The action was tried to a jury. The case in chief for the mining company consisted of documentary evidence, exhibiting title in the mining company to the property in controversy at the date of the alleged ouster. The evidence for the defendant consisted of a certified copy of the statutory designation of Jardine as agent of the mining company, the judgment records in the various actions relied upon, tax deeds covering two of the millsites enumerated in the complaint, and oral testimony. Objection was made to the admission in evidence of the judgment records substantially upon the following grounds: 1. That the records of the judgments in the county court actions did not on their face show the appointment of Jardine as the agent of the mining company, and therefore there was nothing in the records to show that service had been made upon a proper agent of the corporation. 2. That even if the fact of the statutory designation by the corporation of Jardine as its agent could be incorporated into the records and considered, as it was not shown that at the time of the service the corporation was doing business in the state, jurisdiction over the company was not acquired by the service upon Jardine. 3. That in any event, as the service of process in the county court actions had been had upon Jardine in another county than the one mentioned in the statutory appointment as the place of residence of Jardine, the service was void. 4. That as there was then no evidence of personal service on the corporation through its agent, the mere levy of a writ of attachment

was insufficient to confer jurisdiction and to authorize the court to enter judgment and direct a sale of the attached property. These objections, it was insisted, established that the judgments recovered against the corporation were rendered without due process of law and in violation of the Constitution of the United States. The offer of the judgment record in the action to quiet title was also objected to because it was not shown that the company was doing business in Colorado at the time *of service of Jar-[466] dine, and therefore the service on him was void; and further, because the court in its judgment or decree did not purport to direct a conveyance, but simply attempted, by such judgment or decree, to establish title. Treating the actions in the county court as being *in personam*, and not *in rem*, the objections were finally overruled by the trial judge, and all the judgment records were admitted in evidence except the record in the Fulton case. The judgment records in the county court actions were admitted on the ground that it sufficiently appeared from the records that the mining corporation at the time the actions were brought was doing business in the state of Colorado. The record in the Fulton case was excluded because of a deficiency in this particular. The court admitted the records in the action to quiet title because it appeared that the mining company was alleged in the complaint not only to have been authorized to carry on business in the state of Colorado, but to have been formed for that purpose, and its appointment of a statutory agent was a consent to be served through such agent.

Following the introduction of these records, and in support of the defense of estoppel, evidence was offered on behalf of the defendant tending to show the expenditure made by him in connection with the property subsequent to his acquisition of title, but the court held the same to be inadmissible.

In rebuttal, the plaintiff offered in evidence from the record in the Begole action a writing signed by Jardine, in effect notifying the court that he did not reside in Ouray county, and disclaiming being an agent of the mining company, and also asking the court to quash the service made on him of the summons and writ of attachment. The paper was not admitted in evidence and an exception was taken to its exclusion. Two witnesses were next examined on behalf of the mining company for the purpose of establishing that the company maintained no office and was not doing business in the county of Ouray at the time of the service of process in the actions referred to in the answer. No attempt, however, was

[467]made to *prove that there had been an express revocation of the statutory designation of Jardine as agent to receive service of process. The testimony of the two witnesses above referred to tended to show that the mining company had never any established office in Ouray other than that of its statutory agent, while he resided in Ouray; that the mines of the company were situated some six or seven miles from Ouray, and had been worked up to a short time before the bringing of the actions which resulted in a sale of the property. But one witness—the sheriff of the county—testified concerning the operation of the mines, and he was not shown to possess definite knowledge as to when operations ceased. No testimony was introduced to show whether the suspension of operations, if entire, was intended to be permanent or was merely temporary. The court overruled a motion on behalf of the defendant to strike out the testimony of these witnesses, but in doing so observed that it would instruct in view of the testimony.

Thereupon counsel for the plaintiff asked the court to direct the jury to find for the plaintiff except as to two millsites which were covered by tax deeds to Walsh, and to the overruling of this motion the mining company excepted. The court then, of its own motion, instructed the jury as follows:

"Gentlemen of the jury: In the view the court takes of this case, it becomes a question of law, and the court will instruct you to find a verdict in favor of the defendant, and that the defendant is entitled to possession of the demanded premises."

On the verdict, and after overruling a motion for a new trial, judgment was entered. A writ of error from this court was thereupon allowed by the trial judge, who made and signed a certificate reciting "that in the pleadings in this action as well as in the rulings of this court in admitting and refusing to admit evidence and in giving and refusing to give instructions to the jury, as set forth in the assignment of errors hereto annexed, there were involved the application and construction of the Constitution of the United States, viz., of the part of the [468]14th *Amendment to the same which provides for due process of law."

Mr. Carlton M. Bliss argued the cause, and, with Messrs. William H. Moody, John A. Perry, George C. Preston, and Hurlburt, Jones, & Cabot, filed a brief for plaintiff in error.

Messrs. Charles S. Thomas and Charles J. Hughes, Jr., argued the cause, and, with Messrs. Gerald Hughes, William H. Bryant, Harry H. Lee, William Story,

and William Story, Jr., filed a brief for defendant in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

We are asked in this case to review directly the judgment of a circuit court of the United States, and our right to do so, if at all, depends on that clause of § 5 of the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549], which authorizes the taking of appeals or writs of error from district or circuit courts direct to this court "in any case that involves the construction or application of the Constitution of the United States." Of course, if the case at bar does not really involve the construction or application of the Constitution of the United States, in the sense in which that phrase is employed in the judiciary act of 1891, we are precluded from examining the merits upon this writ of error. In order to determine whether the case is one which should have gone to the circuit court of appeals, and not have been brought directly to this court, we must look into the record, without regard to the certificate given by the trial judge. Indeed, we know of no authority for the making of such certificate.

Before coming to the record, however, we shall briefly advert to the legal principles which must control.

In *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63, the record exhibited the following controversy: Stockholders of the railway company filed a bill in equity in a circuit court of the *United States, praying, among other [469] relief, the setting aside of a certain decree of foreclosure and sale, basing the claim upon the grounds of collusion and fraud and want of jurisdiction in the court which had entered the decree. A final decree was entered in the cause dismissing the bill and appeals were allowed, both to the circuit court of appeals and to this court. The appeal to this court was based upon the contention that the cause involved not only the question of the jurisdiction of the court below, but also the question of the construction or application of the Constitution of the United States. The appeal was dismissed, and in the course of the opinion, speaking through Mr. Chief Justice Fuller, it was said (pp. 179, 181, L. ed. pp. 1043, 1044, Sup. Ct. Rep. pp. 65, 66):

"The judiciary act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the circuit court of appeals therein established, designated the classes of cases in respect of which each of

these courts was to have final jurisdiction (the judgments of the latter being subject to the supervisory power of this court through the writ of certiorari as provided), and the act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court.

"It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors, and jurisdictional defects in the foreclosure proceedings, and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the circuit court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree the circuit court decided no question of the construction or the application of the [470] Constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained."

In *Re Lennon*, decided at the same term (150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123), the construction given in the *Carey Case* to the provisions of § 5 of the judiciary act of 1891 was reiterated. In that case an appeal had been taken directly to this court from an order of the circuit court of the United States denying an application for a writ of habeas corpus sued out to obtain relief from an imprisonment upon a conviction for contempt. The jurisdiction of the committing court over the cause in which the order of commitment had been made, as well as over the person of the party sentenced for contempt, was assailed. The direct appeal to this court, however, was dismissed for want of jurisdiction. After pointing out that the objection for want of jurisdiction in the court below was without any foundation, the court, speaking through Mr. Chief Justice Fuller, said (p. 400, L. ed. p. 1122, Sup. Ct. Rep. p. 126):

"Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty, without due process of law. The petition does not proceed on any such theory, but en-

tirely on the ground of want of jurisdiction in the prior case over the subject-matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the circuit court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the circuit court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the Constitution was *involved as [471] a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner."

It is obvious, under the construction of the judiciary act of 1891, announced in the cases just referred to, that this cause does not involve the construction or application of the Constitution of the United States, and therefore was not entitled to be brought directly to this court from the circuit court of the United States. When the proceedings at the trial are taken into view it is clear that the contentions which were urged did not require the construction of the Constitution of the United States, but simply called for the construction of the Constitution and laws of the state of Colorado or the application of the principles of general law. The real contention of the mining company was that, under the laws of Colorado, it was essential to the legality of the service upon its alleged agent that the corporation, when the service was made, should have been doing business within the state, and that the agent should have been resident within the county named in the appointment as his place of residence. It was not disputed that, as authorized by its charter, the mining company had bought mines within the state of Colorado; that it had thereafter appointed, as required by the laws of Colorado, an agent within the state upon whom service of process might be made, and that there had been no direct revocation of such agency. Moreover, it was not disputed that the mining company had worked the mines in question up to a short time before the bringing of the actions in the county court of Ouray county, and that the liabilities enforced in those actions were contracted in Colorado and grew out of the operation of the mines in question. No evidence was introduced tending to show

that the company had permanently ceased the operation of its mines in Colorado and withdrawn from that state; and the undisputed fact was that when the county court actions were brought it still owned the property which it had acquired as authorized by its charter.

No claim was made that the sale of the [472] property under the *executions in the county court actions was void under the Constitution of the United States because wanting in due process of law, if the service on the agent was valid under the law of Colorado or the principles of general law applicable to the facts disclosed at the trial. The primary and fundamental contention of the mining company was therefore this and nothing more: that under the circumstances disclosed the service upon the statutory agent was unauthorized, either by the law of Colorado or the principles of general law: and hence that it had not lost its title to the property. The claim asserted under the Constitution of the United States was, therefore, merely conjectural, and amounted to this only, that if, under the law of Colorado or under the general law, the service on the alleged agent was void, that it would be a violation of the Constitution of the United States to give effect to judgments based on such service. Not only the statement we have made from the record, but the argument at bar, makes this a demonstration. Thus, in the discussion at bar, it was stated that it was not claimed that the state of Colorado could not, without a violation of the Constitution of the United States, have exacted that the authority conferred by a foreign corporation upon an agent to receive service of process should continue for the purpose of the enforcement of obligations contracted by the corporation, although the corporation had ceased to do business within the state; but that, as the Colorado law, when properly construed, did not so provide, therefore the service was invalid, and the sale of the property of the mining company, based on such service, was void. This, however, as we have already shown, amounts but to the concession that the substantial controversy which the case presented involved the mere determination of what was the law of Colorado on the subject. The rulings of the court below as to the admissibility of evidence and its final direction of a verdict involved necessarily deciding that the service upon the agent was valid by the law of Colorado, or the principles of general law applicable thereto, and its action in so doing in nowise involved [473] the construction *or application of any pro-

vision of the Constitution of the United States.

Writ of error dismissed.

Mr. Justice **Brewer** is of opinion that this court has jurisdiction, that the judgment of the Circuit Court was right, and should be affirmed.

CHARLES A. TINKER, *Plff. in Err.*,
v.

FREDERICK L. COLWELL.

(See S. C. Reporter's ed. 473-490.)

Bankruptcy—effect of discharge—judgment for damages for criminal conversation.

A judgment for damages for criminal conversation is one recovered in an action "for wilful and malicious injuries to the person or property of another" within the meaning of the provision of the bankruptcy act of July 1, 1898 (30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. 1901, p. 3428), § 17, subd. 2, excepting judgments recovered in such actions from the operation of a discharge in bankruptcy.

[No. 160.]

Argued February 26, 1904. Decided March 21, 1904.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered in pursuance of an affirmance by the Court of Appeals of that State of an order of the Appellate Division of the Supreme Court for the Third Department, which had in turn affirmed an order of the Special Term of the Supreme Court for the County of New York, denying the application of a bankrupt for an order discharging of record a judgment recovered against him in an action for criminal conversation. *Affirmed.*

See same case below in Appellate Division of Supreme Court, 65 App. Div. 20, 72 N. Y. Supp. 505. In Court of Appeals, 169 N. Y. 531, 58 L. R. A. 765, 62 N. E. 668.

Statement by Mr. Justice **Peckham**:

The plaintiff in error applied to the supreme court of the state of New York for an order discharging of record a certain judgment of that court obtained against him by the defendant in error. The application was denied (35 Misc. 330, 6 Am. Bankr. Rep. 434, 71 N. Y. Supp. 952), and the order denying it was affirmed by the appellate division of the supreme court (65 App. Div. 20, 72 N. Y. Supp. 505), and subsequently by the court of appeals (169 N. Y. 531, 58 L. R. A. 765, 62 N. E. 668), and

the latter court thereupon remitted the record to the supreme court, where it remained at the time plaintiff in error sued out this writ to review the order of the court of appeals.

The application was made under § 1268 of the New York Code, which provides that [474] any time after one year has elapsed since a bankrupt was discharged from his debts, pursuant to the act of Congress relating to bankruptcy, he may apply, after notice to the plaintiff in the judgment, and upon proof of his discharge, to the court in which the judgment was rendered against him for an order directing the judgment to be canceled and discharged of record. The section further provides that if it appear on hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing the judgment to be canceled and discharged of record.

The application in this proceeding was made upon a petition by plaintiff in error, which showed that Frederick L. Colwell, the plaintiff in the action, had, on February 9, 1897, recovered a judgment for \$50,000 and costs against the petitioner for damages for his criminal conversation with the plaintiff's wife; that the judgment was duly docketed in the county of New York on that day; that on September 13, 1899, petitioner filed his petition in the district court of the United States for the southern district of New York, praying that he might be adjudged a bankrupt, and on that day he was adjudged a bankrupt by the district court, pursuant to the act of Congress relating to bankruptcy; on February 2, 1900, the petitioner was discharged by the district court of the United States from all debts and claims which were made provable by the act of Congress against his estate, and which existed on September 13, 1899; that the judgment above mentioned was not recovered against him for a wilful and malicious injury to the person or property of the plaintiff, within the meaning of the act of Congress, and that, by virtue of the discharge in bankruptcy, the petitioner had been duly released from that judgment.

In granting the discharge under the bankrupt act (which was opposed by the plaintiff in the judgment), the district judge refused to pass upon the question whether the judgment was thereby released, although it appears that he thought it was. 99 Fed. 79.

Mr. Nelson Smith argued the cause and filed a brief for plaintiff in error:

The burden is on the defendant in error to show that his debt falls within the exceptions.

United States v. Dickson, 15 Pet. 141, 165, 193 U. S.

10 L. ed. 689, 698; *Spiers v. Parker*, 1 T. R. 141; 1 Sedgw. Stat. & Const. Law, 2d ed. 50; Potter's Dwarrr. Stat. 118, 119.

The debts excepted are judgments recovered in actions for fraud or for wilful and malicious injuries to the person or property of another. This means that the gravamen of the action must be for fraud or for malice, as the case may be.

Burnham v. Pidcock, 58 App. Div. 273, 68 N. Y. Supp. 1007, 5 Am. Bankr. Rep. 590; *Re Rhutassel*, 2 Am. Bankr. Rep. 697, 96 Fed. 597; *Hargadine-McKiltrick Dry Goods Co. v. Hudson*, 6 Am. Bankr. Rep. 657, 111 Fed. 361.

The gravamen of the action in which this judgment was recovered was not for a wilful and malicious injury to the person or property of the defendant in error; but, on the contrary, was for the violation of his marital rights,—the loss of *consortium* with his wife.

2 Greenl. Ev. § 51; *Wcedon v. Timbrell*, 5 T. R. 357; *Burnes v. Allen*, 1 Abb. App. Dec. 111, 117; *Re Tinker*, 99 Fed. 80; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Chambers v. Caulfield*, 6 East, 244; *Winter v. Henn*, 4 Car. & P. 494; *Harvey v. Watson*, 7 Mann. & G. 644; *Bartelot v. Hawker*, Peake N. P. Cas. 7; *Wilton v. Webster*, 7 Car. & P. 198.

Malice is not an ingredient of an action for criminal conversation. There is no precedent for such an allegation in either the pleadings or the proofs in such cases.

1 Saunders, Pl. & Ev. 5th Am. ed. 874-881; Abb. Tr. Ev. 2d ed. 863, 867.

The only evidence required to support such an action is proof of the plaintiff's marriage, and the defendant's sexual intercourse with his wife.

Bedan v. Turney, 99 Cal. 649, 34 Pac. 442.

An action for criminal conversation will lie, though the defendant did not know that the woman with whom he conversed in that way was the plaintiff's wife, or was married.

Wales v. Miner, 89 Ind. 118.

The strict construction of the exceptions of the statute requires that the fraud or malice be actual fraud or actual malice, and not fraud or malice implied by law. So held in the construction of the word "fraud" in the bankrupt law of 1867.

Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576; *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248, 5 Sup. Ct. Rep. 1038.

This conversation by the plaintiff in error with the wife of the defendant in error was not an injury to his person. Nothing short of an immediate physical touching can be considered a personal injury.

Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L. R. A. 781, 56 Am. St. Rep. 604, 45 N.

E. 354; *Victorian R. Co. v. Coultas*, L. R. 13 App. Cas. 222; *Lehman v. Brooklyn City R. Co.* 47 Hun, 355.

The husband's right of *consortium* is not property or a property right. An action for the loss of it does not survive and is not assignable.

Cregin v. Brooklyn Crosstown R. Co. 83 N. Y. 595, 38 Am. Rep. 474.

Mr. Thomas McAdam argued the cause, and, with Mr. George Newell Hamlin, filed a brief for defendant in error:

Each one of the cases enumerated in subd. 2 of § 17 of the bankruptcy act is exactly the same in meaning; that is to say, they all involve a wilful or intentional injury to the person or property.

Re Blumberg, 1 Am. B. R. 634, 94 Fed. 476.

The word "injury" as here used can only mean the invasion of a legal right of another; in other words, a wrong done to a person in violation of his right; and such is its common interpretation.

Parker v. Griswold, 17 Conn. 302, 42 Am. Dec. 739; *Wightman v. Devere*, 33 Wis. 575; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 561, 4 Am. St. Rep. 659, 13 Atl. 690; *Northern R. Co. v. Carpentier*, 13 How. Pr. 222; *Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 781.

Under the general interpretation of the word "injury," it means any legal wrong which will give a cause of action for damages to the one whose rights, person, or property are injured thereby.

Ibid.

The word "injury" is of broader significance than the expression "defraud."

United States v. Taintor, 11 Blatchf. 378, Fed. Cas. No. 16,428; *United States v. Harper*, 33 Fed. 471.

Rights of persons are classified as absolute and relative, and these will include all personal rights for the violation of which the law grants a remedy.

Delamater v. Russell, 4 How. Pr. 234; 3 Bl. Com. pp. 118, 119, 139; 1 Chitty, Pl. 137; 1 Kent, Com. 11th ed. 587.

It follows that, if criminal conversation be not an injury to property, it is an invasion either of an absolute personal right or of a relative personal right. If it be an invasion of an absolute personal right, then there can be no question but that it is "injury to the person" within the narrowest meaning of that term. But being also an invasion of a relative personal right, it is also an injury to the person, because an injury to the person is merely an invasion of any and all personal rights.

Authority is not wanting for this conclusion. It has been held that, under a statute conferring jurisdiction in actions for in-

juries to persons, the words "injuries to persons" include injuries to the relative rights of persons, as well as injuries to their absolute rights.

Wightman v. Devere, 33 Wis. 575.

Criminal conversation at common law is an injury to the husband, entitling him to damages.

3 Bl. Com. 139.

At common law an action in trespass *vi et armis* was the usual form of remedy by a husband for the seduction of his wife, for the reason that a wife could not give her consent, and force was, in consequence, implied.

Woodward v. Walton, 2 Bos. & P. N. R. 476; *Guy v. Livesey*, Cro. Jac. 501; *Parker v. Bailey*, 4 Dowl. & R. 215; 1 Saunders, Pl. & Ev. 5th Am. ed. 875.

And it is the modern rule that force will be implied. The wife cannot, even by her consent, relieve the act of this implication.

Bedan v. Turney, 99 Cal. 649, 34 Pac. 442; *Wales v. Miner*, 89 Ind. 118; *Moore v. Hammons*, 119 Ind. 510, 21 N. E. 1111; *Jacobsen v. Siddal*, 12 Or. 280, 53 Am. Rep. 360, 7 Pac. 108.

Trespass *vi et armis* is the form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property.

2 Bouvier, Law Dict. p. 748.

And so, it has been frequently held that criminal conversation is a personal injury or wrong to the husband,—an invasion of his rights.

Delamater v. Russell, 4 How. Pr. 234; *Straus v. Schwarzwaelden*, 4 Bosw. 627; *Bedan v. Turney*, 99 Cal. 653, 34 Pac. 442; 1 Selwyn, Nisi Prius, 13th ed. 7; *Rigaut v. Gallisard*, 7 Mod. 81, 2 Salk. 552; *Birt v. Barlow*, 1 Dougl. K. B. 171.

But in another aspect of the injury done by criminal conversation to the husband, it consists in an invasion of his property rights. For the husband is entitled to the services of his wife, and this is a right of property.

Cregin v. Brooklyn Crosstown R. Co. 75 N. Y. 192, 31 Am. Rep. 459; *Cregin v. Brooklyn Crosstown R. Co.* 83 N. Y. 595, 38 Am. Rep. 474; *Groth v. Washburn*, 34 Hun, 509.

And criminal conversation, inasmuch as it tends to deprive the husband of the wife's services to himself, or in the bearing and proper nurture of and example to his children, is an injury to that right.

Yundt v. Hartrunft, 41 Ill. 9; *Colwell v. Tinker*, 169 N. Y. 531, 58 L. R. A. 765, 62 N. E. 668.

Judgments for damages for the alienation

of a wife's affections are not barred by a discharge in bankruptcy.

Leicester v. Hoadley, 66 Kan. 172, 71 Pac. 318; *Exline v. Sargent*, 23 Ohio C. C. 180.

And judgments for the seduction of a daughter have been held not barred.

Re Freche, 6 Am. Bankr. Rep. 479, 109 Fed. 620; *Re Naples*, 5 Am. Bankr. Rep. 426, 105 Fed. 919.

Criminal conversation is a malicious and wilful injury.

Re Freche, 6 Am. Bankr. Rep. 479, 109 Fed. 620; *Re Maples*, 5 Am. Bankr. Rep. 426, 105 Fed. 919; Bigelow, Torts, p. 12; 2 Burrill, Law Dict. 175; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Wiggin v. Coffin*, 3 Story, 1, Fed. Cas. No. 17,624; *Etchberry v. Levielle*, 2 Hilt. N. Y. 40; *Rounds v. Delaware, L. & W. R. Co.* 3 Hun, 335; *Bromage v. Prosser*, 4 Barn. & C. 247; *Com. v. Snelling*, 15 Pick. 340; *Wheeler v. State*, 109 Ala. 60, 19 So. 993; *Times Pub. Co. v. Carlisle*, 36 C. C. A. 475, 94 Fed. 766; *Darry v. People*, 10 N. Y. 136; *Wilson v. Noonan*, 35 Wis. 352; *United States v. King*, 34 Fed. 302; *United States v. Reed*, 86 Fed. 309.

Criminal conversation, being a wrong to the husband and done intentionally, is a malicious injury to him, whether the existence of the husband be known or not.

Wales v. Miner, 89 Ind. 118; *Calcraft v. Harborough*, 4 Car. & P. 499; *Bromage v. Prosser*, 4 Barn & C. 247.

That judgments in actions in the nature of criminal conversation are for malicious injuries to the person and property within the meaning of this section of the bankruptcy act has been held in the cases of the alienation of the affections of a wife and the seduction of a daughter.

Leicester v. Hoadley, 66 Kan. 172, 71 Pac. 318; *Exline v. Sargent*, 23 Ohio C. C. 180; *Re Freche*, 6 Am. Bankr. Rep. 479, 109 Fed. 620; *Re Maples*, 5 Am. Bankr. Rep. 426, 105 Fed. 919.

And the injury, being malicious, is also wilful, because malice implies wilfulness.

State v. Robbins, 66 Me. 324; *Funderburk v. State*, 75 Miss. 20, 21 So. 658.

"Wilful" generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent.

Rounds v. Delaware, L. & W. R. Co. 3 Hun, 335, Affirmed in 64 N. Y. 129, 21 Am. Rep. 597; *State v. Clark*, 29 N. J. L. 98; *Highway Commissioners v. Ely*, 54 Mich. 181, 19 N. W. 940; *Newell v. Whitingham*, 193 U. S.

58 Vt. 341, 2 Atl. 172; *Chapman v. Com.* 5 Whart. 429, 34 Am. Dec. 565.

The word means "obstinate, stubbornly; with design; with a set purpose."

Fuller v. Chicago & N. W. R. Co. 31 Iowa, 204.

"Wilfully" means intentionally.

2 Bouvier, Law Dict. 656. *Northern R. Co. v. Carpentier*, 13 How. Pr. 222.

The payment provided for by the judgment is a penalty for a wrongful act.

Re Cotton, 2 N. Y. Legal Obs. 370, Fed. Cas. No. 3,269; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; *Cornelius v. Hambay*, 150 Pa. 359, 24 Atl. 515.

Not all judgments or decrees against a bankrupt for the payment of money evidence debts provable against his estate, under the bankruptcy act of 1898, § 63 a, cl. 1, and in determining their character the court will look beyond the form of the judgment, and consider the nature of the liability upon the original cause of action.

Turner v. Turner, 3 Nat. Bankr. News, 823, 108 Fed. 785.

Notwithstanding the change in form from that of a single debt or duty, by merger into a judgment of a court of record, it still remains the same debt or duty on which the action was first brought.

Boynton v. Ball, 121 U. S. 457, 466, 30 L. ed. 985, 986, 7 Sup. Ct. Rep. 981.

The purpose of the bankruptcy act was to relieve failing honest debtors from their money obligations, and not to free tortious debtors from liability for their wrongs.

Desler v. McCauley, 35 Misc. 411, 71 N. Y. Supp. 949; *Turner v. Turner*, 3 N. B. N. Rep. 823, 108 Fed. 785.

Mr. Justice **Peckham**, after making the above statement of facts, delivered the opinion of the court:

The question herein arising is whether the judgment obtained against the defendant, petitioner, for damages arising from the criminal conversation of the defendant with the plaintiff's wife, is released by the defendant's discharge in bankruptcy, or whether it is excepted from such release by reason of subdivision 2, § 17, of the bankruptcy act of July 1, 1898, which provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another. . . ." [30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. 1901, p. 3428.]

The averment in the petition, that the judgment was not recovered for a wilful

[481]and malicious injury to the person or *property of the plaintiff in the action, is a mere conclusion of law, and not an averment of fact.

If the judgment in question in this proceeding be one which was recovered in an action for wilful and malicious injuries to the person or property of another, it was not released by the bankrupt's discharge; otherwise it was.

We are of opinion that it was not released. We think the authorities show the husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act; because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and wilful. A judgment upon such a cause of action is not released by the defendant's discharge in bankruptcy.

The assault *vi et armis* is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children.

Subsequently the action of trespass on the case was sustained for the consequent damage, and either form of action was thereafter held proper.

Blackstone, in referring to the rights of the husband, says (3 Bl. Com. edited by Wendell, page 139):

"Injuries that may be offered to a person considered as a husband are principally three: *Abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. . . . 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the

[482]coercion of the spiritual *courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary."

Speaking of injuries to what he terms the relative rights of persons, Chitty says that for actions of that nature (criminal conversation being among them) the usual, and,

perhaps, the more correct, practice, is to declare in trespass *vi et armis* and *contra pacem*. 1 Chitty, Pl. [2 vol. ed.] 150, and note *h*.

In *Macfarlzen v. Olivant*, 6 East, 387, it was held that the proper action was trespass *vi et armis*, for that the defendant with force and arms assaulted and seduced the plaintiff's wife, whereby he lost and was deprived of her comfort, society, and fellowship, against the peace and to his damage. Lord Ellenborough, Ch. J., among other things, said:

"Then the question is, whether this can be an action on the case or an action of trespass and assault. And it is said that the latter description only applies to personal assaults on the body of the plaintiff who sues; but nothing of that sort is said in the statute. No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant *per quod servitium amisit*; and so by a husband for a trespass and assault of this kind upon his wife *per quod consortium amisit*."

In *Rigaut v. Gallisard*, 7 Mod. 78, Lord Holt, Ch. J., said that if adultery be committed with another man's wife, without any force, but by her own consent, the husband may have assault and battery, and lay it *vi et armis*, and that the proper action for the husband in such case was a special action, *quia*,—the defendant his wife *rapuit*, and not to lay it *per quod consortium amisit*.

In *Haney v. Townsend*, 1 McCord L. 206, decided in 1821, it was held that case as well as trespass *vi et armis* is a proper action for criminal conversation, the court holding that no doubt trespass was a proper form of action for the injury done by seducing a wife, but that case was also a proper action.

*In *Bedan v. Turney*, 99 Cal. 649, 34 Pac.[483] 442, decided in 1893, it was held that the criminal intercourse of the wife with another man was an invasion of the husband's rights, and it was immaterial whether this invasion was accomplished by force or by the consent of the wife; that the right belonged to the husband, and it was no defense to his action for redress that its violation was by the consent or even by the procurement of the wife, for she was not competent to give such consent; that it was not necessary that the husband should show that it was by force or against her will. The original form of the action was trespass *vi et armis*, even though the act was with the consent of the wife, for the reason, as was said by Holt, Ch. J., in *Rigaut v. Gallisard*, 7 Mod. 78, "that the law will not allow her a consent in such case to the prejudice of her husband."

In *M'Clure v. Miller*, 11 N. C. (4 Hawks) 133, note, page 140, trespass was held to be the proper form of action in such a case, and that a single act of adultery, though never manifested in its consequences, is an invasion of the husband's rights, and the law redresses it. It is also said that the husband has, so to speak, a property in the body and a right to the personal enjoyment of his wife. For the invasion of this right the law permits him to sue as husband.

For the purpose of maintaining the action, it is regarded as an actual trespass upon the marital rights of the husband, although the consequent injury is really to the husband on account of the corruption of the body and mind of the wife, and it is in this view (that it is a trespass upon the rights of the husband) that it is held that the consent of the wife makes no difference; that she is incapable of giving a consent to an injury to the husband. 7 Mod. 78.

In *Wales v. Miner*, 89 Ind. 118, decided in 1883, it was held that in an action of crim. con. the wife was incapable of consenting to her own seduction so as to bar her husband's right of action.

In *Bigacquette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307, it was held the action could be maintained whether the conversation [484] was *with or without the consent of the wife, and although the act caused no actual loss of the services of the wife to the husband.

Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right.

In *Delamater v. Russell*, 4 How. Pr. 234, it was held that the act complained of (criminal conversation) was an injury to the person of the plaintiff; that it was an invasion of his personal rights, and although the action was brought for depriving the plaintiff of the comfort, society, fellowship, aid, and assistance of the wife, yet it was an action brought for an injury to, and an invasion of, the plaintiff's personal rights.

The plaintiff in error refers to the case of *Cregin v. Brooklyn Crosstown R. Co.* 75 N. Y. 192, 31 Am. Rep. 459, same case upon second appeal, 83 N. Y. 595, 38 Am. Rep. 474, for the purpose of showing that the right to the society of the wife is not property, and therefore cannot be regarded as within the words of the bankruptcy act. 193 U. S.

The case does not decide that the right to the wife's society and comfort is not a property right on the part of the husband. It was a case brought by the husband against the railroad company for injuries negligently inflicted on the person of his wife by the company, and after the action was brought the husband died, and an application was made to revive the action in the name of the administrator of the husband. The court held that the action survived under the provisions of the state statute. 2 Rev. Stat. 447, § 1. The case then went to trial and the judge submitted to the jury the question of damages arising for the loss of the services of the wife and of her society, and it was held to be error by the court of appeals, because, while the right to the services of the wife was property, the right to her society, etc., was not property within the meaning of the statute providing for the *survival of the cause of action, for the rea-[485] son that the statute only provided for the survival of those rights the loss of which diminished the estate of the deceased; that the loss of the services of the wife did diminish the estate of the deceased, but that the loss to the husband of the wife's society and aid, etc., did not diminish his estate, and therefore the right of action consequent thereon did not survive the deceased. The question in the case at bar neither arose nor was referred to in the opinions delivered in that case.

We think it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, to the exclusion of all others, and so the act of the defendant is an injury to the person and also to the property rights of the husband.

We think such an act is also a wilful and malicious injury to the person or property of the husband, within the meaning of the exception in the statute.

There may be cases where the act has been performed without any particular malice towards the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute. The act is wilful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.

In order to come within that meaning as a judgment for a wilful and malicious in-

jury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.

In *Bromage v. Prosser*, 4 Barn. & C. 247, which was an action of slander, Mr. Justice Bayley, among other things, said:

"Malice, in common acceptation, means [486] ill will against a *person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of *malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of *malice*, because it is intentional and without just cause or excuse. If I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not. . . ."

We cite the case as a good definition of the legal meaning of the word malice. The law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the exception mentioned.

In *Re Freche* (U. S. district court, district of New Jersey, 1901) 109 Fed. 620, it was held that a judgment for the father in an action to recover damages for the seduction of his daughter was for a wilful and malicious injury to the person and property of another, within the meaning of § 17 of the bankrupt act, and was not released by a discharge in bankruptcy. Kirkpatrick, District Judge, in the course of his opinion, said:

"From the nature of the case, the act of the defendant Freche which caused the injury was wilful, because it was voluntary. That act was unlawful, wrongful, and tortious, and, being wilfully done, it was, in law, malicious. It was malicious because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant Freche must be presumed to have had in mind when he committed the offense. 'Malice,' in law, simply means a depraved inclination on the part of a person to disregard the rights of others, [487] which intent is manifested *by his injurious acts. While it may be true that in his unlawful act Freche was not actuated by hatred or revenge or passion towards the

plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice."

In *Leicester v. Hoadley*, supreme court of Kansas, 1903, 66 Kan. 172, 71 Pac. 318, it was held that a judgment obtained by a wife against another woman for damages sustained by the wife by reason of the alienation of the affections of her husband is not released by the discharge of the judgment debtor under proceedings in bankruptcy, where such alienation has been accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support and impairment of health to the wife.

It was further held that injuries so inflicted are wilful and malicious, and are to the person and property of another, within the meaning of § 17 of the United States bankrupt law.

In *United States v. Reed*, 86 Fed. 308, it was held that malice consisted in the wilful doing of an act which the person doing it knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle, we think a wilful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception.

It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. *Com. v. Williams*, 110 Mass. 401.

*We are not inclined to place such a narrow [488] construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged.

Howland v. Carson, 28 Ohio St. 625, is cited by plaintiff in error. The question arose under the old bankruptcy act, which provided (U. S. Rev. Stat. 5117) that no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, should be discharged by proceedings in bankruptcy, etc. It was held in the case cited that a judgment for the seduction of his daughter in favor of the father, where the seduction was not induced or ac-

complished under a promise of marriage fraudulently made for the purpose, was not a debt created by fraud, within the meaning of the bankruptcy act. We do not perceive the least similarity in the case to the one now before the court, nor could we say that such a debt was one created by fraud.

It is also argued that, as the fraud referred to in the exception is not one which the law implies, but is a particular fraud involving moral turpitude or intentional wrongdoing, so the malice referred to is not a malice implied in law, but a positive and special malice upon which the cause of action is founded, and without proof of which the action could not be maintained. It is true that the fraud mentioned in the bankruptcy statute of 1867 [14 Stat. at L. 517, chap. 176] has been held to be a fraud involving moral turpitude or intentional wrong, and did not extend to a mere fraud implied by law. *Hennequin v. Clews*, 111 U. S. 676, 681, 28 L. ed. 565, 567, 4 Sup. Ct. Rep. 576; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723, 20 Sup. Ct. Rep. 623. The reason given was that the word was used in the statute in association with a debt created by embezzlement, and such association was held to require the conclusion that the fraud referred to meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not a fraud which the law might imply and which might exist without the imputation of bad faith or immorality.

[489] *Assuming that the same holding would be made in regard to the fraud mentioned in the present act, it is clear that the cases are unlike. The implied fraud which the court in the above-cited cases released was of such a nature that it did not impute either bad faith or immorality to the debtor, while in a judgment founded upon a cause of action such as the one before us, the malice which is implied is of that very kind which does involve moral turpitude. This case is not, therefore, controlled in principle by the above-cited cases.

People ex rel. Livergood v. Greer, 43 Ill. 213, is also cited. The court there did hold that, under the Illinois insolvent law, an insolvent debtor was discharged from a judgment obtained by the father for the seduction of his daughter. The law discharging the debt extended by its terms to all tortfeasors except where malice was the gist of the action, and the court said malice was not the gist of the action in question. The case is not opposed to the views we have already expressed.

It is not necessary in the construction we give to the language of the exception in the statute to hold that every wilful act which is wrong implies malice. One who negli-

gently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious. It might be conceded that the language of the exception could be so construed as to make the exception refer only to those injuries to person or property which were accompanied by particular malice, or, in other words, a malevolent purpose towards the injured person, and where the action could only be maintained upon proof of the existence of such malice. But we do not think the fair meaning of the statute would thereby be carried out. The judgment here mentioned comes, as we think, within the language of the statute, reasonably construed. The injury for which it was recovered is one of the *gross-[490] est which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself, and we think Congress did not intend to permit such an injury to be released by a discharge in bankruptcy.

An action to redress a wrong of this character should not be taken out of the exception on any narrow and technical construction of the language of such exception.

For the reasons stated, we think the order of the Court of Appeals of New York must be *affirmed*.

Mr. Justice **Brown**, Mr. Justice **White**, and Mr. Justice **Holmes** dissent.

JAMES C. FARGO, as President of the American Express Company, *Appt.*,
v.

WILLIAM H. HART, Auditor of State of the State of Indiana.

(See S. C. Reporter's ed. 490-503.)

Taxation of nonresident express company—mileage basis—including value of per-

NOTE.—On corporate taxation and the commerce clause—see note to *Sandford v. Poe*, 60 L. R. A. 641.

As to injunction against illegal taxation—see note to *Odlin v. Woodruff*, 22 L. R. A. 699.

On the necessity of payment of tax due where injunction is sought against illegal taxation—see note to *People's Nat. Bank v. Marye, ante*, 180.

sonal property outside the state—injunction against illegal taxation—tender.

1. Personal property owned by a nonresident express company and situated outside the state cannot be taken into account in fixing the value, for taxation, of its property within the state, on a mileage basis, on the theory that it gave the credit necessary for carrying on the business in the state, where the resulting assessment is greatly in excess of the value of the total good will of the company, measured by the difference between its tangible assets and the total value of its stock.
2. Tender is not a prerequisite to injunctive relief against an assessment for taxation made upon unconstitutional principles.
3. Injunction is the proper form of relief from an assessment for taxation made upon unconstitutional principles.

[No. 154.]

Argued February 24, 25, 1904. Decided March 21, 1904.

APPPEAL from the Circuit Court of the United States for the District of Indiana to review a decree which dismissed a bill which sought injunctive relief against assessment for taxation of the property of a nonresident express company on a mileage basis. *Reversed.*

The facts are stated in the opinion.

Mr. Lewis Cass Ledyard argued the cause and filed a brief for appellant:

That no state can tax tangible property owned by a nonresident and having an actual situs without the state cannot be doubted. It is a principle which has again and again been affirmed by this court, that such taxation is a taking of property without due process of law.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 38 L. ed. 1040, 14 Sup. Ct. Rep. 1114.

It matters not whether legislative authority exists for the illegal act, or whether it is done in pretended pursuance of such authority, or whether it is confessedly a bare-faced exercise of arbitrary power. It is the thing itself which may not be done.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The Indiana statute for the taxation of

express companies, as construed by the highest court of the state, does not contemplate or authorize the taxation of tangible property having a situs without the state.

State v. American Exp. Co. 144 Ind. 549, 42 N. E. 483; *Western U. Teleg. Co. v. Taggart*, 141 Ind. 281, 60 L. R. A. 671, 40 N. E. 1051.

It is not the validity of the statute, but the administration of it by the state officials, which we attack in the present suit. If, as matter of fact, these officials in making the assessment included therein, and assessed as part of the property within the state, actual, tangible property having a definite situs without the state, then they went beyond the powers conferred by the statute, and worked an illegal trespass upon the property rights of the appellant's company, which it is as much entitled to restrain as if it had been specifically authorized by an unconstitutional statute.

Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; *Yiek Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 221, 6 Sup. Ct. Rep. 1064.

Whatever remedies are accorded to resident litigants in the courts of a state may be availed of by citizens of other states, in the Federal courts within the jurisdiction of such state.

It has been settled by the decision of the highest court of Indiana that a bill will lie to restrain the certification by the state auditor to the county auditor of an assessment for taxation.

Hart v. Smith, 159 Ind. 182, 58 L. R. A. 949, 64 N. E. 661.

The bill in this suit is framed upon that which was filed in *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, in which the former adjudications of this court were made concerning taxation of express companies. The same objection to the jurisdiction was raised in that case, and elaborately argued, but this court nevertheless sustained the jurisdiction and decided the cause upon the merits.

Mr. Cassius C. Hadley argued the cause, and, with *Messrs. Charles W. Miller, L. G. Rothschild, and William C. Geake*, filed a brief for appellee:

There is no authority for a court of equity to enjoin an assessing officer from performing his duties, as prescribed by law, in placing an assessment made by an assessing board upon the tax duplicates of the different counties.

Smith v. Smith, 159 Ind. 388, 65 N. E. 183.

Before a court of equity will enjoin the collection of a tax, it is necessary for the complainant to pay, or make an unconditional tender of, such part of the tax as is

undisputed, or of what can be seen to be due from the face of the bill, or is shown to be due by affidavits.

State Railroad Tax Cases, 92 U. S. 575, 616, 617, 23 L. ed. 663, 674; *German Nat. Bank v. Kimball*, 103 U. S. 732, 733, 26 L. ed. 469; *Stanley v. Albany County*, 121 U. S. 535, 552, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 90, 37 L. ed. 91, 92, 13 Sup. Ct. Rep. 194; *Northern P. R. Co. v. Clark*, 153 U. S. 252, 272, 38 L. ed. 706, 714, 4 Inters. Com. Rep. 641, 14 Sup. Ct. Rep. 809; *Montgomery v. Sayre*, 65 Ala. 564; *Los Angeles County v. Ballerino*, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329; *Bundy v. Summerland*, 142 Ind. 92, 41 N. E. 322; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546; *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933; *Lewis v. Boguechitto*, 76 Miss. 356, 24 So. 875; *Palmer v. Napoleon Twp.* 16 Mich. 176; *Alleghany County v. Union Min. Co.* 61 Md. 545; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Northern P. R. Co. v. Patterson*, 10 Mont. 90, 24 Pac. 704; *Welch v. Astoria*, 26 Or. 89, 37 Pac. 66; *Union P. R. Co. v. Ryan*, 2 Wyo. 408; *Huntington v. Palmer*, 7 Sawy. 355, 8 Fed. 449; *People's Nat. Bank v. Marye*, 191 U. S. 272, ante, 180, 24 Sup. Ct. Rep. 68; *Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514; *Covington v. Rockingham*, 93 N. C. 134; High, Inj. 3d ed. § 497; 2 Beach, Inj. § 1208; 1 Spelling, Inj. & Extra. Rem. 2d ed. § 662; 2 Cooley, Taxn. 3d ed. 1424-1426; *State ex rel. Gottlieb v. Western U. Teleg. Co.* 165 Mo. 502, 65 S. W. 775.

It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must pay what is conceded to be due, or what it can be seen would be due on the face of the bill, or what can be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted.

State Railroad Tax Cases, 92 U. S. 575, 617, 23 L. ed. 663, 674; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 90, 37 L. ed. 91, 92, 13 Sup. Ct. Rep. 194; *Hagaman v. Cloud County*, 19 Kan. 394; *Alleghany County v. Union Min. Co.* 61 Md. 545; *Chicago, B. & Q. R. Co. v. Norton County*, 67 Fed. 413, 14 C. C. A. 458, 32 U. S. App. 227; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546; *People's Nat. Bank v. Marye*, 191 U. S. 272, ante, 180, 24 Sup. Ct. Rep. 68.

The state board of tax commissioners is given jurisdiction over the subject-matter, to value and assess the mileage of the express companies having lines and routes within the state. Acting under this authority, they did make such assessment and render their finding, which, in its nature, is

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that of a judgment, and is final. Especially is this true as against a collateral attack.

Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Youngstown Bridge Co. v. Kentucky & I. Bridge Co.* 64 Fed. 441; *McLeod v. Receveur*, 18 C. C. A. 188, 34 U. S. App. 533, 71 Fed. 455; *Stanley v. Albany County*, 121 U. S. 535, 30 L. ed. 1000; *Adams Exp. Co. v. Ohio*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Maish v. Arizona*, 164 U. S. 599, 41 L. ed. 567, 17 Sup. Ct. Rep. 193; *Van Nort's Appeal*, 121 Pa. 118, 15 Atl. 473.

The value of stocks and bonds, the unification of which, with the bare appliances and accessories in ownership and use, increases the effectiveness of each, and makes a complete and effective whole, in all justice and fairness should be apportioned to the lines and routes in the different states.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037.

No court will enjoin the collection of taxes, unless fraud is charged and proved against the taxing officers. Otherwise the court would substitute its judgment for the judgment of the taxing officers, which will never be done unless fraud is found as a fact.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 229, 41 L. ed. 683, 698, 17 Sup. Ct. Rep. 305; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *American Exp. Co. v. Indiana*, 165 U. S. 255, 41 L. ed. 707, 17 Sup. Ct. Rep. 991; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527; *Sandford v. Poe*, 60 L. R. A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546; *State v. Adams Exp. Co.* 144 Ind. 549, 42 N. E. 483; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Western U. Teleg. Co. v. Taggart*, 141 Ind. 281, 60 L. R. A. 671, 40 N. E. 1051.

The Federal court will not restrain or interfere with the collection of taxes assessed by the state taxing officers, even temporarily, unless the taxes are wholly void.

Cooley, Taxn. 775; *Desty, Taxn.* 657; *Palmer v. Napoleon Twp.* 16 Mich. 176; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works*, 172 U. S. 32, 37, 43 L. ed. 354, 356, 19 Sup. Ct. Rep. 90; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 435, 38 L. ed. 1039, 14 Sup. Ct. Rep. 1114, Affirming 133 Ind. 625, 33 N. E. 432; High, Inj. § 485.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the United States circuit court dismissing the plaintiff's bill and supplemental bills. The bill was brought by the president of the American Express Company, a joint stock company of New York, on behalf of himself and the other members of the company, to enjoin the auditor of the state of Indiana from certifying an assessment for 1898 to the auditor of the several counties [496] of the state. *Supplemental bills sought the like remedy in respect of the assessments for the following years through 1901. The ground of relief is that the assessments will result in unconstitutional interferences with commerce among the states and also are contrary to the 14th Amendment. The plaintiff's case may be stated in a few words. The American Express Company is engaged in commerce among the states, including Indiana. It has real estate of a market value of nearly two million dollars, which is outside of Indiana, and which it says is not used in its business, and fifteen million and a half dollars' worth of personal property in New York, as to which it says the same; over three million dollars' worth of real estate used in connection with the business, and about a million and a half dollars' worth of personal property used in the business, of which there was less than eight thousand dollars' worth in Indiana. It has paid the local taxes on this last. The total value of the property for 1898 was \$22,059,055.35. The market value of what, for brevity, we may call its stock, was \$21,600,000. The state board of tax commissioners has undertaken to tax the property of the company under the law which was upheld in *American Exp. Co. v. Indiana*, 165 U. S. 255, 41 L. ed. 707, 17 Sup. Ct. Rep. 991; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185; 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527, by treating the whole business as a unit and assessing the company on a proportion of the total value of its property, determined by the ratio of the mileage in Indiana to the total mileage of the company, excluding its ocean mileage for foreign express business, which the company says should have been included. The company relies on the fact that it made a return to the board, setting forth in detail what its property was, where it was situated, and how used, and that the value and nature of the property was not disputed; and it contends that when these facts appeared the board was not at liberty to spread the whole value over the whole line

equally, and tax by mileage. The auditor in his answer sets up that the said sum of fifteen and a half million dollars in securities is used by *the company as a part of [497] the necessary capital of its business, and denies that the board assesses personal property not used in connection with its business. Thus, he admits, by implication, that the above sum did enter into the assessment made, and this would be obvious unless we should assume the intended tax to be wholly arbitrary, as the assessment was at the rate of \$450 a mile for 1,798 and a fraction miles, amounting to \$809,253, as against less than eight thousand dollars' worth of tangible property in the state. There are some differences of detail between the state and the company as to the precise value of the stock, etc. But the foregoing facts present the general question.

The contention of the company in its extreme form is that the state had no right to tax it anything for the years when its stock was of less market value than its property, because that ratio showed that the whole value of the company was in its tangible assets, and that the intangible property spoken of in the *Adams Express Company Case* was nothing. It says that in any year that property was so small as to warrant only a nominal tax. We lay this contention on one side. It was admitted at the hearing before the board of tax commissioners that an appreciable sum properly might be assessed on the mileage basis, and therefore the board was warranted in assuming the fact. It was admitted at the argument before this court that the low market value of the stock was due in part to the ignorance of the public as to the assets of the company. On this concession the market value of the stock was not a test of the value of the business. The statement is confirmed by the continued rise in the stock since, up to \$225 in April, 1902. And apart from these admissions the board well might have hesitated to believe that the company was carrying on a business, which it gave no signs of intending to stop, at a loss, and was paying its regular dividends out of investments alone. We lay on one side also the question of ocean mileage. Without dwelling on the sudden change in the returns, which added *nearly 130,000 miles in [498] 1898, with comparatively slight explanation, or the admitted differences between the ocean and land carriage, we cannot say that the tribunal, having the duty and sole jurisdiction to find the facts, exceeded its powers in not allowing the item.

We come, then, to the real question of the case: whether, the tax provided for by the statute being a tax on property, it sufficiently appears that the board took into

account property which it had no right to take into account in fixing the assessment at the large sum which we have mentioned. We already have stated reasons for assuming that the personal property in New York did enter into the valuation. We may add that it appears by a stipulation as to facts, that "the minutes of said state board of tax commissioners" are in evidence. This means the complete minutes. It must be assumed that the minutes show all that took place in the proceedings, and therefore that we have before us all the evidence that was put in as well as a report of what was said. There was no indication of dispute concerning the amount, value, and place of the company's personal property. The protests of the company alleged that there was no dispute as to the facts. If the company had been mistaken common fairness required that it should be informed and allowed to give further evidence of the undoubted truth. The ground taken before the board, and insisted on in argument before us, was that the property ought to enter into the valuation, because, wherever situated, it was used in the business; if not otherwise, at least as giving the credit necessary for carrying the business on. We shall assume that the question before us is narrowed to whether that ground can be maintained. The pleadings and proceedings leave no alternative open, and no other could be pressed consistently with the candor to be expected from the officers of a state, in face of a constitutional question and dealing with great affairs. For present purposes it does not matter whether the sum taken for division on a mileage proportion was reached by taking the value of the stock or the value of the tangible [499] assets of the company. For if the former was the starting point it appears from what we have said that the tangible assets gave the stock its value. The use of the value either of total stock or total assets is only as a means of getting at the true cash value of property within the state. *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 26, 27; 41 L. ed. 49, 58, 59, 16 Sup. Ct. Rep. 1054; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25, 35 L. ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in

connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system. *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 21, 22, 41 L. ed. 49, 57, 16 Sup. Ct. Rep. 1054. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases.

It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property *outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense. *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 431, 38 L. ed. 1031, 1038, 14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 23, 41 L. ed. 49, 57, 16 Sup. Ct. Rep. 1054. The same principle applies to personal property which the state would not have the right to tax directly. *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 227, 41 L. ed. 683, 697, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 222, 223, 41 L. ed. 965, 978, 17 Sup. Ct. Rep. 604. In *Pittsburgh, C. C. & St. L. R. Co. v. Backus* there was reason to suspect an infraction of constitutional rights, but the secretary of state testified that there was no assessment of property outside the state (154 U. S. 434, 38 L. ed. 1039, 14 Sup. Ct. Rep. 1114), and therefore the court could not say that there was more than a possible overvaluation by

the board. Of course, if the board did not go beyond its jurisdiction, its decision was final. But the court recognized that if the facts charged had appeared the case would have been different. In the *Express Companies' Cases* previously decided, it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the companies should prove the fact to be otherwise a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account.

[501] We come back to the question whether the taking of personal property outside the state into the assessment can be justified on the ground that it gives credit necessary for the business in the state. The testimony was that the property was not necessary for that purpose, and, in fact, was not used. We may *assume that the board was of a different opinion, so far as that was concerned, and still we may hold its action unjustified. It will be seen that we are dealing with much more attenuated relations than when there is a physical line of rails or wires to be valued, every mile of which is a necessary condition of the use of the rest of the lines beyond, and therefore a reflex condition of the value of the line behind it. The case is stronger even than one of terminals having a large value as real estate independent of their use to the road. The express business added nothing to the value of the bonds in New York. Conversely, the utmost extent to which those bonds entered into the value of property in Indiana was in so far as they helped to make the public believe that the express company could be trusted, and therefore increased its good will. That they made a part of the public more willing to buy interests in the company because they were an assurance against personal liability was no concern of Indiana. But it is obvious that, merely from the point of view that the express company could be trusted by the public with the carriage of goods or money, the good will could not be measured by the assets. In the first place, the public knew nothing of the amount. This appears as to even the more instructed portion of the public which bought interests in the concern, and *a fortiori* as to the general run of shippers. For if even the buyers of the stock of the company would pay only in the neighborhood of the value of the tangible assets, it is apparent either that they did not know what the assets were, as was stated by the appellant's counsel, or else that the good will

taxed was worth nothing; and either view is equally fatal to the grounds for the tax.

But again, suppose that the state of the assets of the company had been published in every newspaper in Indiana, can it be imagined that it would have had an appreciable effect upon the company's business? Certainly it is absurd to say that the business of such companies will bear an exact or any proportion to the stocks and bonds which they may own. Unless we are much mistaken, most people who want to send *things by express employ a company simply [502] because it is there, and they see its sign is out. The only effect that knowledge of the capital of the company could have would be to produce the conviction that the company was safe to employ. Assume that something is to be added to the good will of a company because it is safe, and that the good will, or a part of it, of the express business in Indiana may be considered in assessing its property there, this is very different from measuring the good will by the capital, when the facts appear as they do in this case. The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the board was wrong. It involved an attempt to tax property beyond the jurisdiction of the state, and to throw an unconstitutional burden on commerce among the states. The result has been that, taking the value of the stock as stated by the defendant to have been 125 for 1898, the state of Indiana assessed the company for nearly twice the total good will of its business, measuring that good will by the difference between the tangible assets and the total value of the stock. The injustice grew less flagrant as the stock rose, but in the year 1901 the assessment still was nearly double what the state had a right to assess, assuming that, without transcending its constitutional power, it had a right to assess its proportion by mileage of the total good will.

We have explained why, in our opinion, this cannot fairly be treated as a mere case of overvaluation, but is an assessment made upon unconstitutional principles. Under such circumstances it was impossible for the company to tender any sum, because it was impossible for it to say what, if anything, it ought to pay. It denied that under the Constitution it ought to pay anything, and it is plain that for the year 1898, at least, it properly could have been assessed but a comparatively trifling sum. The contention of the company was serious and plausible. It made the only offer it could, which was to give security for the payment of whatever amount should be adjudged to be due. "If there was no right to assess the particular

[503] thing at *all, . . . an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction." *People's Nat. Bank v. Marye*, 191 U. S. 272, 281, ante, 180, 24 Sup. Ct. Rep. 68, 71. See also *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Central P. R. Co. v. California*, 162 U. S. 91, 112, 40 L. ed. 903, 16 Sup. Ct. Rep. 766.

The assessment being bad, for the reasons which we have stated, the board of tax commissioners acted without jurisdiction, according to the decision of the supreme court of Indiana. *Hart v. Smith*, 159 Ind. 182, 58 L. R. A. 949, 64 N. E. 661. We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663. But it was recognized in the passage just quoted from *People's Nat. Bank v. Marye*, that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken without criticism from the court in *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305. It avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be maintained. *Union P. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601; *Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90.

Decree reversed.

The **Chief Justice**, Mr. Justice **Brewer**, and Mr. Justice **Day** dissented.

[504] *GRANVILLE RIPPEY, *Plff. in Err.*,
v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 504-510.)

Constitutional law—validity of local-option law—discrimination in favor of prohibitory vote.

The 14th Amendment to the Federal Constitu-

NOTE.—As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note, and *State v. Loomis*, 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

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tion is not violated by the provisions of Tex. Rev. Stat. art. 3395, which make a majority vote in favor of the prohibition of the liquor traffic in a county or precinct a bar to the resubmission of the question to the voters of any political subdivision thereof until after prohibition has been defeated at a subsequent election in the entire county or precinct, while the failure to carry prohibition in a county is no bar to the immediate resubmission of the question to the voters of its political subdivisions, and the corresponding failure in town or city is no bar to the immediate resubmission of the question to the voters of the larger territory.

[No. 273.]

Argued March 11, 1904. Decided March 21, 1904.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a conviction in the County Court of Grayson County in that State for selling intoxicating liquors in a precinct which had, by a majority vote of its electors, prohibited such sales. *Affirmed.*

See same case below, 73 S. W. 15.

The facts are stated in the opinion.

Mr. George Clark argued the cause, and, with Messrs D. C. Bollinger, Francis M. Etheridge, and Rhodes S. Baker, filed a brief for plaintiff in error:

The Texas legislation in question is repugnant to the Federal Constitution.

U. S. Const. art. 14, § 1; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 188, 189, 31 L. ed. 653, 654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Duncan v. Missouri*, 152 U. S. 382, 38 L. ed. 487, 14 Sup. Ct. Rep. 570; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Marchant v. Pennsylvania R. Co.* 153 U. S. 389, 38 L. ed. 756, 14 Sup. Ct. Rep. 894; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Magon v. Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *Kentucky Railroad Tax Cases*, 115 U. S. 337, 29 L. ed. 419, 6 Sup. Ct. Rep. 57; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; *McPherson v. Blacker*, 146 U. S. 39, 36 L. ed. 878, 13 Sup. Ct. Rep. 3; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Ex parte Jones*, 38 Tex. Crim. App. 482, 43 S. W. 513; *Ex parte McCarver*, 39 Tex. Crim. App. 448, 46 S. W. 936; *Frascr v. McConway & T. Co.* 82 Fed. 257; *Juniata Limestone Co. v. Fagley*, 187 Pa. 197, 42 L. R. A. 442, 67 Am. St. Rep. 579, 40 Atl.

877; *Re Day*, 181 Ill. 80, 50 L. R. A. 519, 54 N. E. 646; *Luman v. Hitchens Bros. Co.* 90 Md. 27, 46 L. R. A. 393, 44 Atl. 1051; *Wanser v. Hoos*, 60 N. J. L. 526, 64 Am. St. Rep. 600, 38 Atl. 449; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 275; *State v. Hoyt*, 71 Vt. 64, 42 Atl. 973.

Mr. C. K. Bell argued the cause, and, with *Mr. T. S. Reese*, filed a brief for defendant in error:

The right to engage in the business of selling intoxicating liquors is not a privilege or immunity of citizens of the United States, within the meaning of § 1 of the 14th Amendment to the Constitution of the United States.

Bartemeyer v. Iowa, 18 Wall. 129, 133, 21 L. ed. 929, 931; *Giozza v. Tierman*, 148 U. S. 657, 661, 662, 37 L. ed. 599, 602, 13 Sup. Ct. Rep. 721; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; *Crowley v. Christensen*, 137 U. S. 86, 91, 34 L. ed. 620, 623, 11 Sup. Ct. Rep. 13.

The privileges and immunities protected are only those flowing from Federal citizenship.

Slaughter-House Cases, 16 Wall. 37, 21 L. ed. 394.

The laws in question do not deprive any person of liberty or property within the meaning of the 5th and 14th Amendments to the Constitution.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. ed. 989, 992.

The laws in question do not deny to any person within the jurisdiction of the state of Texas the equal protection of the law.

Magown v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Powell v. Pennsylvania*, 127 U. S. 678, 683, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Busch v. Webb*, 122 Fed. 655; *Ex parte Fields*, 39 Tex. Crim. App. 50, 46 S. W. 1127; *Rippy v. State*, 68 S. W. 687, 73 S. W. 15; *Kimberly v. Morris*, 10 Tex. Civ. App. 592, 31 S. W. 809.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error was convicted of selling intoxicating liquors contrary to vote of his precinct prohibiting such sale. This vote was in pursuance of a statute which the plaintiff in error alleges to be contrary to the 14th Amendment of the Constitution

of the United States. The question was raised at the outset by a motion to quash, which was overruled, subject to exception; the exception was overruled on appeal, and the case was brought here by writ of error.

The Constitution of Texas, art. 16, § 20, required the legislature to enact a law by which the majority of qualified voters of any county, justice's precinct, town, or city, from time to time might determine whether the sale of intoxicating liquors should be prohibited. The legislature thereupon enacted what now are articles 3384-3399 of the Revised Statutes, and articles 402-407 of the Penal Code. These all are assailed, but the particular object of attack is art. 3395.

Article 3395 is as follows:

Art. 3395. [3238] The failure to carry prohibition in a county shall not prevent an election for the same being immediately thereafter held in a justice's precinct or subdivision of such county as designated by the commissioners' court, or of any town or city in such county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justice's precinct or county in which said town or city is situated; nor shall the holding of an election in a justice's precinct in any way prevent the holding *of an election immediately thereafter for the entire county in which the justice's precinct is situated; but when prohibition has been carried at an election ordered for the entire county, no election on the question of prohibition shall be thereafter ordered in any justice's precinct, town, or city of said county until after prohibition has been defeated at a subsequent election for the same purpose, ordered and held for the entire county, in accordance with the provisions of this title; nor in any case where prohibition has been carried in any justice's precinct shall an election on the question of prohibition be ordered thereafter in any town or city of such precinct until after prohibition has been defeated at a subsequent election, ordered and held for such entire precinct.

It will be seen that this section discriminates in favor of those who vote for prohibition; and the argument is that since the legislature was not authorized to pass a prohibitory law (*Dawson v. State*, 25 Tex. App. 670, 674, 675, 8 S. W. 820), but was required to leave the question to a local vote, it necessarily created a pure democracy to that extent, and therefore could not interfere with the equality of the voters in their right to propose or carry a law. Many questions would have to be answered before so speculative a piece of ratiocination could be followed. But we think it may be

dealt with in short space, so far as is necessary to decide this case.

We follow the state court, of course, as to the state Constitution, and assume that the law is not invalid under that. The question for us is whether, if the state Constitution undertakes to authorize such a law, it encounters the Constitution of the United States. It is a question of the power of the state as a whole. *Missouri v. Dockery*, 191 U. S. 165, 171, *ante*, 133, 24 Sup. Ct. Rep. 53. But the state has power to prohibit the sale of intoxicating liquors altogether, if it sees fit (*Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273), and that being so it has power to prohibit it conditionally. It does not infringe the Constitution by giving those in favor of the sale a chance which it might have denied. It is true that the greater does not always include the less. A man may give [510] his *property away, yet he may not contract with a carrier to take the risk of the latter's negligently injuring it, or part with it on the valuable consideration of a wager. But, in general, the rule holds good. It does here. The state has absolute power over the subject. It does not abridge that power by adopting the form of reference to a local vote. It may favor prohibition to just such degree as it chooses, and to that end may let in a local vote upon the subject as much or as little as it may please. There is no such overmastering consideration of expediency attaching everywhere and always to the form of voting, still less is there any such principle to be drawn from the 14th Amendment, as requires the two sides of a vote on prohibition to be treated with equal favor by the state, the subject-matter of the vote being wholly within the state's control. The only chance for the plaintiff in error to prevail was under the state Constitution. He has no case under the Constitution of the United States.

Judgment affirmed.

I. H. ADAMS, *Plff. in Err.*,
v.

J. M. CHURCH, Administrator of R. M.
Steel, Deceased.

(See S. C. Reporter's ed. 510-517.)

Public lands—timber culture entry—validity of agreement to convey before final proof.

The policy of the timber culture act of June 14, 1878 (20 Stat. at L. 113, chap. 190), cannot be deemed to have been violated by an agreement by one who had made an entry thereunder to convey his claim to a proposed partnership as soon as he should acquire ti-

tle from the government, in view of the failure of that act to require, as in the case of homestead entries, that the entryman shall make affidavit before final certificate that no interest in the land has been alienated.

[No. 169.]

Argued March 3, 1904. Decided March 21, 1904.

IN ERROR to the Circuit Court of Malheur County, State of Oregon, to review a decree entered by direction of the Supreme Court of that State, sustaining the claim that the assets of a partnership included an interest in a tract of land acquired by one of the partners under the timber culture act, before the formation of the partnership. *Affirmed.*

Statement by Mr. Justice Day:

This is an appeal from a decree of the circuit court of Malheur county, state of Oregon, entered by direction of the supreme court of Oregon.

*The action originated in a suit by Steel [511] against Adams to settle the affairs of a partnership theretofore carried on by the parties, and, so far as a Federal question is concerned, involves the right of the plaintiff below to have conveyed to him an interest in a certain tract of land, acquired by Adams under the timber culture act, before the formation of the partnership. 20 Stat. at L. 113, chap. 190. The defendant denies that this tract of land was included in the partnership property. Upon appeal to the supreme court of Oregon, upon whose direction the decree was entered, it was found that at the time of the formation of the partnership Adams was the owner of a timber culture claim covering the land in controversy, and the contention of the plaintiff that it was agreed and understood at the time of forming the partnership that such claim should be conveyed to and become a part of the assets of the firm as soon as Adams should acquire title from the government was sustained.

The Federal question made is that such agreement is void as against the statutes and policy of the United States.

Mr. R. J. Slater argued the cause, and, with Mr. Will R. King, filed a brief for plaintiff in error:

The timber culture act and the rules and regulations promulgated by the commissioner of the General Land Office for the purpose of carrying that law into effect must be read and construed together; and the affidavit required by the regulation is just

as binding as the affidavit required by the act itself. Such rules and regulations have the force of law.

United States v. Eaton, 144 U. S. 688, 36 L. ed. 594, 12 Sup. Ct. Rep. 764.

The affidavit required of the claimant at the time he applies for the entry is identically the same as that required at the time he makes his final proof; and by reason of that affidavit any contract made by the claimant prior to his entry is, without doubt, void as contrary to the statute and public policy of the United States government, and such a contract cannot possibly be carried out without perjury.

Fleischer v. Fleischer (N. D.) 91 N. W. 51.

The contract in the case at bar was made after the first affidavit was made; for which reason the supreme court of the state of Oregon held that it was not inhibited by the act itself, and therefore it was not contrary to the public policy of the United States, and could be enforced after final entry by the applicant. That conclusion is certainly wrong, because it is not necessary that an act should expressly forbid the making of the contract.

Harris v. Runnels, 12 How. 79, 13 L. ed. 901; *Bank of United States v. Owens*, 2 Pet. 527, 7 L. ed. 508; *The Pioneer*, Deady, 72, Fed. Cas. No. 11,177.

Public policy is determined from the Constitution, laws, and decisions of the courts of the United States.

15 Am. & Eng. Enc. Law, p. 933.

The general policy of the United States in disposing of the public land is to secure to each entryman his entry, and to prevent any one individual from securing, either directly or indirectly, more than one entry under each of the said laws; and any contract which is designed to subvert that general public policy of the government cannot be enforced in a court of equity.

Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905.

The allegation of the reply sets up a contract void as against the public policy of the United States and contrary to the timber culture law; and the lower court erred in not dismissing the case *sua sponte*.

Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539.

The reply was clearly a departure from the complaint.

6 Enc. Pl. & Pr. 460.

Mr. **Alonzo Stewart** argued the cause for defendant in error.

Mr. **Joseph Simon** filed a brief for defendant in error:

The timber culture claimant who has made his entry in good faith is not inhibited

from contracting to sell his claim prior to the final proof.

Sims v. Busse, 4 Land Dec. 369; *United States v. Read*, 5 Land Dec. 313. And see *Arnold v. Christy* (Ariz.) 33 Pac. 619; *Palmer v. March*, 34 Minn. 127, 24 N. W. 374; *Richards v. Snyder*, 11 Or. 501, 6 Pac. 186; *Hyde v. Holland*, 18 Or. 331, 22 Pac. 1104; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Lang v. Morey*, 40 Minn. 396, 12 Am. St. Rep. 748, 42 N. W. 88.

Mr. Justice **Day**, after making the foregoing statement, delivered the opinion of the court:

The finding of facts made in the supreme court of Oregon is binding upon this court and will be the basis of decision here. *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

It appears that Adams made the entry under the timber culture act before the partnership agreement was entered into, and there is nothing in the record to show that, in taking the preliminary oath required by the statute, he acted otherwise than in good faith, and stated the truth as to the situation and his purpose in making the entry. As recited in the title, the purpose of the act is to encourage the growth of timber on the Western prairies, and it is intended to induce settlers to plant and cultivate trees with a view to receiving a patent of the lands thus improved. Section 2 of the act (20 Stat. at L. 113, chap. 190) requires the person applying for the benefit of the law to "make affidavit that he is the head of a [514] family (or over twenty-one years of age) and a citizen of the United States, or has declared his intention to become such; that the land specified is devoid of timber; that the entry is made for the cultivation of timber for the exclusive use and benefit of the applicant; that the application is made in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that affiant intends to hold and cultivate the land and to comply with the provisions of the act, and has not made other entry under the law. Before a final certificate can be given or patent issue, eight years must elapse from the date of entry, and if, at the expiration of that time, or within five years thereafter, the person making the entry, or, in event of death, his heir or legal representative, shall prove by two credible witnesses that he, she, or they have planted, and for not less than eight years have cultivated and protected, the required quantity and character of trees; that not less than twenty-seven hundred trees

were planted on each acre, and that at the time of making such proof there shall be then growing six hundred and seventy-five living and thrifty trees on each acre, a patent shall issue for the land.

It is the contention of the plaintiff in error that these provisions demonstrate the policy of the law to grant the lands in question to the person filing the entry, his heirs and legal representatives, and none other; and that to make the sale of an interest in the lands to another as a partner, as is found to have been done in this case, is void as against public policy. It is pointed out that the final affidavit, required by the rules and regulations of the General Land Office, made under authority of § 5 of the act, is to be in the same terms as the preliminary one, and requires the claimant to make oath that his entry was made in good faith, and not for the purpose of speculation or indirectly for the benefit of any other person whomsoever.

[515] This requirement and the general purpose indicated in the *terms of the act, it is argued, bring the case within the reasoning and spirit of *Anderson v. Carking*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905. In that case it was held that a court of equity would not grant a decree for specific performance of an agreement to sell the interest of the homesteader, made after settlement and before the oath is filed for final certificate. But the homestead act specifically requires that the applicant shall make affidavit before entry is made that it is for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person. Rev. Stat. § 2290 (U. S. Comp. Stat. 1901, p. 1389).

Further, the final proof requires affidavit by the applicant "that no part of such land has been alienated except as provided in § 2288 (U. S. Comp. Stat. 1901, p. 1385)" (Rev. Stat. § 2291, U. S. Comp. Stat. 1901, p. 1390), which section limits the right of alienation to "church, cemetery, or school purposes, or for the right of way for railroads."

In this state of the law, this court, in the *Anderson Case*, in an opinion by Mr. Justice Brewer, sustained the contention in behalf of Anderson "that the homestead is a gift from the government to the homesteader, conditioned upon his occupation for five years, and upon his making no disposition or alienation during such term; that the affidavit of nonalienation is as clear an expression of the legislative intent as a direct prohibition; that the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five
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years; that a successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; that a contract whose consummation necessarily rests on perjury is illegal." And that courts of equity would not enforce the performance of such contracts "founded upon perjury and entered into in defiance of a clearly expressed will of the government." But this case is very far from supporting the contention of the plaintiff in error as to the construction of the timber culture act. There is no requirement in the latter *act that the entryman[516] shall make oath that he has not alienated any interest in the land. The policy of the government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily have been pursued by a similar provision in the timber culture act if it was intended to extend the principle to that statute. The final proof under the latter act has in view sworn testimony that the number of trees required has been planted, and the prairies therefore barren of timber have been supplied with trees to the extent required by the law before the title shall pass from the government. The policy of the homestead act, no less than in the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none others, homesteads have been freely granted by the government.

This conclusion is in conformity with the decisions of the Land Department in *Sims v. Busse*, 4 Land Dec. 309, and *United States v. Read*, 5 Land Dec. 313. In these cases the right of the timber culture entryman to dispose of his holding, acquired by him in good faith, before the final certificate, is fully recognized. It is argued that, conceding these decisions to hold that such entryman can sell his claim after entry and before final proof, it does not follow that he can sell it and agree to prove up the entry claim and obtain a patent with a promise to convey it to another, without violating the policy of the law. But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract as was found to exist by the supreme court of Oregon would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms

of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his [517] term of occupancy, he has agreed "to convey an interest, to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law. *Myers v. Craft*, 13 Wall. 291, 20 L. ed. 562.

To sustain the contentions of the plaintiff in error would be to incorporate, by judicial decision, a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.

The decree of the state court is affirmed.

TOM HONG, alias Hom Poe, *Appt.*,
v.

UNITED STATES. (310)

TOM DOCK, alias Hom Dock, *Appt.*,
v.

UNITED STATES. (311)

LEE KIT, *Appt.*,
v.

UNITED STATES. (313)

(See S. C. Reporter's ed. 517-523.)

Chinese exclusion—who are merchants—reversal of orders for deportation as against the evidence.

1. The names of any of the partners need not appear in the company name under which a Chinese grocery is actually conducted at a fixed place of business in order to constitute them "merchants" within the meaning of the Chinese exclusion act of May 5, 1892 (27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319), § 2, as amended by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 1322), which defines a merchant as "a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant."
2. Orders for the deportation of Chinese laborers, made on the sole ground that they had failed to show that they were bona fide merchants within the meaning of the Chinese exclusion act of May 5, 1892 (27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319), § 2, as amended by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, U. S. Comp.

Stat. 1901, p. 1322), at the time registration was required, will be reversed by the Federal Supreme Court, where that court is satisfied, from an examination of the record, that the testimony did establish that fact.

[Nos. 310, 311, 313.]

Argued January 12, 1904. Decided March 21, 1904.

APPEALS from the District Court of the United States for the Eastern District of New York to review an order which affirmed an order made by a United States commissioner, directing the deportation of Chinese laborers from the United States because found therein without certificates of registration. *Reversed* and appellants discharged.

Statement by Mr. Justice Day:

These cases were considered together and are appeals from an order entered in the district court of the United States for the eastern district of New York, affirming an order made by a United States commissioner, directing the deportation of the appellants from the United States to China upon the ground that they were found within this country without certificates of registration, as required by the act of May 5, 1892 [27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319], as amended November 3, 1893. 28 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 1322.

The complaint charges that the appellants, being Chinese laborers, not entitled to remain in this country without certificates of registration, did wilfully and knowingly fail to obtain the certificates required by law, and, having unlawfully come within the United States, were found without certificates of registration within the jurisdiction thereof, in the eastern district of the state of New York.

Testimony was heard in the cases, and at the conclusion of the hearings the commissioner made an order finding each of the appellants a Chinese laborer, without a certificate of registration as required by law, and not a merchant doing business within the meaning of the act of 1892, as amended 1893, and not lawfully entitled to remain in this country.

In each of the cases the commissioner, in addition to the judgment just recited, filed a finding, which was made part of the record by order of the district court, as follows:

In the Matter of Lee Kit, Tom Hong, and Tom Dock.

Before B. L. Benedict, U. S. Commissioner. In these three cases it is urged, on one

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side, that the decision of the circuit court of appeals of this circuit, in the case of *United States v. Pin Kwan*, requires the commissioner to decide that these three Chinese persons were not merchants within the meaning of the statute in 1894, and that, being now laborers without certificate of residence, they must be deported. On the other side it is urged that the decision of the court in that case was only that the merchant's certificate that Pin Kwan had was not the certificate required by law, and could not be effective to allow his remaining here, and that the discussion of the effect and weight of evidence which the court itself had said it was error to admit (a certificate being the sole proof *admissible) goes merely to show what the court thought of the evidence in that case, which differed from the present one. Admitting the distinction, I do not think the United States commissioner is at liberty to disregard carefully expressed language of the circuit court of appeals for the circuit, even though a *dictum* of the court as to the precise question before it. The proofs furnished in this case are sufficient to show that these three persons were engaged in business rather than in manual labor in 1894, but not to show a real interest of each in the business as partners; they do not, to my mind, clearly establish facts which would bring these persons within the statute as merchants. It follows that an order for deportation for each one must be made.

I certify the foregoing to be a true copy of an original decision made by me in the cases of *United States v. Lee Kit*, *United States v. Tom Hong*, and *United States v. Tom Dock*, upon application for orders of deportation of the said Lee Kit, Tom Hong, and Tom Dock, made on the 18th day of December, 1902, and remaining on file in my office.

B. Lincoln Benedict,

[L. S.]

U. S. Comm.

Mr. Terence J. McManus argued the cause, and, with Messrs. Frank S. Black and Russell H. Landale, filed a brief for appellants.

Mr. Max J. Kohler by special leave filed a brief for appellants.

Solicitor General Hoyt argued the cause and filed a brief for appellee.

For contentions of counsel see their briefs as reported in *Ah How v. United States*, ante, 619.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

The contention of the appellants that their right to remain in the United States

is enlarged by the treaty with China of *December, 1894, considered with § 1 of the act of April 29, 1902, chap. 641, 32 Stat. at L. 176 (U. S. Comp. Stat. Supp. 1903, p. 189), continuing all laws then in force so far as the same are not inconsistent with treaty obligations, in its effect upon the acts of 1892, as amended in 1893, is disposed of by the case of *Ah How v. United States* (decided at this term), 193 U. S. 65, ante, 619, 24 Sup. Ct. Rep. 357.

For the first time in the history of legislation having for its purpose the exclusion of certain Chinese from the country, or their deportation when here in violation of the statutes of the United States, and the admission of certain others to the country, or giving the right to remain, Congress, by the act of May, 1892, as amended November 3, 1893, defined those theretofore designated generally as merchants or laborers:

"Sec. 2. The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in tacking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning, and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant."

It is contended by the appellants that as by § 6 of the act as amended November 3, 1893, it is made the duty of certain Chinese laborers within the limits of the United States to apply to the collector of their respective districts within six months after the passage of the act for a certificate of registration, and, in default of compliance with the terms of the act, to be subject to arrest and deportation, unless, for certain reasons given in the statute excusing them, they have been *unable to procure the certificate required by law; and as § 2 of the same act specifically defines what is meant by a "laborer," that only such as come within the statutory provision as "laborers" are liable to deportation upon an affirmative finding of this fact as to the person apprehended.

On the part of the government, it is contended that when a Chinese laborer is apprehended under this act and found with-

out a certificate, and claiming to have been a merchant during the period of registration, he is subject to deportation unless it is affirmatively shown, to the satisfaction of the commissioner or court, that he was a merchant, as defined by the statute, during such period of registration.

We do not find it necessary to determine this question in the cases now before us, for, in the opinion of the court, the testimony shows that the appellants were "merchants" within the definition laid down by the law. The testimony shows, without contradiction, and by disinterested witnesses other than Chinese, that the appellants had been in this country for periods varying from ten to thirty years. That in the years from 1891 to 1895 they were carrying on a Chinese grocery in New York, known as the Kwong Yen Ti Company. In that period they bought and sold groceries, kept books of account, and had articles of partnership. It is a fact that the testimony does not disclose, as to any of them, that the business was conducted in his name, as the literal interpretation of the law would seem to require, but it was carried on in a company name, which did not include that of any of the partners. The fact of buying and selling at a fixed place of business in a real partnership was established without contradiction.

It is true that after the lapse of so many years the appellants, when taken before the commissioner, were unable to produce the books or articles of copartnership of the firm. But some allowance must be made for the long delay in their prosecution by the government, and the natural loss of such testimony years after the firm's transactions were closed.

[522] *The commissioner was doubtless influenced by the intimation in the *Pin Kwan Case*, 40 C. C. A. 618, 100 Fed. 609, to the effect that the statutory requirements as to the conduct of the business in the name of the parties necessitated the appearance of the name in the style in which the business was conducted. But this would be too narrow a construction of the statute. The purpose of the law is to prevent those who have no real interest in the business from making fraudulent claims to the benefits of the act as merchants. The interest in the business must be substantial and real and in the name of the person claiming to own it, but the partner's name need not necessarily appear in the firm style when carried on, as is usual among the Chinese, under a company name which does not include individual names. The main purpose is to require the person to be a bona fide merchant, having, in his own name and right, an interest in a real mercantile business, in which he

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does only the manual labor necessary to the conduct thereof. This conclusion has been reached in a number of Federal cases, in which the matter has been given careful consideration. Perhaps the leading one was decided by the circuit court of appeals for the ninth circuit (*Lee Kan v. United States*, 10 C. C. A. 669, 15 U. S. App. 516, 62 Fed. 914), the opinion being delivered by Mr. Justice McKenna, then circuit judge, in which the subject was so fully considered as to leave little to be added to the discussion. See also *Wong Ah Gah v. United States*, 94 Fed. 831; *Wong Fong v. United States*, 23 C. C. A. 110, 44 U. S. App. 674, 77 Fed. 168.

It is true that the findings of the commissioner and in the district court in cases of this character should ordinarily be followed in this court, and will only be reconsidered when it is clear that an incorrect conclusion has been reached. *Chin Bak Kan v. United States*, 186 U. S. 193-201, 46 L. ed. 1121-1126, 22 Sup. Ct. Rep. 891. But in the present case no new matter seems to have been admitted in the district court, and the finding made by the commissioner as to these appellants is of an uncertain nature when the judgment is read in connection with the special finding filed by that officer and made part of the record in each case, in which *he says: "The proofs furnished in [523] this case are sufficient to show that these three persons were engaged in business rather than in manual labor in 1894."

In this state of the record an examination thereof satisfies us that the appellants adduced testimony which established that they were bona fide "merchants" within the meaning of the law at the time registration was required of laborers by the act of Congress, and, as the orders of deportation were made on the sole ground that appellants failed to show that fact, the judgments are reversed and appellants discharged.

JULES S. BACHE, *Appt.*,

v.

SAMUEL HUNT, as Receiver of the St. Louis, Toledo, & Kansas City Railroad Company, and Toledo, St. Louis, & Western Railroad Company.

(See S. C. Reporter's ed. 523-526.)

Direct appeal from circuit court—when jurisdiction of circuit court not involved.

A suit in which the jurisdiction of a United

NOTE.—On the direct review by the United States Supreme Court of circuit or district court judgments or decrees under the circuit-court-of-appeals act—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

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States circuit court was only questioned under the established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, does not involve a question of jurisdiction which, under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, may be certified directly to the Federal Supreme Court.

[No. 177.]

Argued March 11, 14, 15, 1904. Decided April 4, 1904.

A PPEAL from the Circuit Court of the United States for the Northern District of Ohio to review a decree in a suit in which the jurisdiction of that court was questioned in respect of its general authority as a judicial tribunal. *Dismissed* for want of jurisdiction.

The facts are stated in the opinion.

Mr. F. Spiegelberg argued the cause and filed a brief for appellant.

Mr. Adrian H. Joline argued the cause, and, with **Mr. Clarence Brown**, filed a brief for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

This case was brought directly to this court as coming within the first of the classes of cases enumerated in § 5 of the [524] judiciary *act of March 3, 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549], in which that may be done, the circuit court having certified that the jurisdiction of the court was in issue, and granted the appeal on that ground.

The case was briefly this: Samuel Hunt, receiver, filed his petition in the circuit court of the United States for the northern district of Ohio in the foreclosure suit of *The Continental Trust Company of New York v. The Toledo, St. Louis, & Kansas City Railroad Company, Jules S. Bache, Sylvester H. Kneeland, and others*, asserting that he was entitled, out of certain of the first-mortgage bonds foreclosed in the suit, and stock of the railroad company, in the hands of the Farmers' Loan & Trust Company, to be reimbursed for amounts paid by him, or his predecessors, as receiver, in the extinguishment of prior claims which the bonds and stock had been deposited to secure, and seeking a decree that they be delivered to him, or sold and the proceeds so delivered, etc. The deposit had been made to secure payment of certain underlying liens, which Kneeland had agreed to pay and discharge, and which he had failed to do, and the receiver had done so out of the moneys and property of the railroad company.

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Bache, who was a citizen of, and resided in, New York, and others, were ordered to demur, plead, or answer the petition, and copies of the order were mailed to the parties named, including Bache. Bache appeared specially and filed a plea to the jurisdiction of the court over the subject-matter because of the pendency in the supreme court of New York of a suit instituted prior to the filing of Hunt's petition by Bache as a judgment creditor of Kneeland against the Toledo, St. Louis, & Kansas City Railroad Company, Kneeland, and the Farmers' Loan & Trust Company, in which the last-mentioned company had been appointed receiver of the securities forming the subject of the Hunt petition, on the same day on which the Hunt petition was filed; and of his person because of the insufficiency of the method of service of the order. The plea was overruled.

The circuit court held that when the receiver used the *moneys of the receivership [525] to discharge the underlying liens, the equitable right accrued to him and to those whom he represented, to be reimbursed out of the securities deposited with the Farmers' Loan & Trust Company; and that, as a junior encumbrancer, Bache had never been dismissed from the suit, and as such was before the court for all purposes of the distribution of the proceeds of the sale of the mortgaged property. It appeared that Bache was made one of the original defendants in the foreclosure suit as a junior encumbrancer and entered his appearance; that he afterwards set up his claim, by answer, in that suit, it being the same claim on which his proceeding in the state court was founded; that he filed his claims before the special master under order in that behalf; and that Kneeland was also a party to the cause.

Bache, declining to plead further, the petition was taken as confessed as to him, and a decree was subsequently entered that the Toledo, St. Louis & Western Railroad Company, as successor to the rights of Hunt, as receiver, and his predecessors, was entitled out of the securities in the hands of the Farmers' Loan & Trust Company to be reimbursed in the amounts which had been paid by the receivers in respect of the prior claims; and that said securities be delivered to the railroad company, or, on default of such delivery within thirty days, that they should stand canceled and of no further force or effect. From this decree the pending appeal was thereupon taken.

It will be perceived that the jurisdiction of the circuit court was only questioned in respect of its general authority as a judicial tribunal, and not in respect of its power as a court of the United States. The established rules of practice as to bringing in

parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction, which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the circuit court [526] as a Federal *court. *Louisville Trust Co. v. Knott*, 191 U. S. 225, *ante*, 159, 24 Sup. Ct. Rep. 119; *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497.

Tested by this rule our jurisdiction fails, and the appeal must be dismissed.

LUTHER B. YAPLE, Trustee in Bankruptcy of Hannah L. Weltner, Doing Business as Hannah Weltner & Son,
v.

DAHL-MILLIKAN GROCERY COMPANY.

(See S. C. Reporter's ed. 526, 527.)

Bankruptcy — preference by payments on open account.

Payments made on an open account, within four months of the debtor's adjudication in bankruptcy, which are received in good faith, without the creditor's knowledge of the debtor's insolvency, and are less in amount than the credit sales made by such creditor to the debtor during that period, do not constitute a preference which must be surrendered before the claim for the balance can be allowed under the bankrupt act.

[No. 181.]

Submitted March 15, 1904. Decided April 4, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit, presenting a question as to preferences under the bankrupt act. *Answered in the negative.*

Mr. William T. McClintick submitted the cause for the trustee in bankruptcy.

No counsel opposed.

[527] *THE CHIEF JUSTICE: Two questions are propounded by this certificate, namely:

"1. Where a creditor has a claim for a balance due against an insolvent debtor afterwards adjudicated a bankrupt, upon an open account for goods sold and delivered four months before the adjudication in bankruptcy, and during said period makes a number of sales of merchandise on credit to the insolvent debtor, which becomes a part of the debtor's estate, and during the same period receives payments of sums on account, from time to time, which payments

are received in good faith, without knowledge of the debtor's insolvency on the part of the creditor, the sales exceeding in amount during said period the payments made during the same time,—has the creditor, under such circumstances, received a preference which he is obliged to surrender before his claim shall be allowed under the bankrupt act?

"2. If each of such payments is a preference under the act, is it to be set off under § 60c of the act (U. S. Comp. Stat. 1901, p. 3446) by deducting subsequent sales therefrom, carrying forward to the next payment any excess of preferences, but not of sales, treating any excess of preferences as thus ascertained as a sum to be surrendered before the allowance of the creditor's claim?"

The first question is answered in the negative on the authority of *Jaquith v. Alden*, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; and the second need not be answered. Certified accordingly.

*UNITED STATES, Appt.,

v.

RICHARD JONES. (No. 197.)

UNITED STATES, Appt.,

v.

CHARLES H. GILDERSLEEVE. (No. 198.)

UNITED STATES, Appt.,

v.

MARY K. WHEELER, Administratrix of Stephen Wheeler, Deceased. (No. 199.)

MARY K. WHEELER, Administratrix of Stephen Wheeler, Deceased, Appt.,

v.

UNITED STATES. (No. 525.)

(See S. C. Reporter's ed. 528-531.)

Fees of clerks of Federal courts.

1. A clerk of a Federal court is not entitled to fees for administering oaths and affixing jurats to accounts of United States marshals, in view of the provision of the act of February 22, 1875 (18 Stat. at L. 333, chap. 95, U. S. Comp. Stat. 1901, p. 648), requiring clerks, marshals, and district attorneys to render their accounts duly sworn to for approval.
2. An allowance to a clerk of a Federal court of charges for a transcript of record on writ of error in criminal proceedings, ordered by the court on behalf of an indigent defendant, is not precluded on the theory that U. S. Rev. Stat. § 878 (U. S. Comp. Stat. 1901, p. 668), providing for payment under order of court of fees and costs when defendant under indictment is without means, is exclusive, and does not cover the charge for such service.

3. Compensation is properly allowed a clerk of a Federal court for services in connection with affidavits of defendants in criminal cases of inability to pay costs.
4. A clerk of a Federal court is properly allowed charges for issuing subpoenas for grand and petit jurors by order of the court.
5. Charges for services of a clerk of a Federal court on behalf of indigent defendants in criminal cases, which consist in administering oaths by order of court to defendant's witnesses, in administering oaths to affidavits of poverty, and affixing jurats, in filing and entering applications for process, in filing and entering motions of defendants for new trial, and in rendering services to defendant in a capital case, by order of court, in prosecution of writ of error, are properly allowed under U. S. Rev. Stat. §§ 828, 878 (U. S. Comp. Stat. 1901, pp. 635, 638), and the act of February 6, 1889 (25 Stat. at L. 655, chap. 113; U. S. Comp. Stat. 1901, p. 492).
6. Charges of a clerk of the Federal court for certificates to copies of sci. fa. and copies of orders of the court for furnishing meals to jurors are properly disallowed, where no direction of the court as to such certificates is shown.
7. An allowance to a clerk of a Federal court of charges for administering oaths on the *voir dire* of grand and petit jurors cannot be justified under U. S. Rev. Stat. § 828, cl. 4 (U. S. Comp. Stat. 1901, p. 635).

[Nos. 197, 198, 199, 525.]

Submitted March 18, 1904. Decided April 4, 1904.

A PPEALS from judgments of the Court of Claims in respect of services alleged to have been rendered as clerks of District or Circuit Courts of the United States. Judgment in No. 197 modified by omitting an item for administering oaths and affixing jurats to accounts of United States marshals, and, as so modified, *affirmed*. Judgments in Nos. 198, 199, and 525 *affirmed*.

See same cases below. No. 197, 37 Court of Claims, 565. No. 198, 37 Court of Claims, 571. Nos. 199 and 525, 37 Court of Claims, 571.

The facts are stated in the opinion.

Assistant Attorney General Pradt and **Philip M. Ashford** submitted the cause for appellant in Nos. 197, 198, and 199.

Mr. George A. King submitted the cause for appellee in No. 197.

Messrs. George A. King and **William B. King** submitted the cause for appellee in No. 198.

Mr. Charles C. Lancaster submitted the cause for administratrix Wheeler in Nos. 199 and 525.

THE CHIEF JUSTICE: These are appeals
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from judgments of the court of claims in respect of services alleged to have been rendered as clerks of district or circuit courts of the United States. In each case the accounts for services had been duly approved by the circuit or district court; certain items had been disallowed by the accounting officers of the Treasury Department; thereupon these suits were brought; and the court of claims made findings of fact and conclusions of law. In view of the action of the two courts and of our previous decisions, the points raised in argument do not seem to require particular discussion.

In No. 197 the judgment of the court of claims included, among other items, this: "Administering oaths and affixing jurats to accounts of United States marshals, at 10 cents for each oath and 15 cents for each jurat, \$91.20."

By the act of February 22, 1875 (18 Stat. at L. 333, chap. 95, U. S. Comp. Stat. 1901, p. 648), clerks, marshals, and district attorneys are required to render their accounts, duly sworn to, for approval. We agree with counsel for the government that the making of the oath and attaching the same to the account is a part of the formality of presenting *such accounts, without [530] which they are not properly rendered. This item, therefore, should not have been allowed against the United States in favor of the clerk. *United States v. Van Duzee*, 140 U. S. 169, 35 L. ed. 399, 11 Sup. Ct. Rep. 758; *United States v. Jones*, 147 U. S. 672, 37 L. ed. 325, 13 Sup. Ct. Rep. 437; *United States v. Allred*, 155 U. S. 591, 39 L. ed. 273, 15 Sup. Ct. Rep. 231.

The judgment of the court of claims will be modified by the omission of this item, and, as so modified, affirmed.

In No. 198, the government objects to the allowance of certain charges for transcript of record on writ of error in criminal proceedings, by order of court, on behalf of an indigent defendant; for services in connection with affidavits of poverty; and for issuing subpoenas for grand and petit jurors. As to the transcript, the contention is that § 878 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 668), providing for payment under order of court of fees and costs when defendant under indictment is without means, is exclusive, and does not cover the charge for this service. Here, again, we think the question has been settled, in effect, by what was said in *United States v. Barber*, 140 U. S. 164, 35 L. ed. 396, 11 Sup. Ct. Rep. 749; *United States v. Van Duzee*, 140 U. S. 169, 35 L. ed. 399, 11 Sup. Ct. Rep. 758; and *United States v. Allred*, 39 L.

ed. 273, 15 Sup. Ct. Rep. 231. It was held that an order of the court requiring a service to be performed was sufficient authority as between the clerk and the government for the performance of the service and the allowance of the proper fee therefor.

Section 878 was originally enacted in 1846, and should not be held to operate as a prohibition to the extent contended. The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty, and, when the court has ordered the transcript in the interest of justice, the clerk ought not to be deprived of compensation.

The same considerations dispose of the objection to the second item as to affidavits of defendants in criminal cases of inability to pay costs. And we agree with the court of claims in sustaining the charges for issuing subpoenas for grand and petit jurors by order of court, the charge for seals being rejected. The subject is well treated in *Martin v. United States*, 26 Ct. Cl. 160. The judgment will be affirmed.

531] *In No. 199 counsel for United States assign error in the allowance of charges: (1) for administering oaths, by order of court, to witnesses for defendants on trial in criminal cases; (2) for administering oaths to affidavits of poverty, and affixing jurats; (3) for filing and entering applications for process; (4) for filing and entering motions of indigent defendants for new trial; (5) and for services rendered an indigent defendant, by order of court, in prosecution of a writ of error in a capital case. We assume that all these items relate to indigent defendants, and considering §§ 828 and 878 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 635, 668), the act of February 6, 1889 (25 Stat. at L. 655, chap. 113; U. S. Comp. Stat. 1901, p. 492), our previous decisions, and what has just been said, we perceive no reason for declining to accept the conclusions of the court of claims.

No. 525 is a cross appeal from the judgment brought up in No. 199. We hold that the cross appeal lies in the circumstances, but agree with the disallowance by the court of claims of the items involved. Two of these items consisted of charges for certificates to copies of sci. fa., and to copies of orders of court for furnishing meals to jurors. No direction of court as to such certificates was shown. The other item was for administering oaths on the *voir dire* of grand and petit jurors and we do not think can be justified under the fourth clause of § 828. The judgment will be affirmed.

Judgments will be entered as above indicated.

*GREAT SOUTHERN FIRE PROOF HO-[532]
TEL COMPANY, *Petitioner*,
v.

BENJAMIN F. JONES, George M. Laughlin, Benjamin F. Jones, Jr., *et al.*

(See S. C. Reporter's ed. 532-550.)

Courts—when decisions of state courts are not conclusive on Federal courts—constitutional law—validity of statute giving mechanics' lien to subcontractors—freedom to contract—due process of law.

1. An independent judgment as to the constitutionality, under a state Constitution, of a mechanics' lien law, may be exercised by a Federal court notwithstanding decisions of the state courts, rendered before the commencement of the suit in the Federal court, but not until after the rights of the parties had been fixed by their contracts, declaring such law to be repugnant to the state constitution.
2. Liberty of contract is not unreasonably interfered with, nor is property taken without due process of law, by the provisions of Ohio Rev. Stat. §§ 3184, 3185, 3185a, giving a lien on the property of the owner to subcontractors, laborers, and those who furnish materials to be used by the contractor in the execution of his contract with the owner.

[No. 165.]

Argued February 29, March 1, 1904. Decided April 4, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of Ohio enforcing a mechanic's lien. *Affirmed.*

See same case below, 54 C. C. A. 165, 116 Fed. 793.

The facts are stated in the opinion.

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 583; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 334; and *Forepaugh v. Delaware, L. & W. R. Co.* 5 L. R. A. 508.

On payment to contractors or subcontractors as affecting liens of subordinate claimants—see note to *French v. Bauer*, 20 L. R. A. 560.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On the constitutionality of statutes restricting contracts and business—see note to *State v. Loomis*, 21 L. R. A. 789.

Messrs. Gilbert Holland Stewart and Henry Gumble argued the cause, and, with **Messrs. Stewart & Stewart and Gumble & Gumble**, filed a brief for petitioner:

The Ohio mechanic's lien law of 1894 perverts the meaning of the terms "subcontract" and "subcontractor;" for a subcontractor, as its very meaning indicates, is subordinate to the original contractor. A subcontractor's lien therefore depends on the original contract, and is, like the lien of the contractor himself, governed by its terms.

Boisot, *Mechanics' Liens*, § 228.

There should be no question as to the unconstitutionality of this law.

Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313; *Thaxter v. Williams*, 14 Pick. 49; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Julow*, 129 Mo. 172, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781.

The supreme court of Ohio found that the law in question was in contravention of the provisions of the Bill of Rights.

Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313.

It was conceded in the opinion that exemption laws, although they in a slight degree limit the liberty of contract, laws against usury, and laws in other like cases restraining the liberty of contract, are valid because the court can see in such cases that such laws are for the general welfare of the whole people, and do not, therefore, interfere with their equal protection and benefit; but the court can not see that a law which requires a corporation to pay its employees at least twice in every month (*State v. Lake Erie Iron Co.* Cited in 55 Ohio St. 442, 45 N. E. 313), or a law which limits the hours of service of those employed on public works (*Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 93 Am. St. Rep. 670, 65 N. E. 885), or a law like that in question, which takes away from the owner of a building the liberty to contract that the seller of materials may collect their value from a man who never purchased them, and who has already paid the person with whom he contracted for all that he has received, is for the general welfare.

The decision of the Ohio court is abundantly supported by reason and authority.

Overton, *Liens*, § 553; *Stewart v. Wright*, 52 Iowa, 335, 3 N. W. 144; *John Spry Lumber Co. v. Sault Sav. Bank Loan & T. Co.* 77 Mich. 199, 6 L. R. A. 204, 18 Am. St. Rep. 396, 43 N. W. 778; *Mellis v. Race*, 78 Mich. 80, 43 N. W. 1033; *Snell v. Race*, 78

Mich. 334, 44 N. W. 286; *Waters v. Wolf*, 162 Pa. 153, 42 Am. St. Rep. 815, 29 Atl. 646; *Meyer v. Berlandi*, 39 Minn. 438, 1 L. R. A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; *Selma Sash, Door & Blind Factory v. Stoddard*, 116 Ala. 251, 22 So. 555; *Renton v. Conley*, 49 Cal. 185; *McAlpine v. Duncan*, 16 Cal. 127; *Bowen v. Aubrey*, 22 Cal. 571; *Henry v. Hinds*, 18 Mo. App. 497.

The right to make contracts is one of the attributes of property, and when an individual is deprived of such right he is deprived of his property.

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

The right to contract affords the only way by which a person can rightfully acquire property by his own labor.

Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

The statute in question is obnoxious as class legislation, for it imposes upon the property owner a burden attaching to no one else. It is not uniform in its operation.

State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386, 41 N. E. 263; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Godecharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *South & North Ala. R. Co. v. Morris*, 65 Ala. 194; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Ex parte Jentsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803.

The law, if sustained, would, as held in *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313, operate to exclude the small and financially weak contractors from business. It would deprive such persons of liberty in its broad sense as understood in this country, to wit, the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in

any lawful calling, and to pursue any lawful avocation.

People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 755, 28 L. ed. 590, 4 Sup. Ct. Rep. 652; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Peel Splint Coal Co.* 36 W. Va. 856, 17 L. R. A. 385, 15 S. E. 1000; Brannon's 14th Amend. 110-112; *Allgeyer v. Louisiana*, 165 U. S. 578, 590, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427.

A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all.

Ex parte Jentzsch, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 188, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

The mechanic's lien law now in question deprives the owner of his property without due process of law.

Cooley, Const. Lim. 3d ed. § 353; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 52 Am. St. Rep. 344, 43 N. E. 624.

Everyone has a right to demand that he be governed by general rules, and special statutes which, without his consent, single his case out to be regulated by a different law from that which is applied to all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government.

Cooley, Const. Lim. 3d ed. 391, 392.

In the dissenting opinion of Cassoday, J., in *Mallory v. La Crosse Abattoir Co.* 80 Wis. 180, 49 N. W. 1071, will be found the true reasoning and sound authority upon which this case should be decided.

The law in question is contrary to the spirit of the Constitution in violation of the great first principles of the social compact, and cannot be considered a rightful exercise of legislative authority.

Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Wilkinson v. Leland*, 2 Pet. 658, 7 L. ed. 553; 3 Am. & Eng. Enc. Law, p. 674; *Gunn v. Barry*, 15 Wall. 623, 21 L. ed. 215; *Osborn v. Nicholson*, 13 Wall. 662, 20 L. ed. 695.

The argument that the lien law was read into and made a part of the contracts of the

lien claimants, and the hotel company was thereby bound, is without merit.

Norton v. Shelby County, 118 U. S. 442, 30 L. ed. 186, 6 Sup. Ct. Rep. 1121; *Young v. Lion Hardware Co.* 55 Ohio St. 423, 45 N. E. 313; 3 Am. & Eng. Enc. Law, p. 678; *State v. Public Works*, 3 Ohio L. J. 265; *Meyer v. Berlandi*, 39 Minn. 438, 1 L. R. A. 777, 12 Am. St. Rep. 663, 40 N. W. 513.

An unconstitutional law is void, not from the time it is so declared, but from its enactment.

Findlay v. Pendleton, 62 Ohio St. 80, 56 N. E. 649.

If the law is unconstitutional, it cannot be rendered valid by the mere fact that the owner could relieve himself by requiring the contractor to give a bond.

Bardwell v. Mann, 46 Minn. 285, 48 N. W. 1120; *Gibbs v. Tally*, 133 Cal. 373, 60 L. R. A. 815, 65 Pac. 970; *Shaughnessy v. American Surety Co. (Cal.)* 71 Pac. 701; *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150.

The decision of the supreme court of Ohio in the case of *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313, followed the uniform doctrine theretofore announced.

Hampson v. State, 8 Ohio, 321; *Dunn v. Rankin*, 27 Ohio St. 132; *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737.

The same principle has been announced in more recent decisions, as in *Stark v. Simmons*, 54 Ohio St. 435, 43 N. E. 999, and *Mack v. DeGraff & R. Quarries*, 57 Ohio St. 463, 63 Am. St. Rep. 729, 49 N. E. 697. There has been no change in the state of decisions on the question of mechanics' liens within the history of the state.

The rule that the Federal courts will follow state decisions as to state laws and rights under them is almost invariable.

Brannon's 14th Amend. 307.

For the sake of harmony and to avoid confusion, the courts of the United States will lean toward an agreement of views with the state courts if the question seems to be balanced in doubt.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *O'Brien v. Wheelock*, 37 C. C. A. 309, 95 Fed. 883.

And if the Federal court be bound by the interpretation of the Ohio statute by the state court, it need not review the reason for reaching that interpretation.

New York L. Ins. Co. v. Cravens, 178 U. S. 389, 395, 44 L. ed. 1116, 1122, 20 Sup. Ct. Rep. 962.

The decision of the supreme court of Ohio is founded on reason and authority, but, were the Federal court to conclude otherwise, it would be immaterial.

Forsyth v. Hammond, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665.

The matter in controversy is one peculiarly within the domain of state control. It is of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling. It is a matter of local and non-Federal concern.

Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974.

The laws of the several states include state Constitutions, statutes, the common law, and decisions expounding them.

Brannon's 14th Amend. 393; *Bucher v. Cheshire R. Co.* 125 U. S. 582, 31 L. ed. 798, 8 Sup. Ct. Rep. 974.

In ordinary cases the decisions of the highest court of the state with regard to the validity of one of its statutes are binding on the Federal courts.

McGahey v. Virginia, 135 U. S. 665, 667, 34 L. ed. 305, 306, 10 Sup. Ct. Rep. 972.

If the previous decisions of the state court are so firmly established as to constitute a rule of property, then the Federal courts are governed by the previous decisions of the state courts.

Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

The public policy of a state may be deemed to be authoritatively declared by its courts. We cannot oppose their evidence by speculations of our own. Nor can such interests and policy be changed by the contracts of parties. Against them no intention will be inferred, or permitted to be enforced.

New York L. Ins. Co. v. Cravens, 178 U. S. 398, 44 L. ed. 1123, 20 Sup. Ct. Rep. 962.

It will be claimed that a large number of states have held mechanics' lien laws similar to, or embracing the same principles as, the Ohio mechanic's lien law, to be constitutional; but such a fact is of no consequence in the determination of this case.

Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466.

If there are different interpretations in different states of a local law, that law in effect becomes, by the interpretation, so far as it is a rule for action in the Federal courts, a different law in one state from what it is in another.

Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Louisiana v. Pilsbury*, 105 U. S. 294, 26 L. ed. 1095.

Federal courts are not justified in running

counter to the decisions of the highest court upon questions involving the construction of state statutes or Constitution, on any alleged ground that such decisions are in conflict with the sound principles of general constitutional law.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

Complainant should have known that such a statute as the one under consideration would not receive the approval of the supreme court, and that it would be pronounced unconstitutional.

Hampson v. State, 8 Ohio, 315.

It is sufficient if we have proved that, prior to the execution of the contract, the supreme court of the state had construed a similar statute, and it was not incumbent upon us to prove that the same court had construed the exact mechanic's lien statute which is now under consideration and discussion.

O'Brien v. Wheelock, 37 C. C. A. 309, 95 Fed. 883; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

Messrs. George K. Nash and T. J. Keating argued the cause, and, with **Mr. Louis G. Addison**, filed a brief for respondents:

Respondents were nonresidents of the state of Ohio when they examined the statutes and ascertained their rights before making their contract and furnishing the labor and material, and had the right to presume that the statute was constitutional, and that their rights would be protected thereunder; and, under these circumstances, we think that the decisions of this court have clearly established that this court will act independently of the Ohio court, and, while giving due weight to its decision, will still, of itself and independently of the Ohio court, decide whether or not said law was in fact unconstitutional.

Burgess v. Seligman, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *Young v. Lion Hardware Co.* 55 Ohio St. 423, 45 N. E. 313; *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215; 27 Am. & Eng. Enc. Law, p. 600.

The decision of *Young v. Lion Hardware Co.* 55 Ohio St. 423, 45 N. E. 313, is a departure from the settled construction as theretofore announced by that court.

Scioto Valley R. Co. v. Cronin, 38 Ohio St. 122; *Scioto Valley R. Co. v. McCoy*, 42 Ohio

St. 251; *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643.

If we are correct in this conclusion, then this is an additional ground why this court should consider this question independently of the state court.

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 432, 14 L. ed. 1003; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968.

The contract having been made, executed, and performed during the time this law stood upon the statute books of the state of Ohio as the law of Ohio, the law must, therefore, be considered as forming a part of the contract; and it does not deprive the petitioner of its property without due process of law, nor does it impair the obligation of its contract.

Smith v. Parsons, 1 Ohio, 236, 13 Am. Dec. 608; *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643.

The following decisions have upheld the constitutionality of similar laws to the one now under consideration:

Smith v. Newbaur, 144 Ind. 95, 33 L. R. A. 685, 42 N. E. 40; *Title Guarantee & T. Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271; *Albright v. Smith*, 3 S. Dak. 631, 54 N. W. 816; *Blauvelt v. Woodworth*, 31 N. Y. 285; *Gladius v. Black*, 67 N. Y. 563; *O'Neil v. St. Olaf's School*, 26 Minn. 329, 4 N. W. 47; *Bohn v. McCarthy*, 29 Minn. 23, 11 N. W. 127; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Gardner v. Leek*, 46 Minn. 285, 48 N. W. 1120; *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621; *Taggard v. Buckmore*, 42 Me. 77; *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170, 49 N. W. 1071; *Henry & C. Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 332, 10 S. W. 868; *Parker v. Bell*, 7 Gray, 429; *Donahy v. Clapp*, 12 Cush. 440; *Bowen v. Phinney*, 162 Mass. 593, 44 Am. St. Rep. 391, 39 N. E. 283; *Cole Mfg. Co. v. Falls*, 90 Tenn. 471, 16 S. W. 1045; *Hicks v. Murray*, 43 Cal. 515; *Gurney v. Walsham*, 16 R. I. 699, 19 Atl. 323; *Roanoke Land & Improv. Co. v. Karn*, 80 Va. 589; *Norfolk & W. R. Co. v. Howison*, 81 Va. 125; *Spokane Mfg. & Lumber Co. v. McChesney*, 1 Wash. 609, 21 Pac. 198; *Paine v. Tillinghast*, 52 Conn. 532; *Treuseh v. Shryock*, 51 Md. 162; *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; *Nightower v. Bailey*, 108 Ky. 198, 49 L. R. A. 255, 56 S. W. 147.

In other cases a subcontractor's lien has been upheld and protected, although the constitutional question was not raised.

Winder v. Caldwell, 14 How. 434, 14 L. ed. 487; *Springer Land Assn. v. Ford*, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. Rep. 170.

It is not the contract for erecting or repairing the building which creates the lien,

but it is the use of the material furnished, and the work and labor expended by the contractors, whereby the building becomes a part of the freehold that gives the material man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into; presumably, in view of, or with reference to, the statute.

Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 136, 35 L. ed. 961, 964, 12 Sup. Ct. Rep. 181.

The cases sustaining mechanics' lien laws such as the one now before this court proceed upon this theory.

Cole Mfg. Co. v. Falls, 90 Tenn. 466, 16 S. W. 1045; *Henry & C. Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 332, 10 S. W. 868; *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170, 49 N. W. 1071; *Smith v. Newbaur*, 144 Ind. 95, 33 L. R. A. 685, 42 N. E. 40; *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590.

The act in question is not class legislation.

Summerlin v. Thompson, 31 Fla. 369, 12 So. 667; *Davis v. State*, 3 Lea, 380; *Cole Mfg. Co. v. Falls*, 90 Tenn. 471, 16 S. W. 1045; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195; *Soon Hing v. Crowley*, 113 U. S. 703, 708, 28 L. ed. 1145, 1146, 5 Sup. Ct. Rep. 730; *Cooley*, Const. Lim. 5th ed. 482, 483; *Barbier v. Connolly*, 113 U. S. 27, 31, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *New York ex rel. New York Electric Lines Co. v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; *State v. Powers*, 38 Ohio St. 54.

Mr. Talfourd P. Linn also argued the cause, and, with Mr. John D. McKennan and Outhwaite, Linn, & Thurman, filed a brief for respondents:

Decisions of state courts as to their statutes, which affect the validity of contracts between citizens of different states which were made, or under which rights were acquired, before there was any judicial construction of the statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States.

Burgess v. Seligman, 107 U. S. 32, 27 L. ed. 364, 2 Sup. Ct. Rep. 10; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; 35 Cent. L. J. 322; 27 Am. & Eng. Enc. Law, p. 600; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. ed. 786, 7 Sup. Ct. Rep. 736; *Barnum v. Okolona*, 143

U. S. 396, 37 L. ed. 497, 13 Sup. Ct. Rep. 638; *Speer v. Kearney County*, 32 C. C. A. 103, 60 U. S. App. 38, 88 Fed. 749.

Former decisions of the supreme court of Ohio upon similar contracts and liens are in conflict with the decision of *Young v. Lion Hardware Co.* 55 Ohio St. 423, 45 N. E. 313.

Smith v. Parsons, 1 Ohio, 240, 13 Am. Dec. 608; *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643; *Scioto Valley R. Co. v. Cronin*, 38 Ohio St. 122; *Scioto Valley R. Co. v. McCoy*, 42 Ohio St. 251.

In view of these decisions, if there were no other reason, this court, in this case, not only is not bound by the decision in *Young v. Lion Hardware Co.*, but, under the rule, should follow the principle of the prior decisions, and, in so far as these respondents are concerned, enforce their lien, leaving the case of *Young v. Lion Hardware Co.* to be a rule for cases governing contracts arising subsequently thereto.

The contract having been made during the existence of the statute, it must, therefore, be considered as forming a part of the contract, and does not impair the obligations of that contract, nor deprive appellant of its property without due process of law.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 432, 14 L. ed. 1003; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643; *Cooley*, Const. Lim. 6th ed. 344; *Streubel v. Milwaukee & M. R. Co.* 12 Wis. 67; *Denny v. Bennett*, 128 U. S. 495, 32 L. ed. 493, 9 Sup. Ct. Rep. 134; *Provident Inst. for Savings v. Jersey City*, 113 U. S. 514, 28 L. ed. 1105, 5 Sup. Ct. Rep. 612; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; 2 Jones, Liens, p. 286; *McMurray v. Brown*, 91 U. S. 266, 23 L. ed. 324; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Smith v. Parsons*, 1 Ohio, 236; *Phillips*, *Mechanics' Liens*, § 30.

Every question raised as to the constitutionality of the act has been repeatedly adjudicated previous to the Ohio decision; and, with two exceptions, *viz.*: The supreme court of Michigan in *John Spry Lumber Co. v. Sault Sav. Bank Loan & T. Co.* 77 Mich. 199, 6 L. R. A. 204, 18 Am. St. Rep. 396, 43 N. W. 778, and the supreme court of Pennsylvania in *Waters v. Wolf*, 162 Pa. 153, 42 Am. St. Rep. 815, 29 Atl. 646,—all courts of last resort have held the legislation constitutional,—neither in violation of the obligations of contracts, nor a seizure of property without due process of law.

Blauvelt v. Woodworth, 31 N. Y. 285; *Glacius v. Black*, 67 N. Y. 567; *Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323; *Hicks v. Murray*, 43 Cal. 515; *Atwood v. Williams*, 40 Me. 409; *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621; *Taggard v. Buckmore*, 42 193 U. S.

Me. 77; *Taylor v. Murphy*, 148 Pa. 337, 33 Am. St. Rep. 825, 23 Atl. 1134; *White v. Miller*, 18 Pa. 52; *O'Neil v. St. Olaf's School*, 26 Minn. 329, 4 N. W. 47; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Cole Mfg. Co. v. Falls*, 90 Tenn. 471, 16 S. W. 1045; *Reeves v. Henderson*, 90 Tenn. 521, 18 S. W. 242; *Alvord v. Hendrie*, 2 Mont. 115; *Paine v. Tillinghast*, 52 Conn. 532; *Hightower v. Bailey*, 108 Ky. 198, 49 L. R. A. 255, 94 Am. St. Rep. 350, 56 S. W. 147; *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590; *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170, 49 N. W. 1071; *Treusch v. Shryock*, 51 Md. 162; *Colter v. Frese*, 45 Ind. 96; *Andis v. Davis*, 63 Ind. 17; *Smith v. Newbaur*, 144 Ind. 95, 33 L. R. A. 685, 42 N. E. 40; *Spokane Mfg. & Lumber Co. v. McChesney*, 1 Wash. 609, 21 Pac. 198; *Norfolk & W. R. Co. v. Howison*, 81 Va. 125; *Provident Inst. for Savings v. Jersey City*, 113 U. S. 516, 28 L. ed. 1106, 5 Sup. Ct. Rep. 612; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 446, 25 L. ed. 1058; *Winder v. Caldwell*, 14 How. 434, 444, 445, 14 L. ed. 487; *Puritan v. Hull of a New Ship*, 2 Curt. C. C. 416, Fed. Cas. No. 11,472; *Bowen v. Phinney*, 162 Mass. 593, 44 Am. St. Rep. 391, 39 N. E. 283; *Donahy v. Clapp*, 12 Cush. 440; *Henry & C. Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 332, 10 S. W. 868; *Bohn v. McCarthy*, 29 Minn. 23, 11 N. W. 127.

Mr. Justice **Harlan** delivered the opinion of the court:

The Great Southern Fire Proof Hotel Company, a corporation of Ohio, made a contract with one McClain for the construction of a hotel building and opera house at Columbus, Ohio.

McClain contracted with Jones & Laughlins, Limited, a partnership association organized under the laws of Pennsylvania, for a certain amount of steel to be used in the buildings which he undertook to erect.

Under that contract Jones & Laughlins, Limited, furnished steel of the value of \$43,296.74.

Proceeding under certain statutes of Ohio relating to liens for mechanics and others, Jones & Laughlins, Limited, brought suit in the circuit court of the United States for the southern district of Ohio against the hotel company, to enforce a lien asserted by them on the hotel building and opera house for the balance due on their contract with McClain. Various persons were made defendants because they asserted claims upon or interest in the property. It was a case in which the jurisdiction of that court depended upon diversity in the citizenship of the parties. Upon final hearing the circuit court dismissed the bill on the ground that the statute of Ohio of April 13th, 1894 (91

Ohio Laws, 135), under which Jones & Laughlins, Limited, proceeded, was repugnant to the Constitution of Ohio. 79 Fed. 477. Upon appeal to the circuit court of appeals, that court, being of opinion that the statute was constitutional, reversed the decree of the circuit court. 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370. The case [540] was *then brought here upon writ of certiorari, and this court, without considering the merits, reversed the judgments of both courts upon the ground that the record did not affirmatively show a case of which the circuit court could properly take cognizance, so far as the citizenship of the parties was concerned. In the opinion then rendered we said that, under the circumstances, the plaintiffs should be permitted to amend their pleadings as to the citizenship of the parties; and, if a case could be presented within the jurisdiction of the circuit court, the parties should be allowed to proceed to a final hearing on the merits. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 812, 20 Sup. Ct. Rep. 690.

Upon the return of the cause the plaintiffs filed an amended bill of complaint, which cured the defect in its original bill as to the citizenship of the parties. The case went to a final hearing upon the merits, and a decree was rendered in favor of the plaintiffs. That decree was affirmed in the circuit court of appeals. *Great Southern Fire Proof Hotel Co. v. Jones*, 54 C. C. A. 165, 116 Fed. 793. The case is again here upon a writ of certiorari granted upon motion of the hotel company.

The statutory provisions, questions as to the constitutionality of which have been raised in this case, are certain sections of the Revised Statutes of Ohio, as follows:

"Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering, or repairing a boat, vessel, or other water craft, or for erecting, altering, repairing, or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure, or for the digging, drilling, plumbing, boring, operating, completing, or repairing of any gas well, oil well, or any other well, or performs labor of any kind whatsoever, in altering, repairing, or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of, the owner thereof or his agent, trustee, contractor, or subcontractor, shall have [541] a lien to secure the *payment of the same upon such boat, vessel, or other water craft, or upon such house, mill, manufactory, or other building or appurtenance, fixture, bridge, or other structure, or upon such gas

well, oil well, or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed.

"Sec. 3185. Such person, in order to obtain such lien, shall, within four months from the time of performing such labor, or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material, and a description of any promissory note or notes given for such labor, machinery, or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, manufactory, or other buildings, or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time, the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

"Sec. 3185a. In all cases where the labor, material, or machinery referred to in §§ 3184 and 3185 shall be furnished by any person other than the original contractor with such *owner, or his agent or trustee, the [542] lien shall not exceed the actual value of the labor, material, or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery: Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material men, or laborers, fixed an unreasonably low price in

the original contract for any work or material for which a lien is given under § 3184, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors, material men, and laborers shall have a lien to the amount of such fair and reasonable price so ascertained." 91 Ohio Laws, 135, 137.

The contention of the hotel company is that the statute under which Jones & Langhlins, Limited, proceeded was repugnant to the Constitution of Ohio; and that the supreme court of Ohio having held in two cases—*Palmer v. Tingle*, and *Young v. Lion Hardware Co.* 55 Ohio St. 423, 45 N. E. 313, determined before the bringing of this suit, but after the rights of the parties had been fixed by their contracts—that the statute was inconsistent with the state Constitution, the duty of the Federal court was to follow those decisions, even if, in the exercise of an independent judgment on the subject, it was of opinion that the statute was constitutional. Is that view in harmony with the decisions of this court?

The leading case on this subject is *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10, 21. In that case, which was in the circuit court of the United States, the rights of the parties depended upon a statute of Missouri which had not been construed by the highest court of the state at the time those rights accrued under it; and the question arose whether the circuit court was entitled to determine for (543) itself what was the true meaning of the statute. In view of some differences in forms of expression in previous cases, the court deemed it wise to re-examine the subject upon both principle and authority, and to announce the rule by which a circuit court of the United States should be guided in case of a conflict of opinion between it and the highest court of the state as to the meaning and legal effect of a local statute upon which the rights of parties depended.

In that case Mr. Justice Bradley, delivering the unanimous judgment of this court, said: "The Federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules

are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. *But even (544) in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

So in *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539, in which the principal question was as to the validity, under the Constitution of Mississippi, of certain proceedings taken under a railroad charter, the supreme court of that state having passed on the question, it was contended that its judgment was binding on the courts of the United States. But this court, speaking by Mr. Justice Matthews, said: "It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States,

in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one state, suing in another, the choice of resorting to a Federal tribunal. *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10." And in *Anderson v. Santa Anna Twp.* 116 U. S. 356, 365, 29 L. ed. 633, 636, 6 Sup. Ct. Rep. 413, 418, it was *distinctly adjudged that where rights have accrued under a state constitution or statute, "before the state court has announced its construction, the Federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment." In *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 72, 34 L. ed. 864, 867, 11 Sup. Ct. Rep. 215, where the rights of one of the parties depended upon the validity of a statute of Ohio, and which statute the supreme court of Ohio had held after the rights of the parties had accrued, under their contract, to be in violation of the Constitution of that state, this court, although reaching the same conclusion as that announced by the state court, took care to say that the decision of the state court did not conclude this court, and that concurrence with the views expressed by the state court was the result of the exercise of its independent judgment; citing *Burgess v. Seligman* as having settled the law upon this subject.

In *Folsom v. Township Ninety-Six*, 159 U. S. 611, 627, 40 L. ed. 278, 283, 16 Sup. Ct. Rep. 174, 178, which involved a question of the validity of a state enactment, this court referred to *Burgess v. Seligman*, and, speaking by Mr. Justice Gray, said: "There not being shown to have been a single decision of the state court against the constitutionality of the act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its own view of the law of South Carolina." In *Barnum v. Okolona*, 148 U. S. 393, 37 L. ed. 495, 13 Sup. Ct. Rep. 638, which involved the validity of certain bonds, and which bonds the highest court of the state had adjudged to be void under a local statute, the court said: "As against a party who became the owner of such bonds before the decision of the supreme court of the state was rendered, which was the case here, we do not consider our-

selves bound by such decision unless we regard it as intrinsically sound." As late as *Stanly County v. Coler*, 190 U. S. 437, 445, 47 L. ed. 1126, 1132, 23 Sup. Ct. Rep. 811, relating to the validity of certain municipal bonds, this court reaffirmed the same principles. *To the same effect are other cases[546] which will be found cited in the opinion of the circuit court of appeals in this case when it was first before that court. *Jones v. Great Southern Fire Proof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370. The only exception to the general rule announced in the above cases arises when the question is whether a particular statute was passed by the legislature in the manner prescribed by the state Constitution, so as to become a law of the state. *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Post v. Kendall County*, 105 U. S. 667, 26 L. ed. 1204; *Wilkes County v. Coler*, 180 U. S. 506, 520, 45 L. ed. 642, 650, 21 Sup. Ct. Rep. 458.

The plaintiffs insist that the supreme court of Ohio, in *Scioto Valley R. Co. v. Cronin*, 38 Ohio St. 122, 43 Am. Rep. 419, and *Scioto Valley R. Co. v. McCoy*, 42 Ohio St. 251—which were determined prior to the contract between McClain and the plaintiffs—announced principles which, being applied here, would sustain the validity of the act of 1894. If this were true, then, in conformity with the settled course of decisions in this court, we should hold that the rights of the plaintiffs under their contract could not be affected by a change of decision in the state court. But, as the circuit court of appeals held, the two cases just referred to should not control the decision here. Those cases, it is true, related to statutes giving liens to those who performed labor and furnished materials in the construction of railroads. But it does not appear that any question was raised or determined in them as to the constitutionality of the particular statutes there involved.

On behalf of the hotel company, it is contended that the cases of *Hampson v. State*, 8 Ohio, 315, *Copeland v. Manton*, 22 Ohio St. 398, *Dunn v. Rankin*, 27 Ohio St. 132, and *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737, all prior to the act of 1894, announced general principles which, being accepted, would necessarily lead to the conclusion reached by the supreme court of Ohio in the two subsequent cases, above cited, in which § 3184 of that act was held to be in violation of the state Constitution. It is, therefore, contended that our interpretation of the Constitution *of Ohio should be controlled by the rule stated in *O'Brien v. Wheelock*, 37 C. C. A. 309, 95 Fed. 883, 905, which involved the validity of certain municipal bonds as well as the validity of a statute of Illinois passed in 1871, the Il-

Illinois Constitution then in force being the one adopted in 1870. In that case the court observed that the Illinois act of 1871 not having been construed by the supreme court of Illinois before the bonds there in question were issued, it was its duty, under the rule announced in *Burgess v. Seligman*, to exercise an independent judgment as to the validity of that act under the state Constitution. But in so doing the court said two principles should not be overlooked, namely: "(1) That, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiffs accrued, this court should give effect to any rules of construction that may have been previously established by the highest court of the state when interpreting similar provisions in the Constitution of 1848; (2) that the Federal courts, for the sake of harmony, and to avoid confusion, should 'lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt,' and endeavor to avoid 'any unseemly conflict with the well-considered decisions of the state courts' upon questions of local law." We have already shown that it was the duty of the Federal court to lean to an agreement with the state court, and we recognize it to be equally its duty, when the rights of parties depend upon the construction of a state constitution, to give effect to any settled rules for construing that instrument which had been announced by the highest court of the state before such rights accrued. The difficulty in applying this principle here is that, prior to the two cases in 55 Ohio St., the supreme court of Ohio had not, we think, established any rules of constitutional construction that would necessarily require us to hold the act of 1894 to be unconstitutional.

In our opinion, neither the decisions of *Palmer v. Tingle*, and *Young v. Lion Hardware Co.* 55 Ohio St. 423, 45 N. E. 313, nor [548] any *other case in the supreme court of Ohio, precluded the circuit court from exercising its independent judgment as to the constitutionality of the statute of Ohio here in question. If, prior to the making of the contracts between the plaintiffs and McClain, the state court had adjudged that the statute in question was in violation of the state Constitution, it would have been the duty of the circuit court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the state court, as to the constitutionality of the statute in question, having been rendered after the rights of parties to this suit had been

fixed by their contracts, the circuit court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the Federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the constitution or laws of the state.

It remains to dispose of the question of the constitutionality of the Ohio statute upon which this suit is based. In its consideration of the subject, the supreme court of Ohio, in the *Palmer-Young Cases*, referred to the preamble to the Constitution of that state, declaring that "We, the people of the state of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this constitution;" to the 1st section of the Ohio Bill of Rights, providing that "all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety;" and to the 2d section of the state Constitution declaring that "all political power is inherent in the people. Government is instituted for their equal protection *and benefit." It then said: "The [549] usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract, when made and entered into, cannot be impaired by act of the general assembly." In view of these constitutional provisions, aided by the general rules of law, the state court held the statute to be unconstitutional and void, so far as it gave (syllabus) "a lien on the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor;" that "all to whom the contractor becomes indebted in the performance of his contract are bound by the terms of the contract between him and the owner." 55 Ohio St. 423, 45 N. E. 313.

The circuit court of appeals expressed its earnest desire, in the interest of harmony of decision, to come to an agreement with the state court, but its sense of duty compelled it to sustain the constitutional validity of the statute upon which the plaintiffs based their claim. Upon a careful consideration of the objections urged to the statute, and after an extended review of the authorities, the circuit court of appeals held that the statute did not deprive the owner of his property without due process of law, nor unreasonably interfere with his liberty of con-

tract; that the restraints put upon the owner by the provisions in favor of sub-contractors and those who furnished materials to be used by the contractor in execution of his contract with the owner was neither arbitrary nor oppressive; that such provisions were no more onerous than required by the necessity of protecting those who actually do the work or furnish the material by which the owner is benefited; and that, as the legislation in question was sanctioned by the dictates of natural justice, and, as must be conclusively presumed, was known to the owner when he contracted for the building of his house, its requirements could only be avoided by pointing out some specific part of the organic law which has been violated by its enactment.

[550] We are constrained to withhold our assent to the views *expressed by the supreme court of Ohio, and to express our concurrence with the circuit court of appeals. The great weight of authority in this country as to the meaning and scope of constitutional provisions substantially like those to be found in the Constitution of Ohio is, in our opinion, against the conclusion reached by the learned state court. Exercising an independent judgment on the subject, we are obliged to so declare. The reasons in support of the constitutionality of the statute are cogently stated in the able and elaborate opinion of Judge Lurton, speaking for the circuit court of appeals in this case. *Jones v. Great Southern Fire Proof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 371. As the reports of the decisions of the circuit court of appeals are accessible to all, we will not encumber this opinion with a restatement of the grounds, so fully set forth by that court, on which the validity of the statute must be sustained. We content ourselves with referring to its opinion, and with citing in the margin† some authorities which, in our judgment, support the views expressed by the circuit court of appeals. It results that *the decree must be affirmed.*

It is so ordered.

Mr. Justice **White** did not hear the ar-

gument, and took no part in the decision of this case.

*MUTUAL LIFE INSURANCE COMPANY[551]
OF NEW YORK, *Petitioner,*

v.

ELIZA MAUD HILL, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by his Guardian *ad litem*, Eben Smith.

(See S. C. Reporter's ed. 551-561.)

Appeal—questions open on second review—life insurance—application of New York statutes respecting forfeiture to contracts made in other states.

1. A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided, and on a second review all questions which appear on the record and have not already been decided are open for consideration.
2. A general declaration in a life insurance contract executed in another state that it is to be held and construed to have been made in the city of New York does not make controlling the requirement of N. Y. Laws 1876, chap. 341, as amended by Laws 1877, chap. 321, for notice as a condition of forfeiture for nonpayment of premiums, where the contract contains an express stipulation with reference to notice which amounts to an admission by the insured of the receipt of every notice in respect to the payment of premiums which can be implied from any other part of the policy, or required by any statute.

[No. 166.]

Argued March 1, 2, 1904. Decided April 4, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Washington in favor of

NOTE.—On the conclusiveness of prior decisions on subsequent appeals—see note to *Hastings v. Foxworthy*, 34 L. R. A. 321.

As to what law governs insurance policies—see note to *Corley v. Travelers' Protective Assn.* 46 C. C. A. 287.

†*Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 128, 35 L. ed. 961, 12 Sup. Ct. Rep. 181; *McMurray v. Brown*, 91 U. S. 257, 23 L. ed. 321; *Blauvelt v. Woodworth*, 31 N. Y. 285; *Glacius v. Black*, 67 N. Y. 563; *Donahy v. Clapp*, 12 Cush. 440; *Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283; *White v. Miller*, 18 Pa. 52; *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621; *Palme v. Tillinghast*, 52 Conn. 532; *Treusch v. Shryock*, 51 Md. 162; *Colter v. Frese*, 45 Ind. 96; *Smith v. Newbaur*, 144 Ind. 95, 33 L. R. A. 685, 42 N. E. 40; *Title Guarantee & Trust Co. v. Wrenn*, 35 Or. 62, 56 Pac. 271; *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170, 49 N. W. 1071; *Laird v. Moonan*, 32 Minn.

358, 20 N. W. 354; *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590; *Barnard v. McKenzie*, 4 Colo. 251; *Smalley v. Gearing*, 121 Mich. 196, 79 N. W. 1114, 80 N. W. 797; *Hightower v. Bailey*, 108 Ky. 198, 56 S. W. 147; *McKeon v. Sumner Bldg. & Supply Co.* 51 La. Ann. 1961, 26 So. 430; *Roanoke Land & Improv. Co. v. Karn*, 80 Va. 589; *Henry & C. Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 332, 10 S. W. 868; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045; *Gurney v. Walsham*, 16 R. I. 699, 19 Atl. 323. See also 2 *Jones, Liens*, 286; *Phillips, Mechanics' Liens*, 324, 3d ed. § 30.

plaintiffs in an action on a policy of life insurance. *Reversed* and remanded for a new trial.

See same case below, 55 C. C. A. 536, 118 Fed. 708.

Statement by Mr. Justice **Brewer**:

On April 28, 1886, George D. Hill, at Seattle, Washington, signed a written application to the Mutual Life Insurance Company of New York (hereinafter called the insurance company) for a policy of \$20,000. The application was forwarded to the home office. The insurance company accepted the application, executed a policy, and forwarded it to its local agent at Seattle, who there, on June 12, 1886, received the first premium and delivered the policy to Hill. The beneficiary named in the policy was Ellen K. Hill, the wife of the applicant. She died on February 14, 1887, leaving four children, the present defendants in error. A premium receipt for the second annual premium was, in 1887, forwarded to the local agent *at Seattle, presented by him to Hill, and not paid. No subsequent premiums were paid, and on December 4, 1890, Hill died.

[552] Thereafter this action was commenced in the circuit court of the United States for the district of Washington. The contention of the plaintiffs is that, although the annual premiums for 1887, 1888, 1889, and 1890 had not been paid, the insurance company was nevertheless indebted to them for the full amount of the policy and interest, by reason of the fact that it had failed to give the notice of forfeiture prescribed by chapter 341, Laws 1876, as amended by chapter 321, Laws 1877, of the state of New York. The complaint set out a copy of the policy, alleged the payment of the first annual premium, the death of the insured, and the relationship of the plaintiffs to the beneficiary. The defendant relied upon the nonpayment of the premiums other than the first, and an abandonment of the contract. A demurrer to these defenses was sustained and a judgment entered for the plaintiffs, which was affirmed by the court of appeals for the ninth circuit. 49 L. R. A. 127, 38 C. C. A. 159, 97 Fed. 263. A writ of certiorari was issued by this court (176 U. S. 683, 20 Sup. Ct. Rep. 1032), the judgment reversed, and the case remanded for further proceedings. 178 U. S. 347, 44 L. ed. 1097, 20 Sup. Ct. Rep. 914. An amended answer and a replication were then filed by leave of the circuit court. A trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiffs. This judgment was affirmed by the court of appeals. (55 C. C. A. 536, 118 Fed. 708) and the case was again

brought here on certiorari. 188 U. S. 742, 47 L. ed. 678, 23 Sup. Ct. Rep. 856.

Mr. Julien T. Davies argued the cause, and, with *Messrs. Edward Lyman Short, E. C. Hughes, and Frederick D. McKenney*, filed a brief for petitioner:

There is no "law of the case" which prevents the court from examining the whole record.

Panama R. Co. v. Napier Shipping Co. 166 U. S. 284, 41 L. ed. 1005, 17 Sup. Ct. Rep. 572; *Patillo v. Allen-West Commission Co.* 47 C. C. A. 637, 108 Fed. 729.

An intent to make the premium-notice statute govern would be inconsistent with the clause in the policy expressly waiving any statutory notice.

If the waiver is invalid under the laws of New York, then the very fact that the stipulation as to waiver was introduced into the policy is cogent evidence of the intention that the New York statute should not govern, on the principle that when a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

Re Missouri S. S. Co. L. R. 42 Ch. Div. 321; *Hobbs v. McLean*, 117 U. S. 576, 29 L. ed. 943, 6 Sup. Ct. Rep. 870; *United States v. Central P. R. Co.* 118 U. S. 236, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; *Burdor. Central Sugar Ref. Co. v. Payne*, 167 U. S. 142, 42 L. ed. 110, 17 Sup. Ct. Rep. 754; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 181, 23 L. ed. 875; *Ewing v. Howard*, 7 Wall. 506, 19 L. ed. 296; *Lorillard v. Clyde*, 86 N. Y. 387; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 128 Mo. 224, 27 S. W. 568, 30 S. W. 430.

The special clause covers primarily any laws of New York as to declarations, agreements, and warranties in the application, and the legal situation is the same in this respect as in the *Cohen Case*.

Mutual L. Ins. Co. v. Cohen, 179 U. S. 267, 45 L. ed. 185, 21 Sup. Ct. Rep. 106.

The intent of the parties that the premium-notice statute should not govern is still further indicated by the application of the *lex loci solutionis*, as the place of part performance in respect to the matter which is in dispute, namely, the payment of premiums, was in Washington, and not in the state of New York.

Hibernia Nat. Bank v. Lacombe, 84 N. Y. 378, 38 Am. Rep. 518; *Calhoun County v. Galbraith*, 99 U. S. 214, 25 L. ed. 410; *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 57 L. R. A. 513, 88 Am. St. Rep. 614, 62 N. E. 672.

The whole contract taken together, and the fact that the statute in question does not operate extraterritorially, rebut any inference and presumption which might be drawn by applying arbitrary rules to this contract.

Scamans v. Knapp-Stout & Co. Co. 89 Wis. 182, 27 L. R. A. 362, 46 Am. St. Rep. 825, 61 N. W. 757; *Greer v. Poole*, L. R. 5 Q. B. Div. 274; *Hamlyn v. Talisker Distillery* [1894] A. C. 207; *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 600; *Bottomley v. Metropolitan L. Ins. Co.* 170 Mass. 274, 49 N. E. 438; *Pritchard v. Norton*, 106 U. S. 136, 27 L. ed. 108, 1 Sup. Ct. Rep. 102.

Mr. Stanton Warburton argued the cause, and, with *Messrs. Eben Smith and Harold Preston*, filed a brief for respondents:

Parties to a contract may, by agreement, subject their contract to the operation of the laws of the state or country of their choice, and the courts will give full force and effect to such an agreement. The parties to this contract, by such an agreement, made New York the place of contract.

Union Cent. L. Ins. Co. v. Pollard, 94 Va. 146, 36 L. R. A. 271, 64 Am. St. Rep. 715, 26 S. E. 421; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413; *Johnson v. New York L. Ins. Co.* 109 Iowa, 708, 50 L. R. A. 99, 78 N. W. 905; *Griesemere v. Mutual L. Ins. Co.* 10 Wash. 202, 38 Pac. 1031; *Massachusetts Ben. Life Asso. v. Hale*, 96 Ga. 802, 23 S. E. 849; *Rosenplanter v. Provident Sav. Life Assur. Soc.* 46 L. R. A. 473, 37 C. C. A. 566, 96 Fed. 721; *New York L. Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284, 61 S. W. 337; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Voorheis v. People's Mut. Ben. Soc.* 91 Mich. 469, 51 N. W. 1109; *Johnson v. New York L. Ins. Co.* 109 Iowa, 708, 50 L. R. A. 99, 78 N. W. 905; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113.

New York is the place of performance of the contract. The presumption is that parties intended that the place of the performance of the contract shall be the place of contract.

Hyde v. Goodnow, 3 N. Y. 266; *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 109; 35 L. ed. 951, 954, 12 Sup. Ct. Rep. 150; *London Assur. Co. v. Companhia de Moagens do Barreiro*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; *Richardson v. Rowland*, 40 Conn. 565; *Stevenson v. Payne*, 109 Mass. 378; *Hyde v. Goodnow*, 3 N. Y. 266; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Arnold v. Potter*, 22 Iowa, 194.

Where a contract is made in one state to be performed in another state, and there is no express provision of the contract adopting the latter state as the place of contract, its

validity as a whole is dependent upon the laws of such state.

Dacey, Conf. L. pp. 555, 764-766; *Foot*, *Priv. International Law*, pp. 364, 369, 370, 375; *Minor*, Conf. L. § 175; *Story*, Conf. L. pp. 325, 327, 376, 416, 417; *Rorer*, *Inter-State Law*, p. 50; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *London Assur. Co. v. Companhia de Moagens do Barreiro*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; *Hyde v. Goodnow*, 3 N. Y. 266; *Bank of Louisville v. Young*, 37 Mo. 398; *Stevenson v. Payne*, 109 Mass. 378; *Knott v. Botany Worsted Mills*, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30.

All authorities agree that, if a contract is made in one state, parties cannot evade its public policy, or a law declarative of its public policy.

Equitable Life Assur. Soc. v. Clements, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Albro v. Manhattan L. Ins. Co.* 119 Fed. 629; *Fidelity Mut. Life Asso. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 526; *Wall v. Equitable Life Assur. Soc.* 32 Fed. 273; *Berry v. Knights Templars' & M. Life Indemnity Co.* 46 Fed. 239; *Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. 796; *Cravens v. New York L. Ins. Co.* 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519.

Where a contract is made in New York the service of the statutory notice cannot be waived by a provision to that effect in the policy.

Strauss v. Union Cent. L. Ins. Co. 33 Misc. 333, 67 N. Y. Supp. 509, Affirmed in 170 N. Y. 349, 63 N. E. 347; *Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. 802; *Fischer v. Metropolitan L. Ins. Co.* 167 N. Y. 178, 60 N. E. 431; *Warner v. National Life Asso.* 100 Mich. 158, 58 N. W. 667; *Hermany v. Fidelity Mut. Life Asso.* 151 Pa. 17, 24 Atl. 1064; *Wall v. Equitable Assur. Soc.* 32 Fed. 273.

Where parties to a contract by an agreement make the place of contract and the place of performance in a state different from that where the contract is delivered, they cannot, by inserting an agreement in the contract, waive a public-policy statute of such state.

New York L. Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336; *Griesemer v. Mutual L. Ins. Co.* 10 Wash. 202, 38 Pac. 1031; *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680; *Union Cent. L. Ins. Co.*

v. *Pollard*, 94 Va. 146, 36 L. R. A. 271, 64 Am. St. Rep. 715, 26 S. E. 421; *Massachusetts Ben. Life Asso. v. Hale*, 96 Ga. 802, 23 S. E. 849; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413; *Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197.

The decision of a circuit court of appeals is the law of the case on a second hearing, when it has not been removed here on writ of certiorari.

Mathews v. Columbia Nat. Bank, 40 C. C. A. 444, 100 Fed. 397; *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772; *Supreme Lodge, K. of P. v. Lloyd*, 46 C. C. A. 153, 107 Fed. 70; *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed. 19; *Panama R. Co. v. Napier Shipping Co.* 166 U. S. 280, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572; *Smith v. Vulcan Iron Works*, 165 U. S. 518, 521, 41 L. ed. 810, 811, 17 Sup. Ct. Rep. 407.

Would the rule be changed, when the case had been removed here by writ of certiorari, as to those points it did not decide and upon which it expressed no opinion? The rule that would prevail as between this court and a nisi prius court would not prevail as between this court and a circuit court of appeals. Nor is it the practice of appellate courts, in reviewing the decision of a nisi prius court, to leave undecided questions which must, or probably will, again come up on retrial,—especially if the disposition of them will necessarily end the case. The practice is just the contrary.

Olson v. Northern P. R. Co. 55 C. C. A. 665, 119 Fed. 77.

When this court removes a case here from the circuit court of appeals by writ of certiorari, reverses it on one of a dozen points raised and urged in both courts, and passes over the other eleven points in silence, by every rule of implication it affirms the circuit court of appeals; the lower court, the circuit court of appeals, is justified in so regarding its silence. The circuit court of appeals cannot, with proper regard for its own decisions, refuse to follow its decisions on points upon which it is not reversed or criticised.

See *Kankakee Co. v. Crane Bros. Mfg. Co.* 38 Ill. App. 555; *Pentecost v. Manhattan L. Ins. Co.* 22 Ky. L. Rep. 1644, 61 S. W. 29; *Masterson v. Chicago, R. I. & P. R. Co.* 58 Mo. App. 572; *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843.

Matters necessarily involved in the determination of a question on appeal are settled by the decision when the same are again presented on a subsequent appeal.

Hutchinson v. Chicago & N. W. R. Co. 41 193 U. S.

Wis. 541; *Forgerson v. Smith*, 104 Ind. 246, 3 N. E. 866; *Milbank v. Jones*, 2 Misc. 503, 22 N. Y. Supp. 525; *McKinney v. State ex rel. Nixon*, 117 Ind. 26; *Joslin v. Cowee*, 56 N. Y. 626; *Camden v. Werninger*, 7 W. Va. 528; *Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772; *New Haven & N. Co. v. State*, 44 Conn. 376; *Union Mut. L. Ins. Co. v. Kirchoff*, 149 Ill. 536, 36 N. E. 1031; *Carter v. Hough*, 89 Va. 503, 16 S. E. 665.

Mr. **George Turner** also argued the cause for respondents.

*Mr. Justice **Brewer** delivered the [553] opinion of the court:

A preliminary matter is this: When the case was here before we held that, upon the record, there was disclosed an abandonment of the insurance contract by both the insured and the beneficiaries, and on that ground the judgment was reversed. It is now contended that "the only question left open by the mandate of this court was a submission of this question;" that our decision was substantially an adjudication that the plaintiffs had a right to recover unless it was shown that there had been an abandonment of the insurance contract, and that upon this trial it was shown that there had been no such abandonment, the insured having always expressed a wish to continue the policy, the beneficiary named in the policy having died before the second premium became due, and her children, who became entitled thereafter as beneficiaries, being minors and in actual ignorance of its existence. That decision was based upon the averments of the pleadings, and these pleadings were amended after the judgment was reversed and the case returned to the trial court. Clearly, the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate *court of any [554] other than the questions in terms discussed

and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration.

Previous decisions in kindred cases have established these propositions: First, the state of Washington, was the place of the contract. *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 232, 35 L. ed. 497, 500, 11 Sup. Ct. Rep. 822; *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106. Second, the statutory provision of the state of New York in reference to forfeitures has no extraterritorial effect, and does not of itself apply to contracts made by a New York company outside of that state. *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106. Third, parties contracting outside of the state of New York may, by agreement, incorporate into the contract the laws of that state and make its provisions controlling upon both parties, provided such provisions do not conflict, with the law or public policy of the state in which the contract is made. *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 232, 35 L. ed. 497, 500, 11 Sup. Ct. Rep. 822; *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106. If it were necessary, other cases from this and state courts might be cited in support of these propositions. Applying them, it follows that, as Washington was the place of the contract, the laws of that state control its terms and obligations, unless the parties thereto have stipulated for some other laws. Such a stipulation, it is insisted, is found in this contract. In determining the effect of such a stipulation it must be borne in mind that the applicability of other laws than those of the state of the place of contract is a matter of agreement, and that the agreement may select laws and also limit the extent of their applicability. The case [555] is precisely like one in which *the parties, without mentioning laws or state, stipulate that the contract shall be determined in accordance with certain specified rules.

This insurance policy contains these recitals:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana

Hill, of Seattle, in the county of King, Washington territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use, \$20,000; upon acceptance of satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part thereof:

"The annual premium of \$814 and — cents shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the 29th day of April in every year during the continuance of this contract.

"Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived.

"Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, *or within six months thereafter, [556] issue a paid-up policy, payable as herein provided for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the state of New York."

In the application are these provisions:

"If said policy be issued, the declarations, agreements, and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York.

"4th. Policy holders must not expect to be notified when their premiums will be due. It is a practice of the company to send these notices, as reminders when the address is known, but no responsibility is assumed on the part of the company in consequence of their nonreception."

The statute of New York, relied upon as controlling, forbids the forfeiture of any life insurance policy unless "a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be

paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void."

Now, to what extent were the statutes of New York made by these stipulations controlling? It is stated in the application that the contract of insurance is to "be held and construed at all times and places to [557] have been made in the city of New *York." It might with some plausibility be contended that this general provision is limited to the matter which precedes it in the same sentence, to wit, the "declarations, agreements, and warranties herein contained." This contention is reinforced by the fact that elsewhere in the contract there is special mention of one statute of New York,—to wit, chap. 347, Laws 1879,—which is made controlling in reference to a single matter.

But assuming that the general declaration that the contract is to be held and construed to have been made in the city of New York would, if there was nothing else, make controlling all the applicable statutes of that state, it is limited by other express agreements of the policy. Among these are that "notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived," and also that "policyholders must not expect to be notified when their premiums will be due. It is a practice of the company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the company in consequence of their nonreception." Language could not be clearer to the effect that the party accepting the policy admits thereby the receipt of every notice in respect to the payment of premium which can be implied from any other part of the policy or required by any statute. The contention is that this express stipulation in reference to notice is nullified by the general provision that the contract is to be construed to have been made in the city of New York. It is urged that the laws of New

York control in the construction of any contract made in that state, that they require notice as a condition of forfeiture, and forbid a waiver of such notice, and therefore that the agreement in the policy in respect to notice is overthrown by the law of the state. But that assumes that the contract was made in New York, whereas it was in fact made in Washington, and the laws of New York are controlling in any respect *only because the parties have so stipulated, [558] and, as we have indicated, the stipulation in respect thereto is to be harmonized with the other stipulations in the contract. The ordinary rule in respect to the construction of contracts is this: That where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because, when the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. Here, when the parties stipulate that no other notice shall be required, attention is directed to the particular matter of notice. When the stipulation is that the contract shall be construed to have been made in New York, no particular statute is referred to, and the attention may not be directed to the matter of notice or any other special feature of New York law. The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents,—contracts as well as statutes. *Bock v. Perkins*, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677, and cases cited; *Rodgers v. United States*, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582, and cases cited; *Winebrenner v. Forney*, 189 U. S. 148, 47 L. ed. 754, 23 Sup. Ct. Rep. 590; *Sedgw. Stat. & Const. Law*, 2d ed. p. 360 and note; 2 *Parsons, Contr.* 6th ed. p. 501 and note.

Obviously, the express stipulation in the policy as to the matter of notice must be held paramount, and to that extent limiting the provision of the New York law in reference to notice which was not specially referred to in the contract, and can be invoked only because it is one of the various statutes of New York applicable to insurance policies.

Beyond the proposition that, by the terms of the policy, the *insured was bound to take [559]

notice of the time when the payment of the second premium was due, it was also shown by the testimony that the renewal receipt was forwarded to the local agent at Seattle and by him presented to the insured, so that there was notice in fact as well as notice implied from a receipt of the policy. Under those circumstances the insured failed to pay, and continued such failure for four years prior to his death. Yet, notwithstanding his failure to perform his part of the contract,—and performance by the insured underlies the obligation of the insurance company to perform on its part,—this action was brought to compel the same performance by the company that would have been due if he had performed. It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. It is true cases arise in which one party is enabled to take advantage of some statutory provision and exact compliance from the other without having himself first complied, and courts may not ignore the scope and efficacy of such statutory provisions; but, nevertheless, a judgment for failure to perform against one party in favor of the other, when the latter was the first delinquent, is offensive to the sense of righteousness and fair dealing. We have had before us a series of cases coming from the same jurisdiction in which, when the insured had, for a series of years, neglected to pay their insurance premiums or perform their parts of the insurance contract, their heirs or beneficiaries have, on their deaths, sought to obtain judgments against the insurance company for the amounts which would have been due on the policies if the insured had performed their stipulations in respect to the payment of premiums. Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defenses to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid. We cite with [560] approval *the decision of the supreme court of Washington in a recent case (*Lone v. Mutual L. Ins. Co.*) decided December 21, 1903, and reported in 74 Pac. 689, in which, as in this case, the insured made payment of one premium and then lived years without making further payment, and in which the court said, in reference to the New York statute here relied upon, and the conduct of the insured:

"The statute, it is true, provides that no life insurance company shall have power to

declare forfeited or lapsed any policy by reason of the nonpayment of any annual premium, unless notice be given in a specified manner; but a statute must be construed, and its provisions enforced, with reference to its objects; and the legislature, taking into consideration the infirmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what, in homely phrase, is termed 'snap judgment' on its patrons, thereby depriving them of the benefit of contracts by reason of slight negligence on their part, and when there was no real intention to rescind,—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness.

"We are satisfied that the thought never occurred to Rex during his lifetime that he had a claim against this company on the policy which had been issued so many years before, or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under the contract, and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived. In *Shutte v. Thompson*, 15 Wall. 151, 21 L. ed. 123, where a party was standing upon his statutory right in relation to the notice concerning the depositions, the court said that it was not doubted that all the provisions of the statute respecting notice to the adverse party could be waived by him; that a *party [561] could waive any provision, either of a contract or of a statute, intended for his benefit; and that, if a course of action on his part had misled the other party, he ought not to be allowed to avail himself of his original rights, because, under such circumstances, he would be availing himself of what was substantially a fraud, and that he should not be allowed to reap any advantage from his own fraud.

"From every consideration of justice and fair dealing, we think the respondent should not be allowed to recover in this case."

The judgments of the Circuit Court and of the Circuit Court of Appeals will be reversed, and the case remanded to the Circuit Court with instructions to set aside the verdict and grant a new trial and to proceed further in accordance with the views expressed in this opinion.

Mr. Justice **Peckham** took no part in the consideration and decision of this case.

NEWBURYPORT WATER COMPANY,
Appt.,
v.

CITY OF NEWBURYPORT.

(See S. C. Reporter's ed. 561-579.)

*Jurisdiction of circuit court—case arising
under Federal Constitution.*

The averment in a bill that the property of a water company was taken without due process of law by Mass. Laws 1894, chap. 474, enabling it to sell its property to a municipality to defeat municipal construction of a water supply system, because such statute was construed by the highest state court as not entitling the company to compensation for its franchise and other incorporeal rights, and the averment that the obligation of the company's contract with the city to furnish water for fire protection was impaired by the failure to value future profits arising from such contract, are so devoid of merit, where the water company's charter was not exclusive, and was subject to repeal, alteration, and amendment, as to be insufficient to sustain the jurisdiction of a circuit court of the United States on the theory that the case arose under the Federal Constitution within the meaning of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508).

[No. 182.]

*Argued March 16, 1904. Decided April 4,
1904.*

APPEAL from the Circuit Court of the United States for the District of Massachusetts to review a decree dismissing, on the merits, a bill seeking the restoration to a water company of property which it had conveyed to a municipality, with damages for its detention, and, in the alternative, an award of full compensation therefor. *Reversed* and remanded with instructions to dismiss the bill for want of jurisdiction.

See same case below, 113 Fed. 677.

Statement by Mr. Justice White:

The Newburyport Water Company, appellant, is a Massachusetts corporation created by special act on April 23, 1880, which act was subject to alteration, amendment, or repeal at the pleasure of the legislature.

As authorized by its charter, the water company established a water supply system in the city of Newburyport. On August 17, 1880, the water company entered into a contract with the city to furnish water for fire purposes during a term of twenty years,

with the privilege to the city of purchasing the waterworks property after the expiration of ten years.

In the year 1893 the legislature passed an act (chapter 471) conferring power upon the city, if sanctioned by popular vote, to provide its own water plant, to supply itself and its inhabitants with water, and, if also approved by the voters, to acquire, by agreement with the water company, its plant. The voters of the city, however, decided not to purchase the plant, but to establish and maintain an independent water supply system. On June 14, 1894, an act, designated as chapter 474, was passed by the legislature, forbidding the city of Newburyport, in the event that the water company, within thirty days after the passage of the act, elected to offer its property for sale to the city, from acting under the authority of chapter 471 of the acts of 1893, unless [563] the city first purchased that plant of the company. A copy of the act is inserted in the margin.†

† Chapter 474.

An Act to Provide for the Purchase of the Property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows: Sec. 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter 471 of the acts of the year 1893, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city; and said city is authorized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If, at the first meeting, a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7; Bailey v. Mosher, 11 C. C. A. 308; and Re Buchanan, 39 L. ed. U. S. 884.

Availing themselves of the privilege conferred by this act, *the stockholders of the water company voted to sell to the city, and served notice to that effect upon the mayor. The city, by popular vote, decided to buy. The water company thereupon, on January 20, 1895, executed and delivered to the city a deed of all its property, both corporeal and incorporeal. In accepting the deed, however, the city served upon the water company the notice printed in the margin.†

[565] *Under the deed of the water company the city took possession of the plant. The parties being unable to agree as to the sum to be paid, the water company petitioned the supreme judicial court for the county of Essex, to appoint three commissioners to fix the amount, which was done. Hearings were

†To the Newburyport Water Company:

In accepting the conveyance made to the city of Newburyport by the Newburyport Water Company, dated January 29, 1895, and delivered to the mayor on that day by the clerk of that corporation for examination, it is not admitted, on behalf of the city, that any franchise is acquired by the said city under such conveyance, or that the city is under any obligation to make payment on account of any franchise of said corporation by reason thereof.

It is further not admitted or claimed that the four filters, with their gates, pipes, appliances, and appurtenances, described in item 2 of said deed as situated upon the second lot of land described in item 1 therein, are used in supplying said city or its inhabitants with water, or that the city is bound to pay for the same or any part thereof.

It is further not admitted or claimed that the Newburyport Water Company has any right or authority to convey by said conveyance, or the city Newburyport to accept or make payment for anything whatever, except according to provisions of chapter 474 of the act of 1894.

Adopted by a unanimous yeas vote, six aidemen present and voting.

determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or account of the franchise of said company.

Sec. 2. In case said Newburyport Water Company shall convey its property to the city of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter 471 of the acts of the year 1893.

Sec. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes, or scrip to an amount sufficient for such purpose; such bonds, notes, or scrip shall bear on their face the words "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semiannually at a rate not exceeding 6 per centum per annum, and shall be signed by the treasurer of the city and

had and the commissioners made an award of \$275,000, but no allowance was made for the franchise or right of the water company to lay and maintain pipes in the streets, and for its right to collect water rates, or for the profits which the company might have made on the contract for furnishing water to the city for fire purposes, had not the sale of the plant to the city taken place. It is stipulated by counsel that the commissioners did not value such contract, "it being their opinion that the same in law could not be valued," and that, although the water company offered the contract before the commissioners, "no evidence of the quantity of water supplied to the city under the contract, nor any direct evidence of the cost of performing the contract, or of its value to the company," was introduced. The stipulation also recites—

"That counsel for the city, in his closing argument, asked counsel for the water company if he had waived the claim to have the contract valued, and the latter replied that he did not waive it, and was not prepared to say what use he should make of it. That thereupon counsel for the city proceeded to argue that the contract should not be valued; that the counsel for the water company, in his closing argument, mentioned the contract as one of the items of property which the company had parted with to the city, and urged, but not in this connection, that it was the duty of the commissioners to estimate the value of all of the property of the company as one whole."

The report on the award made by the commissioners was *heard before a single [566] justice of the supreme judicial court, who reserved for the full court whether the award should be recommitted or be accepted. The

countersigned by the water commissioners provided for by chapter 471 of the acts of the year 1893. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient, with the accumulations thereof, to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

Sec. 4. In case said city shall, in violation of § 1 of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

Sec. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

full court affirmed and accepted the award of the commissioners. 168 Mass. 541, 47 N. E. 533. A rehearing was applied for, but while the petition was pending the water company brought the present suit in equity in the circuit court of the United States for the district of Massachusetts. After the bringing of such equity suit the petition for rehearing was dismissed.

In the bill of complaint the foregoing facts, except as to the recited provisions referred to as embraced in the stipulation, were set out with much amplitude, and it was alleged that no claim was made before the commissioners or in the state courts (except in the petition for rehearing) that the act of 1894 was repugnant to the Constitution of the United States.

In substance, the grounds for relief propounded in the bill were that as the act of the legislature which gave the privilege to the water company to sell had been construed by the supreme judicial court as not entitling that company, on the sale by it made to the city, to compensation for its franchises and other valuable incorporeal rights, that act as construed amounted to a taking of the property of the water company against its consent, without due process of law, and in violation of the 14th Amendment to the Constitution of the United States. The bill based this contention upon the charge that, as the legislative act which gave the company the privilege to sell to the city, if it chose to do so, was coupled with the right conferred upon the city, if the company did not sell, to erect a water plant of its own, the sale by the company was compulsory, since the execution by the city of the authority to erect its own plant would have worked the ruin of the water company. In addition, it was charged in the bill that the failure under the legislative act, of which the company had availed itself, to value the future profits which the company might have derived from its contract to furnish the city with water, impaired the obligation of the contract arising from the *charter, in violation of the contract clause of the Constitution of the United States. Charging that it was the intention of the city to issue bonds for the purpose of raising funds with which to pay the award in question, the bill prayed an injunction and the appointment of a receiver to manage the property claimed by the water company, which it had conveyed to the city, until the controversy was finally determined. The ultimate and substantial relief sought by the bill was, first, a restoration to the water company of the property which it had conveyed to the city, with damages for its detention, and, in the alternative, that full compensation be awarded. The

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city, appearing specially for the purpose, moved to dismiss for want of jurisdiction. This, after hearing, was overruled. Thereupon a demurrer was filed to the bill, which, after argument, was overruled. Application was next made for a rehearing on the demurrer, and pending action thereon an answer and replication were filed. The application for a rehearing on the demurrer was overruled. A motion was then made for leave to file a special demurrer to that portion of the bill and prayer in which a right to a decree for compensation was asserted. This was refused, and thereafter, by consent of parties, the following order was made by the court:

“Ordered: That the constitutional question, to wit, whether or not the plaintiff has been deprived of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, be first heard; and that all questions as to plaintiff's relief, if any (including questions of valuation of the property alleged to have been taken), await the determination of the constitutional question.”

Soon afterwards a hearing was had upon the question referred to in said order, and the decision of the court was adverse to the water company. 103 Fed. 584. After this the court heard argument upon the contention of the water company that the act of 1894 impaired the obligation of its contract with the city, and in consequence violated § 10 of article 1 of the Constitution of the United States. It was decided that the *failure to value the contract in question [568] “does not tend to prove that the act of 1894 was repugnant to the contract clause of the Constitution.” The court, having thus decided all the constitutional questions raised by the water company against that company, entered a final decree dismissing the bill. This appeal, directly to this court, was then taken.

Messrs. Lauriston L. Scaife and Robert M. Morse argued the cause and filed a brief for appellant:

The jurisdiction of the circuit court is to be determined wholly upon plaintiff's own allegations, and is not limited by defendant's denials; nor does it depend upon the result of the trial of any issues presented by the pleadings of both parties.

Notes on U. S. Rev. Stat. 1 Gould & Tucker, p. 101. See also *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 11, 43 L. ed. 341, 346, 19 Sup. Ct. Rep. 77.

The jurisdiction of the circuit court is fully established under the following cases:

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 562, 563, 41 L. ed. 1114, 1116. 17

Sup. Ct. Rep. 653; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 83, 46 L. ed. 808, 816, 22 Sup. Ct. Rep. 585.

That the circuit court had jurisdiction of the bill upon the constitutional question arising under the allegation of the impairment of the obligation of plaintiff's contract is established by the decision and opinion in *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 83, 46 L. ed. 808, 816, 22 Sup. Ct. Rep. 585.

See also *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 7, 43 L. ed. 341, 344, 19 Sup. Ct. Rep. 77; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 544, 545, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431.

The constitutional questions set out in this bill were not raised in the state court, and could not have been drawn in question in that suit.

Moore v. Sanford, 151 Mass. 285, 7 L. R. A. 151, 24 N. E. 323; *Pitkin v. Springfield*, 112 Mass. 509; *Norcross v. Cambridge*, 166 Mass. 508, 33 L. R. A. 843, 44 N. E. 615.

Such acts as plaintiff has done herein do not constitute a waiver.

Moore v. Sanford, 151 Mass. 285, 7 L. R. A. 151, 24 N. E. 323; *Norcross v. Cambridge*, 166 Mass. 508, 33 L. R. A. 843, 44 N. E. 615.

Where the Federal and state courts have concurrent jurisdiction (1) a party litigant loses no rights by bringing his suit in the Federal court; and (2) the Federal court will apply to the case the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality.

Ex parte McNiel, 13 Wall. 238, 243, 20 L. ed. 625, 626; *Gormley v. Clark*, 134 U. S. 338, 348, 349, 33 L. ed. 909, 914, 10 Sup. Ct. Rep. 554; *Clement v. Packer*, 125 U. S. 309, 31 L. ed. 721, 8 Sup. Ct. Rep. 907; *Halsted v. Buster*, 140 U. S. 273, 276, 277, 35 L. ed. 484, 485, 11 Sup. Ct. Rep. 782; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 459, 460, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Mr. Albert E. Pillsbury argued the cause, and, with **Mr. George H. O'Connell**, filed a brief for appellee:

It is not enough to give the circuit court jurisdiction that there may be a Federal question in the case. It is settled that suits arising under the Constitution or laws of the United States, in the sense of the act of 1888, do not include all the classes of which this court has appellate jurisdiction from the state courts under Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575).

Cooke v. Avery, 147 U. S. 375, 385, 37 L. ed. 209, 212, 13 Sup. Ct. Rep. 343.

The original jurisdiction of the circuit court is much narrower, and seems from the

decisions to be confined to cases in which the construction of the Federal Constitution or laws is directly involved.

Starin v. New York, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28.

When a proposition has once been decided by the supreme court, it can no longer be said that in it there still remains a Federal question.

Kansas v. Bradley, 26 Fed. 289.

The repugnancy of a state statute or proceeding to the Federal Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require; and, if there be ground for complaint of their decision, the remedy is by writ of error under § 709 of the Revised Statutes.

New Orleans v. Benjamin, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905. See also *McCain v. Des Moines*, 174 U. S. 168, 181, 43 L. ed. 936, 941, 19 Sup. Ct. Rep. 644; *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40; *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63; *Owensboro v. Owensboro Waterworks Co.* 191 U. S. 358, ante, 217, 24 Sup. Ct. Rep. 82; *Arbuckle v. Blackburn*, 191 U. S. 405, 413, ante, 239, 241, 24 Sup. Ct. Rep. 148.

One who takes the benefit of a statute is held thereby to have waived any right thereafter to attack it as unconstitutional or otherwise invalid.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 568, 41 L. ed. 1114, 1118, 17 Sup. Ct. Rep. 653; *Clay v. Smith*, 3 Pet. 411, 7 L. ed. 723; *Chapman v. Forsyth*, 2 How. 202, 11 L. ed. 236; *Daniels v. Tearney*, 102 U. S. 415, 421, 26 L. ed. 187, 189; *Gibbs v. Baltimore Gas Co.* 130 U. S. 396, 408, 32 L. ed. 979, 984, 9 Sup. Ct. Rep. 553; *Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Ashley v. Ryan*, 153 U. S. 436, 441, 38 L. ed. 773, 776, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Pierce v. Somerset R. Co.* 171 U. S. 641, 648, 43 L. ed. 316, 319, 19 Sup. Ct. Rep. 64; *Hale v. Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *O'Brien v. Wheelock*, 184 U. S. 450, 491, 46 L. ed. 636, 655, 22 Sup. Ct. Rep. 354; *Haskell v. New Bedford*, 108 Mass. 208; *Bancroft v. Cambridge*, 126 Mass. 438; *Eustis v. Bolles*, 146 Mass. 413, 4 Am. St. Rep. 327, 16 N. E. 286; *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 16 N. E. 420; *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168; *Citizens' Gaslight Co. v. Wakefield*, 161 Mass. 432, 439, 31 L. R. A. 457, 37 N. E. 444; *Hudson Electric Light Co. v. Hudson*, 163 Mass. 346, 40 N. E. 109.

There is waiver and estoppel by election of remedy.

Rosenthal v. Coates, 148 U. S. 142, 147, 47 L. ed. 399, 400, 13 Sup. Ct. Rep. 576; *Robb v. Vos*, 155 U. S. 13, 43, 39 L. ed. 52, 63, 15 Sup. Ct. Rep. 4; *Forsyth v. Hammond*, 166 U. S. 506, 517, 41 L. ed. 1095, 1099, 17 Sup. Ct. Rep. 665; *Remington Paper Co. v. Watson*, 173 U. S. 443, 451, 43 L. ed. 762, 764, 19 Sup. Ct. Rep. 456; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 177, 30 L. ed. 196, 204, 6 Sup. Ct. Rep. 1009; *Manning v. Amy*, 140 U. S. 137, 141, 35 L. ed. 386, 388, 11 Sup. Ct. Rep. 707; *Wilson v. Lambert*, 168 U. S. 611, 618, 42 L. ed. 599, 601, 18 Sup. Ct. Rep. 217; *Mitchell v. First Nat. Bank*, 180 U. S. 471, 482, 45 L. ed. 627, 632, 21 Sup. Ct. Rep. 418; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 216, 217, 46 L. ed. 1132, 1134, 22 Sup. Ct. Rep. 820; *Connihan v. Thompson*, 111 Mass. 270.

The bill does not present, bona fide, a real Federal question. The Federal claim is simulated, for the purpose of getting a new trial. The suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, in the sense of the statute of March 3, 1875, § 5 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), and the bill might have been dismissed below upon this ground.

New Orleans v. Benjamin, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905; *McCain v. Des Moines*, 174 U. S. 168, 181, 43 L. ed. 936, 941, 19 Sup. Ct. Rep. 644; *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40; *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63; *Owensboro v. Owensboro Water Works Co.* 191 U. S. 358, ante, 217, 24 Sup. Ct. Rep. 82; *Arbuckle v. Blackburn*, 191 U. S. 405, 413, ante, 239, 241, 24 Sup. Ct. Rep. 148; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 344, 345, 46 L. ed. 941, 22 Sup. Ct. Rep. 691.

The bill is in the nature of a bill of review, or appeal.

Barrow v. Hunton, 99 U. S. 80, 83, 25 L. ed. 407, 408; *Nougue v. Clapp*, 101 U. S. 551, 554, 25 L. ed. 1026, 1027; *Blythe v. Hinckley*, 173 U. S. 501, 508, 43 L. ed. 783, 786, 19 Sup. Ct. Rep. 497; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 191, ante, 140, 143, 24 Sup. Ct. Rep. 63; *Hendrickson v. Bradley*, 29 C. C. A. 303, 55 U. S. App. 715, 85 Fed. 508, 171 U. S. 686, 18 Sup. Ct. Rep. 943.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

At the threshold we are met with the objection, raised below and urged at bar, that the circuit court was without jurisdiction, because the bill on its face did not state a case arising *under the Constitution or laws[576]

of the United States, within the intendment of the act of August 13, 1888. 25 Stat. at L. 433, chap. 866 (U. S. Comp. Stat. 1901, p. 508). As the case is here on direct appeal from the decree of the circuit court of the United States, the solution of this question necessarily involves also deciding whether the cause was properly brought to this court. As the existence of the constitutional question is the only basis of the right to the direct appeal, if there was no such question in the court below there was and is no such issue by which the direct appeal to this court can be sustained. Under these circumstances, if the contention as to want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, our duty is not simply to dismiss the appeal, but to reverse the decree below, with instructions to the circuit court to dismiss the bill for want of jurisdiction. *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63.

If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit. *Underground R. Co. v. New York*, 193 U. S. 416, ante, 733, 24 Sup. Ct. Rep. 494; *Arbuckle v. Blackburn*, 191 U. S. 405, ante, 239, 24 Sup. Ct. Rep. 148; *Owensboro v. Owensboro Waterworks Co.* 191 U. S. 358, ante, 217, 24 Sup. Ct. Rep. 82; *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63; *Swafford v. Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; *McCain v. Des Moines*, 174 U. S. 168, 181, 43 L. ed. 936, 941, 19 Sup. Ct. Rep. 644, and cases cited. Whether the Constitution of the United States was and is, in a real and substantial sense, involved, depends upon apparently two considerations: First, the proposition that the sale made by the company to the city was compulsory, and hence there was a taking of the property in disregard of due process of law; and, second, that the failure of the commissioners to value the future profits arising from the contract for the furnishing for fires of a water supply to the city impaired the obligations of the company's contract. We *say[577]

apparently two, since the questions are vir-

tually one, depending both on the same considerations.

Now, it is conceded that the charter of the water company was not exclusive, and was subject to repeal, alteration, or amendment at the will of the legislature. This being the case, it is evident that no deprivation of property without due process of law or impairment of the obligations of a contract did or could arise from the act of the legislature empowering the city to erect its own waterworks. Having this power, the legislature could therefore have exercised it without compelling the city to buy the plant of the water company, and the bill proceeds upon the theory that if this right had been exerted by the legislature the company would have been ruined, and the value of its property in effect entirely destroyed. This follows, because the averments are based upon the assumption that the conveyance by the company of its property to the city was not voluntary, since, if it had not so conveyed, the exercise by the city of the right to construct its own plant would have destroyed the company's property. The contentions, therefore, as to the Constitution of the United States, are based solely upon the proposition that because the legislature sought to protect the company and save its property from ruin by conferring upon it the privilege of selling its property to the city, if it chose to do so, thereby compulsion and consequent violation of the Constitution of the United States arose. In other words, that because there was conferred a benefit upon the corporation, which the legislature need not have bestowed, and which the company availed of, that its property was taken from it forcibly and without its consent. When the contention is thus reduced to its ultimate analysis, it comes to this, - that the property of the company was taken from it without its consent, because, by the action of the legislature, for the benefit of the company, it was enabled to sell its plant to the city and thus escape a serious loss. Indeed, in reason, the theory upon which the bill is based could not be maintained without deciding that the company had an exclusive contract, and therefore, *that there was a want of power in the legislature to authorize the city to erect its own plant; or, what is tantamount thereto, declaring that, although there was no exclusive right and therefore power in the legislature to give the city the right to erect its own plant, that body must have abstained from the exercise of its lawful authority, unless it determined to exert it so as to destroy and ruin the company. The power being in the legislature, it was competent for that body to exert it for the benefit and in the interest of the water company, to enable that com-

pany, if it chose, to sell its plant upon the terms stipulated, and thus avoid the loss which otherwise, the bill avers, would have been entailed. And these considerations take this case out of the reach of the authorities which are relied upon as establishing that one cannot enforce a contract benefit derived from, or advantage gained over, another, by coercing his will by means of threats, even of the doing of a lawful act. The advantage resulting from the power conferred upon the company to sell enured to its benefit, since it saved it from a ruin which otherwise would have been occasioned. No compulsion in any legal sense can be said to have been exerted on the company by the option given it, because the exercise by the company of the option, upon its own theory of the case, saved its property from destruction. To indulge in the assumption that the action of the company was not voluntary would require the assumption that the company would have willingly suffered a most grievous wrong when, by accepting as it did the benefits of the act, such consequences were averted. The supreme judicial court of Massachusetts, in passing upon the award made by the commissioners, aptly said (168 Mass. 554, 47 N. E. 533):

"It must be remembered that the transaction before us springs out of a voluntary offer by the petitioner to sell upon the statutory terms, and therefore there is no reason to try to bend those terms in its favor. Of course, an offer by a water company, made under a threat of municipal competition, and to avoid ruin, might be voluntary only in name. But we have *no reason to[579] assume in this case that the petitioner is the victim of robbery, and must treat it as having acted of its free choice in fact as well as in form."

It is to be observed that in the legislative act which the company accepted, and in furtherance of which it voluntarily conveyed its property to the city, it was expressly stipulated that the value of such property "should be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." It is also worthy of note that before the state courts the only question presented for consideration was the proper interpretation of the statute in question, and whether or not it provided for payment for certain incorporeal rights and franchises which the water company contended should have been allowed for by the commissioners. Having accepted the statute, conveyed its property to the city, provoked the state proceedings to value the property, and derived the benefits resulting

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from the legislation of the state of Massachusetts, the water company may not now, because of disappointment at the result of the interpretation which the statute received at the hands of the state court, change its position and cause its voluntary acceptance to become an involuntary one in order to assail the constitutionality of the legislation in question.

Concluding, for the foregoing reasons, that the rights asserted in the bill under the Constitution of the United States, upon which the jurisdiction of this court depends and upon which, also, the jurisdiction of the lower court depended, were so attenuated and unsubstantial as to be absolutely devoid of merit, our duty is to direct that *the decree of the Circuit Court be reversed* at appellant's costs, and that the case be remanded to that court with instructions to dismiss the bill for want of jurisdiction.

And it is so ordered.

[580] *GLOUCESTER WATER SUPPLY COMPANY, *Appt.*,
v.

CITY OF GLOUCESTER.

(See S. C. Reporter's ed. 580, 581.)

Jurisdiction of circuit court—case arising under Federal Constitution.

This case is governed by the decision in *Newburyport Water Co. v. Newburyport*, ante, 795.

[No. 183.]

Argued March 16, 1904. Decided April 4, 1904.

A PPEAL from the Circuit Court of the United States for the District of Massachusetts to review a decree dismissing, on the merits, a bill seeking the restoration to a water company of property which it had conveyed to a municipality, with damages for its detention, and, in the alternative, an award of full compensation therefor. *Reversed* and remanded with instructions to dismiss the bill for want of jurisdiction.

The facts are stated in the opinion.

Messrs. Lauriston L. Scaife and Robert M. Morse argued the cause and filed a brief for appellant.

Mr. Albert E. Pillsbury argued the cause, and, with **Mr. Charles A. Russell**, filed a brief for appellee.

For contentions of counsel, see briefs as

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308; and *Re Buchanan*, 39 L. ed. U. S. 884.

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reported in *Newburyport Water Co. v. Newburyport*, ante, 795.

Mr. Justice **White** delivered the opinion of the court:

In the main, this case is like that of *Newburyport Water Co. v. Newburyport* (just decided), 193 U. S. 561, ante, 795, 24 Sup. Ct. Rep. 553.

The Gloucester Water Company was engaged in supplying the city of Gloucester and its inhabitants with water under a non-exclusive charter and a nonexclusive hydrant contract made with the city. Under the authority of a statute enacted in 1895, similar in tenor to the act of 1894, considered in the *Newburyport Case*, the Gloucester company sold its plant to the city of Gloucester. After the sale the company petitioned for the appointment of commissioners to value the property. Objections were made by both parties to the award, and the objections were reserved for consideration to the full bench of the supreme judicial court of Massachusetts. That court accepted the award for the sum of \$576,544, with interest. 179 Mass. 365, 60 N. E. 977. Thereafter the present suit in equity was *instituted in the circuit court of the United States for the district of Massachusetts, the bill filed containing substantially similar allegations to those made in the *Newburyport Case*. Similar relief was also sought, except that there was no claim that the commissioners had not made an allowance for the unexpired term of the hydrant contract. After the decision in the *Newburyport Case* the circuit court sustained a demurrer and dismissed the bill on the merits. [581]

For the reasons stated in the opinion delivered in the *Newburyport Case*, *the decree of the Circuit Court is reversed* at appellant's costs, and the case remanded, with instructions to dismiss the bill for want of jurisdiction.

THIRD NATIONAL BANK OF BUFFALO,
N. Y., *Plff. in Err.*,
v.

BUFFALO GERMAN INSURANCE COMPANY.

(See S. C. Reporter's ed. 581-593.)

National banks—by-law against transfer of shares by stockholder while indebted to bank, invalid.

A national bank is impliedly precluded from forbidding any transfer of its shares of stock, without the consent of the directors, by a stockholder while he is indebted to the bank, because of the repeal, by the act of June 3,

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1864 (13 Stat. at L. 99, chap. 106), re-enacting, in completer form, the entire law as to national banks, of the provisions of the act of Feb. 25, 1863 (12 Stat. at L. 665, chap. 58), subjecting transfers of stock in a national bank to debts due by the stockholders to the bank, or permitting the board of directors to provide to that effect.

[No. 146.]

Argued January 27, 28, 1904. Decided April 4, 1904.

IN ERROR to the Court of Appeals of the State of New York to review a judgment affirming a judgment of the Appellate Division of the Supreme Court for the Fourth Department, which had affirmed a judgment of the trial court in favor of plaintiff, in a suit to compel a transfer of shares of stock by a national bank, and the payment of dividends which had accrued thereon since the date of the demand for such transfer. *Affirmed.*

See same case below, 171 N. Y. 670, 64 N. E. 1119.

Statement by Mr. Justice **White**:

The Third National Bank of Buffalo, spoken of hereafter as the bank, was organized on the 9th of February, 1865, and its articles of association contained the following:

"That the board of directors shall have power to make all by-laws that may be proper and convenient for them to make under said act for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to the association either as principal debtor or otherwise, without the consent of the board."

In virtue of the authority assumed to be conferred by the foregoing provision, the board of directors adopted in February, 1865, a by-law as follows:

"Transfers of Stock.—Sec. 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfers of stock shall be made. No transfers of the stock of this association shall be made, without the consent of [583] the board of directors, by any *stockholder who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all the profits thereof, and dividends and certificates of stock shall contain upon them notice of this provision."

Pursuant to this by-law the stock certificates of the bank were thus framed:

"This is to certify that ——— is the owner of ——— shares of \$100 each of the capital stock of the Third National Bank of Buffalo, subject to the lien or liens referred to in § 15 of the by-laws of said bank, in the following words: 'No transfer of the stock of this association shall be made without the consent of the board of directors, by any stockholder who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.' And the said stock is transferable only on the books of the bank by him or his attorney on the surrender and cancelation of this certificate and compliance with the said by-laws."

Emmanuel Levi became the registered holder and owner of 450 shares of the capital stock, evidenced by certificates in the form just stated. Levi borrowed money from the bank upon his promissory notes, secured by various collaterals. On the first day of October, 1890, he applied for a further loan, which the bank agreed to make, provided the new loan was indorsed by Louis Levi, a son of Emmanuel. At that time, in a conversation between the president of the bank and Levi, it was understood that all the stock held by Levi in the bank should be considered as additional security for his entire loan. When this conversation took place, however, the certificates evidencing Levi's stock were in his possession, and no formal pledge or subsequent delivery of the certificates of stock to the bank took place.

A few months after (on December 3, 1890), Emmanuel Levi borrowed \$25,000 from the Buffalo German Insurance Company, hereafter spoken of as the insurance company, and secured this loan by pledging, delivering, and assigning to the insurance company his certificates of stock in the bank. The written contract of pledge gave the insurance company power, in default of payment of the loan at its maturity, to sell the stock at public or private sale after notice and apply the proceeds to the debt. On August 13, 1891, and on May 5, 1892, Levi borrowed additional sums from the insurance company and secured these loans by a pledge and assignment of his remaining stock in the bank. These contracts of pledge also contained a power of sale similar to that conferred by the first contract. In June, 1893, Emmanuel Levi died, and Louis and Rosa Levi were appointed and qualified as his executors. On the 9th of June, 1896, there was due to the insurance company *on the notes of Levi, secured by [584] the pledge of his stock as above stated, the sum of \$55,000 of principal, with certain

unpaid interest. On that date the insurance company served upon the executors of the estate of Levi a demand for the payment of the debt, accompanied with a notice that if payment were not made the stock would be sold and the proceeds applied to the debt. Payment not having been made, after adequate notice, the attorneys for the bank, the attorneys of the executors of Levi, and one of the executors being present, the stock was sold at public auction, and was bought by the insurance company for the sum of \$44,000, that being the highest bid offered. The insurance company thereupon presented to the bank the certificates of stock, the assignment thereof, and the evidence of the purchase at auction, and demanded a transfer to its name. This the bank refused on the ground of Levi's indebtedness to it. Subsequently the insurance company filed its bill, praying that the bank be decreed to transfer the stock and pay the dividends which had accrued thereon since the date of the demand to transfer. The bank, by its answer, set up the debt due by Levi to it, asserting that under the provision of its articles of association and by-laws, as well as under the terms of the certificates of stock and the agreement with Levi, it had the right to apply the dividends on the stock, accrued since the purchase by the insurance company, to its debt, and, indeed, having a prior lien upon the stock for its debt, had the right to withhold the transfer of the stock until the debt due it by Levi or his estate was paid. There was a decree in the trial court in favor of the bank. The case was appealed by the insurance company to the appellate division of the supreme court, fourth department, in which court the judgment of the trial court was affirmed. 29 App. Div. 137, 51 N. Y. Supp. 667. The insurance company prosecuted its appeal to the court of appeals of the state of New York, and in that court the judgments below were reversed and the case was remanded for further proceedings. 162 N. Y. 168, 48 L. R. A. 107, 56 N. E. 521. The cause was again tried and resulted in a decree in [585] favor of the insurance *company in both the trial court and the appellate division of the supreme court, and these judgments were affirmed by the court of appeals on the authority of its previous opinion. It is to review such decree of affirmance that this writ of error is prosecuted.

Mr. Adelbert Moot argued the cause, and, with **Mr. George L. Lewis**, filed a brief for plaintiff in error.

Mr. Arthur W. Hickman argued the cause and filed a brief for defendant in error.

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Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

It is obvious that the bank had no lien on the stock of Levi *as the result of an [588] express contract of pledge. The mere statement by Levi in a conversation with the president of the bank when the last loan was made to him, that his stock was a security to the bank, did not amount to a pledge of such stock, as there was no delivery of the certificates. As tersely said by the court below:

"If we assume the existence of a contract between the defendant bank and Levi (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge in order to raise a privilege against third persons. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307."

We may, therefore, at once lay out of view the provisions of § 5201, Revised Statutes, prohibiting a national bank from making any loan or discount on the security of its shares of stock, and forbidding the purchase or holding by a national bank of such shares of stock, unless necessary to prevent loss on a debt previously contracted in good faith. And putting these provisions aside, we may also pass the consideration of the decisions of this court construing the provisions in question, and holding that they may not be availed of by a debtor of the bank to defeat the enforcement of obligations by him contracted in favor of the bank. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Thompson v. Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66. This brings us to the real question in the case, which is, the validity and effect of the provisions of the charter and by-law of the bank forbidding a transfer of stock where the stockholder was indebted to the bank, and the insertion of a condition to the same effect in the certificates of stock which were held by Levi, and which he delivered to the insurance company, as collateral, when he borrowed money from that company. If those provisions were valid it is obvious that the insurance company *took the stock subject to the par- [589] amount right which the bank possessed. If, on the other hand, the condition in question was void because repugnant to the text

of the national bank law and in conflict with the public policy which that act embodies, it is equally clear that there was no lien in favor of the bank, and the title of the insurance company, derived from its pledge and purchase, was paramount to any assumed right of the bank to refuse to transfer the stock in order to enforce a lien which, it was asserted, the bank possessed as a result of the condition in question. That the provisions referred to were void because coming within the last-mentioned category will become apparent from a brief consideration of the national bank law found in the Revised Statutes, as elucidated by its evolution from the acts of 1863 and 1864, and as expounded by the previous decisions of this court.

National banks were first created by the act of 1863. 12 Stat. at L. 665, chap. 58. By § 36 of that act it was provided:

"That the capital stock of any association formed under this act shall be divided into shares of \$100 each, and shall be assignable on the books of the association in such manner as its by-laws shall prescribe; but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety, or otherwise, to the association for any debt which shall have become due and remain unpaid, nor in any case shall such shareholder be entitled to receive any dividend, interest, or profit on such shares so long as such liabilities shall continue, but all such dividends, interests, and profits shall be retained by the association and applied to the discharge of such liabilities; and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association."

Section 37 of the same act provided that—

"No banking association shall take, as security for any loan or discount, a lien upon any part of its capital stock, . . . [590] *and no such 'banking association shall be the purchaser or holder of any portion of its capital stock or of the capital stock of any other incorporated company, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith on security which, at the time, was deemed adequate to insure the payment of such debt, independent of any lien upon such stock; or in case of forfeiture of stock for the nonpayment of instalments due thereon, and stock so purchased or acquired shall in no case be held by such association so purchasing for a longer period of time than six months, if the same can, within that time, be sold for what the stock cost."

The act of 1863 was expressly repealed (§ 62) by the act of 1864 (13 Stat. at L. 99, chap. 106). The repealing act, however, contained the following:

"Provided, that such repeal shall not affect any appointments made, acts done, or proceedings had, or the organization, acts, or proceedings of any association organized or in process of organization under the act aforesaid."

The act of 1864, which contained a repealing clause subject to the foregoing proviso, re-enacted in complete form the entire law as to national banks. The subjects which had been embraced by § 36 of the act of 1863 were contained in § 12 of the act of 1864, in part, as follows:

"The capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; . . ."

The remaining provisions of the section related solely to the double liability of the shareholders. It hence follows that all the provisions found in § 36 of the act of 1863, empowering the board of directors of a national bank to withhold a transfer in case of a debt due by a stockholder to a bank, were not only omitted from the new act, but were expressly repealed. The provision found in the 37th section of *the act [591] of 1863, prohibiting an association from making any loan or discount on the security of the shares of its own capital stock, was re-expressed in a substantially identical, though somewhat more amplified, form of statement in § 35 of the new act. The provisions of the act of 1864, in the particulars in question, are now embodied in §§ 5139 and 5201 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 3461, 3494).

When this history of the legislation is considered it becomes apparent that the clause inserted in the articles of association, in the by-laws and the certificates of stock of the bank here being considered, was directly repugnant to the act of 1864, and amounted simply to an attempt on the part of the bank to exercise the power which was granted under the act of 1863, but which was denied by the act of 1864. And this result was long since pointed out by the decisions of this court. In *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172, the case was this: The First National Bank of South Bend was organized under the act of 1863. A by-law of the bank provided that "the stock of the bank should be assignable only on its books, subject to the provisions and restrictions of

the act of Congress." Culver became a stockholder in the bank, certificates having been issued to him as such, stating on their face the limitations on the power to transfer expressed in the by law just referred to. By an agreement between Culver and the bank it was understood that his stock in the bank should secure the bank against any loss resulting from a deposit of its funds made by the bank with the house of Culver, Penn. & Co., of New York, of which Culver was a member. When, however, this agreement was made, the certificates of stock were not delivered to the bank, but remained in the possession of Culver. After the passage of the national bank act of 1864, Culver, in violation of his agreement with the bank, sold his stock and delivered the certificates thereof, with power to transfer the same, to Lanier and Handy, who requested a transfer of the same. This the bank refused to do on the ground of Culver's agreement, and on the further ground of the provision in the by-law and [592] certificates, which, it was asserted, but expressed by reference the provisions of the 36th section of the act of 1863. Two questions were necessary to be decided: *a*, the right of the bank resulting from the understanding with Culver; and *b*, its right arising from the terms of the by-law and certificate. These questions were ruled adversely to the bank. It was held that the agreement between the bank and Culver was void because it was within the prohibitions of both the 37th section of the act of 1863 and the 35th section of the act of 1864, prohibiting a national bank from loaning on the security of its own capital stock, etc. Irrespective, however, of this question, it was expressly decided that, as the act of 1864 had repealed the provision of the act of 1863, subjecting transfers of stock in national banks to debts due by the stockholder to the bank, or permitting the board of directors to provide to that effect, the result of the act of 1864 was impliedly to prohibit a bank from imposing such a condition on the transfer of stock. And the doctrine was applied to a by-law adopted prior to the passage of the act of 1864, because it was held that the continued operation of such a by-law was prevented by the act of 1864, as the right to continue it was not saved by the proviso to the repealing clause of that act. It was pointed out that the provision of the act of 1864, making the stock of national banks transferable like other personal property, was a fundamental departure from the act of 1863, and was based on a rule of public policy initiated by the act of 1864, intended to afford facilities for the transfer of stock in national banks, and

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thereby to encourage investment in such stock. The same subject was considered in *Bullard v. National Eagle Bank*, 18 Wall. 589, 21 L. ed. 923. There a by-law and form of certificate, adopted after the enactment of the statute of 1864, reserving the right to refuse to transfer stock in a national bank where the stockholder was indebted to the bank, was again determined to be *ultra vires*, because in conflict with the act of 1864, and such a provision was decided to be inoperative even as against the assignee in bankruptcy of the stockholder. These cases foreclose every question presented on this record. The cases have been frequently referred to approvingly. *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. Rep. 254, and authorities there cited. The contention that, although the condition in the certificate was void, nevertheless it operated as a notice to the insurance company, and thereby deprived it of its right to compel the transfer of the stock, but asserts in another form that there was power, by the insertion of such a condition in the certificate of stock, to deprive the stock of a national bank of its attribute of sale like any other personal property. The contention wholly ignores not only the text of the law, but the rule of public policy which the national bank act has been decided to embody.

Affirmed.

UNITED STATES, *Plff. in Err.*,
v.

CHRISTOPHER C. MCCOY, David W. Small, William O'Donnell, and Thomas Mosgrove.

(See S. C. Reporter's ed. 593-602.)

Appeal—waiver of objections to evidence—abandonment of mail contract—prima facie case.

1. An objection to the admissibility of telegrams in evidence because they were copies is waived by failure to insist upon a ruling on the objection, and reserve the question.
2. Abandonment of a contract to carry mail is prima facie established in a suit by the Federal government on a mail contractor's bond by the introduction in evidence of the official finding of the Postmaster General that he was a failing contractor, together with the official reports of the local postmaster, upon which the finding was based.

[No. 148.]

Submitted January 25, 1904. Decided April 4, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit

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to review a judgment which affirmed a judgment of the Circuit Court for the District of Washington in favor of defendant in an action by the Federal government on a mail contractor's bond. *Reversed* and remanded to the Circuit Court for further proceedings.

See same case below, 51 C. C. A. 688, 113 Fed. 1021.

Statement by Mr. Justice **White**:

This suit was commenced by the government to recover an amount alleged to be due on a bond to secure the performance of a contract to carry mail. The defendants [594] were McCoy, the *contractor and principal in the bond, and his sureties. The cause was put at issue by a general denial, and was tried in November, 1899. The government prosecuted error from a judgment of nonsuit which was entered against it. The circuit court of appeals for the ninth circuit decided that the trial court was "right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a prima facie case for damages on account of the alleged entire failure of McCoy to perform the service provided in his contract." It was, however, held that a prima facie right to recover the amount of a fine of \$5 had been established. The judgment was, therefore, reversed and the case remanded for a new trial. 44 C. C. A. 125, 104 Fed. 669. A second trial took place in May, 1901. At that trial the case made by the government was as follows: McCoy, being the lowest bidder, was awarded a contract for carrying the mails from July 1, 1890, to June 30, 1894, between the postoffice at San Francisco and certain railroad stations and steamboat landings, and executed the bond which was sued on. On May 3, 1893, the postmaster at San Francisco telegraphed the Postoffice Department that, under a judgment rendered against McCoy, the sheriff had seized the wagons used by him in executing his contract, and would sell them on May the 5th; that the probable result of this sale would be to render it impossible for McCoy to continue to perform his contract, and that some temporary arrangement would be necessary, and asking instructions in the premises. Three days later, on May the 8th, the postmaster telegraphed the Department that the service had been absolutely abandoned by McCoy, and that a temporary arrangement had been made, to last until the Department could act. On the day after the receipt of this telegram (May 9) the Postoffice Department addressed a letter to McCoy, care of Zevely and Finley, Washington, D. C., giving the substance of the two telegrams

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above referred to, and asking if McCoy intended to carry out his contract. On May 17 the Department telegraphed the sureties on McCoy's bond, informing them that *McCoy had failed to perform his contract, [595] and inquiring if they would assume the service. On the same day the Department by telegram informed the postmaster at San Francisco that his action in providing a temporary arrangement for the performance of the service was approved. On May 18 a telegram was received by the Department from one of the sureties of McCoy, saying that he, the surety, was unable to perform the contract, and requesting to be relieved from all future liability on the bond, because his signature thereto had been "improperly obtained." On the same day (May 18) a finding was made by the Postmaster General that McCoy was a failing contractor, this finding being evidenced by the following certificate:

State of California. No. 76,475.

Regulation wagon service, San Francisco, San Francisco county. Contractor, C. C. McCoy. Pay, \$7,700.00.

Whereas C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service, he is hereby declared a failing contractor.

W. S. Bissell,
Postmaster General.

Date, May 18, 1893.

The Department subsequently advertised for proposals for the remaining period of McCoy's term, and the same was let to one Popper, and a contract entered into with him on the subject. Thereupon the auditor of the Postoffice Department stated the account of McCoy as a failing contractor. That account charged on the debit side the sum paid for temporary service from May 5 to August 13, 1893, the date when the new contract was awarded, and also the difference between the amount stipulated to be paid in the McCoy contract and that which the government had contracted to pay Popper, the new contractor, from August 14, 1893, to June 30, 1894, when the McCoy contract would have terminated. The account, moreover, stated a charge against McCoy of \$5, the amount of a fine which had been imposed on him by the Department during the third quarter of 1893. McCoy was credited *with the whole sum [596] which he would have earned had he performed his obligations, the balance to the debit being the amount sued for, \$5,772.99. After the government had shown the facts above stated, it rested its case, and the defendant offered no evidence whatever.

The government then requested an in-

struction in its favor on the ground that a prima facie case of liability had been proven. Exception was taken to the refusal of the court to give this instruction.

The court charged the jury as follows:

"It will not be necessary for you to retire to consider this case. You can render a verdict from your seats. This is an action in which the government sued to recover damages for breach of a mail contractor's bond—breach of the contract. The action is against the contractor and the sureties upon his bond. The government claims damages for the total abandonment of the contract without having performed it, and as to that claim all the evidence that has been offered on the part of the government is insufficient to prove that there was an abandonment, there being no testimony of any witness having knowledge of the fact that the contractor did fail. The evidence includes the statement of account made up by the auditing department of the government, in which there appears to have been a fine of \$5 imposed upon the contractor for a particular failure, and in accordance with the decision of the circuit court of appeals for this circuit that evidence is sufficient prima facie to entitle the government to recover the \$5, and the defendants here in open court have admitted liability for that \$5. Therefore your verdict will be in favor of the government for the sum of \$5. I have prepared a verdict which you will select one of your number to sign as foreman, and that will be your verdict in the case."

To this instruction the government saved an exception. From a judgment in favor of the defendant for all but \$5 of the amount [597] claimed, the government prosecuted error. The circuit court of appeals affirmed the judgment upon the authority of the ruling made by it when the case was previously before it. This writ of error was thereupon prosecuted.

Assistant Attorney General Purdy submitted the cause for plaintiff in error:

The documentary evidence introduced by the government was legally sufficient to make out a prima facie case.

Greenl. Ev. §§ 483, 493; 3 Taylor, Ev. § 1591; 1 Whart. Ev. §§ 639, 640; *United States v. Carr*, 132 U. S. 644, 653, 33 L. ed. 483, 486, 10 Sup. Ct. Rep. 182; *Evans-ton v. Gunn*, 99 U. S. 660, 25 L. ed. 306; *Bingham v. Cabbot*, 3 Dall. 19, 38, 1 L. ed. 491, 500.

The certified copy of the records in the auditor's office of the Postoffice Department of the account of C. C. McCoy, as failing contractor, for the amount of actual damages sustained by the United States,

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taken in connection with the other testimony offered, is prima facie evidence, not only of the fact and the amount of the indebtedness, but also of the time when and the manner in which it arose.

Soule v. United States, 100 U. S. 8, 25 L. ed. 536; *United States v. Stone*, 106 U. S. 525, 530, 27 L. ed. 163, 165, 1 Sup. Ct. Rep. 287; *United States v. Dumas*, 149 U. S. 278, 285, 37 L. ed. 734, 736, 13 Sup. Ct. Rep. 872.

Mr. E. C. Hughes submitted the cause for defendant in error:

The abandonment of the contract was not prima facie established by the transcripts from the Department.

United States v. Buford, 3 Pet. 12, 7 L. ed. 585; *United States v. Jones*, 8 Pet. 375, 8 L. ed. 979; *Hoyt v. United States*, 10 How. 109, 13 L. ed. 348, 576; *United States v. Forsythe*, 6 McLean, 584, Fed. Cas. No. 15,133; *United States v. Case*, 49 Fed. 270.

An entirely different effect is given to papers certified under § 882 from that given to the copy of the account from the books certified under § 889.

United States v. Pinson, 102 U. S. 548, 26 L. ed. 226.

The abandonment is not shown by the copy of the Postmaster's telegram.

United States v. Corwin, 129 U. S. 381, 32 L. ed. 710, 9 Sup. Ct. Rep. 318; *United States v. Carr*, 132 U. S. 644, 33 L. ed. 483, 10 Sup. Ct. Rep. 182.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The assignments of errors and arguments at bar present two questions for decision: First. Were the copies of telegrams sent by the postmaster at San Francisco to the Postoffice Department admissible in evidence? And second, if they were, Did the certified copy of the account of McCoy as a failing contractor from the books of the auditor for the Postoffice Department, the telegrams from the postmaster at San Francisco, and the finding of the Postmaster General that McCoy was a failing contractor, make out a prima facie case for the government? Concerning the first question it suffices to say that, although it is urged that the telegrams were not admissible because they were merely copies of copies, the originals being on file in the telegraph office from which the messages were sent, the record does not show that any ruling on this subject was insisted on in the trial court, and hence no exception was taken to the introduction of the copies. As the objection that the telegrams were not the best evidence because they were

merely copies was susceptible of being cured, if insisted on, it follows that the failure to so insist and reserve the question was a waiver of the objection. It then remains only to consider whether, taking into view the whole case as made by the government, a prima facie right to recover was established. Section 889 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 671), is as follows:

[599] "Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account-books of the Postoffice Department, when certified by the sixth auditor under the seal of his office, shall be admitted as evidence *in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits."

The certified account from the books of the auditor for the Postoffice Department which was offered in evidence came clearly within this statute. The items in that account were ascertained and established in the regular course of official action by the Department, and represented disbursements made in the ordinary course of business for temporary service and under the new contract, all of which was occasioned by the actual or assumed default of McCoy. The payments shown by the items, therefore, properly appeared on the books of the Treasury Department. The account was clearly, therefore, competent; at least, for the purpose of showing the amount of the indebtedness, if any, existing. *United States v. Stone*, 106 U. S. 525, 27 L. ed. 163, 1 Sup. Ct. Rep. 287. As, however, the correctness of the items in the account depended upon proof of the fact of the delinquency of McCoy, the contractor, it remains to determine whether the evidence introduced by the government at the trial prima facie established such delinquency; in other words, whether the evidence was sufficient, in the absence of proof to the contrary, to show that McCoy had totally abandoned his contract on May 5, 1893. The solution of this question depends upon the probative force of the official finding by the Postmaster General that McCoy was a failing contractor, based, as it was, upon the official report on the subject, made to the Department by the postmaster at San Francisco.

In *United States v. Dumas*, 149 U. S. 808

278, 37 L. ed. 734, 13 Sup. Ct. Rep. 872, the court considered the act of June 17, 1878 (20 Stat. at L. 140, chapter 259, § 1, U. S. Comp. Stat. 1901, p. 2614), which provides: "That in any case where the Postmaster General shall be satisfied that a postmaster has made a false return of business, it shall be within his discretion *to withhold com-[600] missions on such returns, and to allow any compensation that, under the circumstances, he may deem reasonable." The facts were as follows: On August 11, 1888, the then Postmaster General made an order, reciting his "being satisfied" that Dumas had made false returns of business at the office of which he had been postmaster, and declaring that, in the exercise of the discretion conferred by acts of Congress, the commissions on such returns were withheld, and the compensation of the postmaster was fixed as stated in the order. As a result of this finding by the Postmaster General, an action was subsequently brought against the postmaster and his sureties, and it was decided that the order of the Postmaster General and the certified accounts of the government, which were produced and which were founded upon such order, were held to be prima facie evidence of the balance due the government.

Moreover, by § 3962 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2704), it is provided that—

"The Postmaster General may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier."

And the 2d section of the act of August 3, 1882, chap. 379 (22 Stat. at L. 216, U. S. Comp. Stat. 1901, p. 2703), provides as follows:

"Sec. 2. Whenever a contractor for postal service fails to commence proper service under the contract, or, having commenced service, fails to continue in the proper performance thereof, the Postmaster General may employ temporary service on the route, at a rate of pay per annum not to exceed the amount of the bond required to accompany proposals for service on such route, as specified in the advertisement of the route, or at not exceeding *pro rata* of such bond, in cases where service shall have been ordered to be increased, reduced, curtailed, *or changed, subsequent to the exe-[601] cution of contract; the cost of such temporary service to be charged to the contractor, and to continue until the con-

tractor commences or resumes the proper performance of service, or until the route can be relet, as now provided by law, and service commenced under the new award of contract. All acts or parts of acts inconsistent with the provisions of this act being hereby repealed."

These provisions, by necessary implication, declare that whenever the Postmaster General "is satisfied," from evidence presented to him, that conditions exist which justify the imposition of fines or the deciding that a postal contractor has abandoned the performance of his contract, the Postmaster General may act as authorized in such provisions. It would seem to be an appropriate act for the Postmaster General to make distinct official evidence of the fact of such finding, to be filed among the archives of his office. The pertinency of such an official finding was, as has been shown, recognized in the *Dumas Case*; and, when coupled, as it is in the case at bar, with the reports upon which the finding in the certificate was based, we think the certificate was legally competent to establish prima facie the fact that McCoy had abandoned his contract. It was made the duty of the postmaster at San Francisco, by § 3849 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2617), to "promptly report to the Postmaster General every delinquency, neglect, or malpractice of the contractors, their agents or carriers, which comes to his knowledge." The reports embodied in the telegrams in question on their face show that they related to facts which had come to the knowledge of the postmaster, bearing upon the delinquency of McCoy, particularly the ultimate fact of total abandonment by McCoy of his contract. The opinion in *United States v. Corwin*, 129 U. S. 381, 32 L. ed. 710, 9 Sup. Ct. Rep. 318, contains a clear recognition of the competency, as evidence, of official communications of this character, when made to those higher in authority, as supporting and giving evidential weight to findings based thereon. The reports contained in [602] the telegrams *in question present an application of what is stated in the opinion in the *Corwin Case* (p. 385, L. ed. p. 711, Sup. Ct. Rep. p. 319) to be "the well-established rule that official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts."

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, *Plff. in Err.*,

v.

OSEE W. WILMOT.

(See S. C. Reporter's ed. 602-613.)

Limitation of actions—action on liability of stockholders in foreign corporation—what is moneyed corporation—nature of stockholder's liability.

1. The three years' statute of limitations prescribed by N. Y. Code Civ. Proc. § 394, for actions against directors or stockholders of a moneyed corporation to enforce a common-law or statutory liability is applicable to actions of that character brought within the state against directors and shareholders of foreign corporations.
2. A Kansas trust company which is empowered to receive deposits and to loan money on real estate and personal security must be deemed a "moneyed corporation" within the meaning of N. Y. Code Civ. Proc. § 394, prescribing a three years' limitation for actions to enforce stockholders' liabilities, in view of

NOTE.—*Conflict of laws as to limitation of actions to enforce liability of stockholder.*

No question as to what statute of limitations controls in an action to enforce a stockholder's liability in a foreign corporation was raised in *PLATT V. WILMOT*. This was because the Kansas statute prescribed a three years' limitation (*Hobbs v. National Bank of Commerce*, 41 C. C. A. 205, 101 Fed. 75), and, if applicable, would, therefore, have barred the action as effectually as the New York statute, which was held to control. For the same reason this question was left undecided in *Hobbs v. National Bank of Commerce*, 37 C. C. A. 513, 96 Fed. 396. Rehearing denied in 41 C. C. A. 205, 101 Fed. 75.

This question was squarely passed upon in *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921, where the Kansas statute of limitations was held inapplicable to an action of assumpsit by a creditor of a Kansas corporation to enforce the double liability against a stockholder resident in Maine. The court said that the Kansas statute which creates the stockholders' liability prescribed no period within which that liability must be enforced. The statute relied upon to defeat the action is a part of the general statute of limitations of the state of Kansas. It is applicable to all contracts not in writing, and to all liabilities created by statute, other than a forfeiture or penalty. It is not, therefore, an integral part of the right itself, which goes with it everywhere that the right is sought to be enforced; but it applies only when the remedy is sought in Kansas, and cannot follow the right beyond the bounds of that state.

"Inasmuch as the Kansas statute [of limitations] is a general one, and the statutes in regard to the liability of stockholders of an insolvent corporation to its creditors do not contain provisions in regard to the limitations of actions, we think," said Shipman, Ch. J., in *Whitman v. Citizens' Bank*, 49 C. C. A. 122, 110 Fed. 503, "that the statutes of the forum in which the suit was brought must apply."

And this principle was the ground for the

the definition of that term in 1 N. Y. Rev. Stat. 598, § 51, as one having the power to make loans upon pledges or deposits, and of the further definition of a moneyed corporation in the revised corporation act of 1890, as one formed under, or subject to, the banking or insurance law.

3. The double liability of a stockholder in a Kansas corporation is one created by common law or statute within the meaning of the three years' statute of limitations prescribed by N. Y. Code Civ. Proc. § 394, for actions to enforce a liability of that character against corporate directors or stockholders, since such liability, while contractual in its nature, arises out of the Kansas Constitution or statutes, or from a combination of both by virtue of the application of general principles of law to the facts in the case.

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decision in *Dexter v. Edmonds*, 89 Fed. 467, that the time within which an action might be maintained in Massachusetts to enforce the statutory liability of a stockholder of a Kansas corporation was to be determined by the law of the forum.

Because the liability of a stockholder in a Kansas corporation is contractual and transitory an action in New York to enforce such liability is governed by the *lex fori* as to limitations. *Schiffer v. Columbia College*, 87 Fed. 166.

In *Hutchings v. Lamson*, 37 C. C. A. 564, 96 Fed. 720, it is held that an action in Illinois to enforce the liability of stockholders of a Kansas corporation cannot be maintained after the time when the action has been barred by the Illinois statute.

But an action in the Federal court to enforce, in Massachusetts, the liability of a stockholder in a New Jersey corporation is governed by the New Jersey statute of limitations. *Andrews v. Bacon*, 38 Fed. 777.

In *Crofoot v. Thatcher*, 19 Utah, 212, 75 Am. St. Rep. 725, 57 Pac. 171, which is an action by the receiver of a Nebraska corporation on a note given for subscription for stock, it is conceded that the statute of limitations fell within the remedy, and that the law of the forum governed in so far as the remedy was concerned as applied to an existing and enforceable cause of action; but it was held that the law of Nebraska controlled as to the time when the statute of limitations began to run.

In *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867, an action to enforce, in Missouri, the liability of stockholders in a Virginia corporation, it is held that the laws of Virginia fixing the liability of stockholders, rather than the laws of Missouri, will govern in determining when the statute of limitations begins to run.

In *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810, an action in Iowa to recover an assessment against a stockholder in an Illinois corporation, ordered paid by the courts of that state, it was held that the provision of the Iowa statute that the cause of action accrued when the contract of subscription was entered into, rather than the provision of the Illinois statutes that the cause of action accrued at the time the order of an assessment was made, would govern in determining whether the statute of limitations had run.

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Argued March 2, 1904. Decided April 4, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of New York, dismissing a complaint in an action to recover the double liability of a stockholder in a Kansas corporation. *Affirmed*.

See same case below, 54 C. C. A. 683, 118 Fed. 1019.

Statement by Mr. Justice **Peckham**:

Plaintiff in error brings the case here to review the judgment of the United States circuit court of appeals for the *second cir-[603]

In *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603, which was an action to enforce the statutory liability of stockholders of a Kansas corporation against persons residing in Massachusetts, it was held that under the Kansas statutes of limitations, which provide that, if a person is out of the state when the cause of action against him accrues, the period limited for the commencement of the action does not begin to run until he comes within the state, which had been construed by the Kansas courts to apply to nonresidents, the cause of action was not barred, as the statute on which the right to hold the stockholder liable rested did not contain any requirement that the right be enforced within a specified time. This case seems to admit that the statute of limitations of the state which created the liability, rather than that of the forum, would govern.

An action to enforce the liability of a stockholder in a New York corporation, imposed by N. Y. Stat. 1848, chap. 40, § 24, providing that no stockholder shall be liable unless suit for collection of the debt is brought against the corporation within a year after the debt becomes due, cannot be maintained in Massachusetts, where suit was not commenced against the corporation within the time so fixed. *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157.

And the case of *Brunswick Terminal Co. v. National Bank*, 48 L. R. A. 625, 40 C. C. A. 22, 99 Fed. 635, holds that an action in Maryland to enforce the statutory liability of a stockholder in a Georgia corporation is governed by Ga. Code 1882, § 2916, providing that all suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of the law, shall be brought within twenty years after the right of action accrues. In this case the court holds that the fact that such statute is not a part of the act of incorporation does not change the rule that statutes creating a liability, which require suit to be brought thereon within a specified time, will govern in an action in another state, as it is a special statute applicable to statutory liabilities, or liabilities arising under acts of incorporation, and must, therefore, be considered as forming a part of the act of incorporation.

On the general question as to when statute of limitations will govern action in another state or country, see note to *Brunswick Terminal Co. v. National Bank*, 48 L. R. A. 625.

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cuit, which affirmed the judgment of the circuit court for the northern district of New York, dismissing the plaintiff's complaint upon the merits. The action was commenced in the last-named court by the service of a summons on the defendant on October 1, 1898, and was brought by the plaintiff as receiver of the Commercial National Bank of Denver, Colorado, to recover from the defendant the double liability imposed upon him as stockholder in the Western Farm Mortgage Trust Company of Lawrence, Kansas, hereinafter called the trust company.

The defendant answered the complaint, and, among other things, set up the defense of the three years' statute of limitations of the state of New York.

The action was tried in the circuit court for the northern district of New York without a jury, and findings of fact were made by the court upon which the conclusion of law was based that the plaintiff's cause of action was barred by § 394 of the Code of Civil Procedure of the state of New York, being the three years' statute of limitations, and that his complaint should therefore be dismissed with costs.

The court found that the bank of which plaintiff was subsequently appointed receiver had commenced an action against the trust company, and on June 3, 1893, had recovered a personal judgment against it for the sum of \$4,930.72, with interest thereon from the date of the recovery of the judgment. Execution had been issued upon said judgment on August 29, 1894, and returned unsatisfied on September 7, 1894.

At the time of the rendition of the judgment and the return of the execution unsatisfied, the defendant was the holder of, and has continued since that time to hold, twenty shares of the capital stock of the trust company.

By the terms of its articles of association the corporate powers of the trust company were, among others, as follows:

"Article II. The purposes for which it is formed are to receive deposits of money, bonds, and securities; to loan money on real estate and personal security; to negotiate [604] loans on real *estate and other securities; to purchase and sell bonds and notes secured by mortgages and deeds of trusts on real estate; to purchase and sell municipal bonds and the bonds, assets, and franchises and securities of other corporations; to issue and sell its debentures and secure the same by pledge of notes, bonds, and other securities, real or personal; to guarantee the payment of principal and interest of loans by it negotiated or made and sold; to act as financial agent of any state, municipality, corporation, association, company, or per-

son; to purchase, hold, sell, and convey such real estate and personal property as it may require for its use; to purchase, hold, sell, and convey such real estate and personal property as may be necessary for the security or collection of claims due or owing it; to accept and execute any trust committed to it by any municipality, corporation, association, company, person, or other authority."

Judgment dismissing the complaint having been entered, the plaintiff, by virtue of a writ of error, obtained a review of the judgment by the circuit court of appeals of the second circuit, where it was affirmed, without any opinion, upon the authority, as stated in a memorandum by the court, of the case of *Hobbs v. National Bank of Commerce*, 37 C. C. A. 513, 30 N. Y. Civ. Proc. Rep. 24, 96 Fed. 396.

The Constitution and statutes of Kansas provide for the individual liability of the stockholders in a corporation to an additional amount equal to the stock owned by each stockholder, but the provision does not apply to a railroad corporation, nor to corporations for religious or charitable purposes.

Mr. Omar Powell argued the cause, and, with **Mr. Elijah Robinson**, filed a brief for plaintiff in error.

No counsel for defendant in error.

Mr. Justice Peckham, after making the above statement of facts, delivered the opinion of the court:

The only question which the plaintiff in error presents is *whether or not this action [607] was barred by the New York three years' statute of limitations, and that depends upon whether § 382 or § 394 of the Code of Civil Procedure of that state is applicable.

Section 382 provides that actions of the following nature shall be barred within six years.

"1. An action upon a contract, obligation, or liability, express or implied, except a judgment or sealed instrument.

"2. An action to recover upon a liability created by statute, except a penalty or forfeiture."

Section 394, which the courts below have made applicable to plaintiff's cause of action, reads as follows:

"Sec. 394. This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute; but such an action must be brought within three years after the cause of action has accrued."

Several objections are made by the plaintiff in error to the application of § 394 to this case. They are (1) that the section does not apply to a director or stockholder of a foreign corporation; (2) that if it be held that it does extend to actions against directors and stockholders of foreign corporations of the class designated in the section, yet it does not apply to this case, because the trust company is neither a moneyed corporation nor a banking association; (3) that the stockholders' liability in this case is one based upon contract, and is not created either by the common law or by statute.

Taking up these objections in their order, we are brought to a consideration of the one which asserts that § 394 does not apply to directors or stockholders of foreign corporations. We think it does.

A history of the legislation upon this subject in the state of New York, which finally resulted in § 394 of the Civil Code, is given in the opinion in *Hobbs v. National Bank of Commerce*, 37 C. C. A. 513, 30 N. Y. Civ. Proc. Rep. 24, 96 Fed. 396, by Judge Shipman, and it is also *referred to by Judge Earl, in *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663.

The section as originally enacted was § 44, part 3, chap. 4, title 2, of the Revised Statutes, which chapter related to "Actions, and the Times of Commencing Them." These statutes took effect (as to the greater part) in 1830. The section in question then read as follows:

"None of the provisions of this chapter shall apply to suits against directors or stockholders of any moneyed corporations to recover any penalty or forfeiture imposed or to enforce any liability created by the second title of the eighteenth chapter of the first part of the Revised Statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached or by which such liability was created."

Upon the adoption of the Code of Procedure of 1848 the section became § 89 of that Code. The second title of the first part of the Revised Statutes, referred to in the section, among other things, imposed liabilities upon the directors and stockholders of the moneyed corporations authorized by that title. If the statute of limitations above quoted had not been amended, it would have been limited to the liabilities mentioned in such title, and would not have included a case like this.

In 1849 § 89 of the Code of Procedure of 1848 became § 109, and read as follows:

"This title shall not affect actions against directors or stockholders of a moneyed cor-

poration or banking associations to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached or the liability was created."

The difference in the two sections is plainly seen, and consists in striking out the words as to a liability created by the Revised Statutes, and enlarging the operation of the section *to a "liability created by law." The words "liability created by law," were held in *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663, to mean statutory liabilities which, as stated by Judge Earl (page 192, N. E. p. 666), "comprehend not only liabilities created by the title and chapter of the Revised Statutes referred to, but also those created by other statutes and the Constitution of 1846 (art. 8, § 7)."

In 1877 another amendment was made to the section by leaving out the words "six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created," and substituting therefor the words "three years after the cause of action accrued."

The act was further amended in 1897, and the statute (§ 394) reads, after that amendment, in the way it has been quoted above, so that the action must be brought within three years after the cause of action has accrued to enforce a liability created by the common law or by statute.

As to the meaning of this statute, it was held in the *Hobbs Case*, 37 C. C. A. 513, 30 N. Y. Civ. Proc. Rep. 24, 96 Fed. 396, that the legislature meant to enlarge the former limitation so it should no longer be limited to liabilities created by one set of statutes or imposed upon the officers or stockholders of moneyed corporations or banking associations within the state only, but the terms of the statute were held to be so broad as to include every class of liabilities of such stockholders, whether they were stockholders of foreign or domestic corporations. The statute was held to be a totally different one from that which was originally passed, and the language evinced an intention that it should not be so limited as to apply only in favor of a New York stockholder in a domestic corporation, but that, on the contrary, the statute should also apply to a shareholder in a foreign corporation.

In our view this interpretation by the circuit court of appeals is the correct one. We are of opinion that the amendments were not intended to continue the application of the limitation to those corporations only which were domestic and *were of the

kind mentioned in the Revised Statutes, because, as amended, the statute used language which was inconsistent with that idea. The original reference to the liabilities of directors and stockholders under the second title of the Revised Statutes was stricken out and in place thereof language was used which clearly indicated a purpose to extend the statute to all liabilities of directors or stockholders in any corporation, foreign or domestic, which liabilities were created by common law or by statute, provided the corporation was a moneyed corporation or banking association. We can see no reason why the director or stockholder of a domestic corporation should cease to be liable in three years from the time the cause of action accrued, while if he were a director or stockholder of a foreign corporation his liability should still last for six years, upon a suit commenced in New York.

It is not the case of a state legislature assuming to regulate foreign corporations, and no such attempt has been made. The substance of the legislation is that when suits are brought in the state of New York to enforce therein the liabilities of directors or stockholders, the statute of limitation enacted by the legislature of that state in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign corporations. This is what the legislature has done and this is what it had the right to do.

The Federal courts, sitting in the state, will, in cases brought therein, enforce the state statute of limitations in actions of this nature.

This view of the statute is not affected by reason of the language of the revised corporation law of New York, chap. 563 of the Laws of 1890. That act is, by its terms, confined to corporations under the laws of New York; but § 394 of the Code is a different statute, and, as has been seen, refers to any corporation, foreign or domestic, which may be a moneyed corporation or banking association within the meaning of the law of New York.

[611] The next objection is, that even if the statute referred to *foreign as well as domestic corporations, yet the trust company is not a moneyed corporation within the meaning of the section in question. What is meant by the term "moneyed corporation," in § 394 is shown by the definition of that term given in 1 Rev. Stat. 598, § 51, where it is said: "Section 51. The term 'moneyed corporation,' as used in this title, shall be construed to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances."

Although this definition refers to the

meaning of the term "moneyed corporation," as used in that title of the Revised Statutes, we think it is plain that the same term used in § 394 of the Code means the same thing as defined in § 51. The legislature used a term which was well known in the legislation of New York and for a long period of years a definite meaning had been given to it in that legislation, and when speaking of limitations of actions in regard to moneyed corporations nothing would be more natural than to assume that the term when thus used should have the same meaning applied to it as had been defined by the legislature when enacting legislation in regard to moneyed corporations. This legislation does not assume to enact what shall be "moneyed corporations," in other states, but its effect is that when actions are brought in the state of New York and the question arises whether a foreign corporation is or is not a moneyed corporation, that question will be solved in such a case as this for the purpose of construing the statute of limitations of the state, by reference to the meaning given to the term by the legislature or courts of New York, rather than by reference to the legislation of another state under which the corporation may have been formed. The question is not what the corporation is under the legislation of that other state, but whether what it is doing is of that description provided for and designated by the legislation of the state of New York. and if by that legislation it comes within the description of a "moneyed corporation," it must abide thereby so far as regards *the statute of limitations of New[612] York and the proper construction to be given it.

Now, by reference to the powers granted to the trust company, it will be seen that it had power "to receive deposits of money, bonds, and securities; to loan money on real estate and personal security; . . ." etc. The powers granted to the trust company bring it distinctly within the definition of the term "moneyed corporation" as used in § 394 of the Code of New York. It had power to loan money not only on real estate but on personal security, and the statute of New York said any corporation having the power to make loans upon pledges or deposits was a moneyed corporation within the meaning of the act.

Again, referring to the revised corporation act of New York of 1890, a moneyed corporation is therein stated to be one formed under or subject to the banking or the insurance law. If a foreign corporation have powers, or some of them, which are given a banking association under the law of New York, that foreign corporation is, under the circumstances of this case, a mon-

eyed corporation or banking association within the meaning of the New York statute of limitations now under discussion. This corporation has, at least, some of those powers, and we think comes within the definition of a banking association, although it also has other powers.

The third objection is that the liability of the stockholder in this case is not created by the common law or by statute, but is contractual in its nature, and, is, therefore, governed by § 382 (the material portion of which has already been set forth), instead of § 394 of the Code.

[613] The case of *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477, is cited to show that the double liability of the stockholder under the Kansas Constitution and statutes is of a contractual nature, and, therefore, not within § 394, because it is not a liability created by common law or by statute. In the *Whitman Case* it was held that this liability, though statutory in origin, was contractual in its nature; or, in other words, the stockholder, when he subscribed for or purchased his stock, entered into a contract authorized by statute. In that case it was also held that the constitutional provision did not stand alone, but that the legislature of Kansas had also acted on the subject-matter, and that the Constitution and the statutes were to be taken together as making one body of law, and that, therefore, it would serve no good purpose to inquire what rights or remedies a creditor of a corporation might have or what liabilities would rest upon a stockholder if either Constitution or statutes stood alone and unaided by the other.

We think, within the meaning of § 394, this liability was created by statute, as it was by virtue of the statutes that the contractual liability arose. The language of the section plainly includes this case. It is a liability created by the statute, because the statute is the foundation for the implied contract arising from the purchase of, or subscription for, the stock, the contract being that the holder of the stock shall be liable in accordance with the terms of the statute.

Also, while the liability is contractual in its nature, it arises out of the Constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the Constitution nor the statute says that the liability is contractual, but, as the Constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a contractual liability

upon these facts, and it may be fitly described as the common law.

We think *the judgment of the Circuit Court of Appeals is right, and it is affirmed.*

*JOHN M. SLOAN *et al.*, Appts.,

[614]

v.

UNITED STATES *et al.*

(See S. C. Reporter's ed. 614-621.)

Direct appeal from circuit court—when construction of treaty not drawn in question.

The construction of an Indian treaty is not drawn in question in a suit in a Federal circuit court, so as to justify a direct appeal to the Supreme Court under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, where the contentions with reference to the proper construction of such treaty are only made by way of founding an argument as to the proper construction of the act of August 7, 1882 (22 Stat. at L. 342, chap. 434), providing for allotments in an Indian reservation, which is the issue directly in question.

[Nos. 453-475.]

Argued March 16, 17, 1904. Decided April 4, 1904.

APPEALS from the Circuit Court of the United States for the District of Nebraska to review a judgment dismissing bills in actions brought for the purpose of maintaining rights to allotments in the reservation of the Omaha Indians. *Dismissed* for want of jurisdiction.

See same case below, 118 Fed. 283.

The facts are stated in the opinion.

Messrs. **Thomas L. Sloan** and **H. C. Brome** argued the cause, and, with *Mr. Charles E. Clapp* and *Messrs. Anderson & Keefe*, filed a brief for appellants.

Mr. John L. Webster argued the cause and filed a brief for appellees.

Mr. Justice Peckham delivered the opinion of the court:

These are appeals by the complainants below directly to this court from the circuit court of the United States for the district of Nebraska. They were taken under the provisions of the 5th section of the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), on the ground that the construction of a treaty or treaties of the United States with the

NOTE.—On the direct review by the United States Supreme Court of circuit or district court judgments or decrees under the circuit-court-of-appeals act—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

[615] Omaha *Indians is drawn in question. The actions were brought some time in April, 1901, under the authority of the acts of Congress approved respectively August 15, 1894, and February 6, 1901, permitting persons in whole or in part of Indian blood, and claiming to be entitled to an allotment of land under an act of Congress, to commence an action in the proper circuit court of the United States for the purpose of maintaining their right to such allotment. 28 Stat. at L. 286, 305, chap. 290; amended, 31 Stat. at L. 760, chap. 217.

Under the authority of these statutes the complainants have brought these actions to obtain allotments in the reservation of the Omaha Indians. Their right thereto is based upon the act of Congress, chapter 434, approved August 7, 1882 (22 Stat. at L. 342, chap. 434), the 5th section of which is set forth in the margin.†

[616] *By the act approved March 3, 1893, chap-

†Act of 1882.

Sec. 5. That with the consent of said Indians, as aforesaid, the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City & Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe, in quantity as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who, being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

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ter 209 (27 Stat. at L. 612, 630), the act was amended so as to enlarge somewhat the right to allotments with the consent of the Indians, but the material portion of the act is the original § 5, above quoted.

All of the complainants are of mixed blood, and in their various bills of complaint they insist that they are entitled to allotments under and by virtue of the correct construction of the above act of 1882 and its amendments, and they set up the facts upon which they base their contentions, which included references to the treaties above mentioned. After having stated them, the complainants aver that the defendant, the United States, had theretofore contended that the 4th article of the treaty of March 6, 1865, between the United States and the Indians, confined the right of allotment to the members of the tribe, including their half-breed and mixed blood relatives who were residing with them at the time of the ratification of the treaty, and that neither the complainants nor their ancestors were residing on the reservation at the time, and were therefore not entitled to the land.

Complainants further stated that the United States had also contended that some of the complainants or their ancestors had received allotments of land under and by virtue of the treaty of July 15, 1830, article 10 thereof, and that, by the acceptance of such allotments, the complainants were not entitled under the statute of 1882 to a second allotment or further participation in the tribal rights of the Omaha tribe of Indians. To these matters of defense the complainants then set up certain facts which they insisted were answers thereto, and that the complainants were therefore entitled under the statute to the allotments claimed by them.

The United States in its answer did make reference to certain *treaties it had made [617] with the Omaha Indians. The reference was for the purpose of founding an argument for the construction of the act of 1882, in the manner contended for by it. It urged that the complainants were not entitled to allotments because, among other reasons, they did not reside with the Omaha Indians on their reservation at the time of the ratification of the treaty of 1865; and also that those who had received, or whose ancestors had received, allotments under the treaty of 1830, were not entitled to any further allotment under the act of 1882. The treaties referred to in the answer are the treaty of 1830 (7 Stat. at L. 328, 330, art. 10), and the treaty of 1865 (14 Stat. at L. 667, art. 4). The 10th article of the treaty of 1830 is set forth in the margin.‡

‡Treaty of 1830.

Article 10. The Omahas, Ioways, and Ot-

815

So much of article 4 of the treaty of 1865 as is material upon the question now under consideration is also set forth in the margin. §

[618] *It will be observed that this article of the treaty of 1865 provides for assigning the lands therein mentioned, in severalty, to the members of the tribe, including their half or mixed blood relatives, *now residing with them*. That is, at the date of the treaty.

There is another treaty, that of 1854 [10 Stat. at L. 1043], between the United States and the Omaha Indians, which it is not necessary to refer to at length. In it the Indians cede to the United States certain lands therein described, and they reserve certain other lands to themselves. The 6th article permits the President to assign at his discretion the whole or such portion of the lands reserved to the Indians as he may think proper, to be surveyed into lots, and to be assigned by the President to such Indians as were willing to avail themselves of the privilege and would locate on the same as a permanent home, subject to the conditions named in the article. The treaty is not material upon the question of the right to appeal directly to this court, hereinafter discussed.

Stipulations in regard to the facts in each

§ Treaty of 1865.

Article 4. The Omaha Indians, being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians.

toes, for themselves, and in behalf of the Yanckton and Santie bands of Sioux, having earnestly requested that they might be permitted to make some provisions for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits, to wit: Beginning at the mouth of the Little Ne-mohaw river, and running up the main channel of said river to a point which will be ten miles from its mouth in a direct line; from thence in a direct line to strike the Grand Ne-mohaw ten miles above its mouth, in a direct line (the distance between the two Ne-mohaws being about twenty miles); thence down said

ease were entered into between the parties and testimony also was given upon the various issues between them. The trial court held that the act of 1882 took the place of all previous acts and treaties providing for allotments of land to the Omaha tribe of Indians, including the half or mixed breeds; that the fundamental question was who, under the terms of the act of 1882, were entitled to allotments; that the rights of the complainants *must be adjudged according to [619] the intent of the act of 1882, and that if a person had a right, within the terms of that act, to an allotment, it could not be denied him simply because he could not be brought within the terms of the treaty of 1865; that the act of 1882 did not restrict the persons to whom allotments were to be made under its provisions to those who resided on the reservation in 1865, but it included all who were in fact members of the tribe, whether of mixed blood or not, residing on the reservation in the tribal relation when the act of 1882 was passed; but such right was not possessed by the mixed bloods who were not living on the reservation as members of the tribe in 1882; that those of mixed blood who had received allotments under the treaty of 1830 were not entitled to any allotments under the provisions of the act of 1882. 118 Fed. 283, 95 Fed. 193.

The bills were dismissed on the merits in twenty-three out of the twenty-five actions brought in the court below, while the complainants in two of them recovered judgment for an allotment to each. They were Thomas L. Sloan and Garry P. Myers. Sloan was held entitled to an allotment in his own right as an Indian of mixed blood, living on the Omaha reservation at the time of the passage of the act of 1882, although his grandmother, a daughter of a full blood Indian mother, had received an allotment of 320 acres in the Nemaha reservation in 1857, under the treaty of 1830. Myers was held entitled as an Indian of mixed blood and a resident of the Omaha reservation in 1882, the contested question being as to the amount of his allotment,—whether it should be 80 or 160 acres,—and he was held entitled to the latter quantity.

river to its mouth; thence up, and with the meanders of the Missouri river to the point of beginning, it is agreed that the half-breeds of said tribes and bands may be suffered to occupy said tract of land; holding it in the same manner and by the same title that other Indian titles are held; but the President of the United States may hereafter assign to any of the said half-breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section, of six hundred and forty acres to each individual. And this provision shall extend to the cession made by the Sioux in the preceding article.

The appellee has made a motion to dismiss these appeals on the ground that the court has no jurisdiction to hear them, as they do not fall within any of the provisions of § 5 of the act of March 3, 1891, and because the respective complainants neither assert nor claim any right to an allotment under or by virtue of any treaty, and the [620] validity or construction of a *treaty is not drawn in question in these cases. We think the motion should be granted.

The actions do not, in our judgment, involve the construction of any treaty within the meaning of § 5 of the statute of 1891. The complainants in their several bills have based their claims to an allotment upon the act of 1882 and upon the proper construction to be given to its language, which construction, they aver, would recognize their rights to an allotment under the treaties referred to. The United States, in defending against the claims made by the complainants, also relies entirely upon the proper construction of the act of 1882. The construction of a treaty is used only as an argument upon the issue directly in question, viz., the construction of the statute. The alleged right to an allotment being based upon the act of 1882, and the defense being also based upon the proper construction of that act, we cannot but regard the case as one simply resting on such act. The construction of these various treaties was not substantially, or in any other than a merely incidental or remote manner, drawn in question, and therefore a direct appeal to this court cannot be sustained.

We think the appeals come within the principle of *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867, and *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368, which hold that where the suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution or laws, and that jurisdiction cannot, under such circumstances, be maintained of a direct appeal to this court from the circuit court.

In *Musc v. Arlington Hotel Co.*, it was held that some right, title, privilege, or immunity dependent upon a treaty must be so set up or claimed as to require the circuit court to pass upon the question of the validity or construction of the treaty in disposing of the right asserted. In order to come [621] *within the act of 1891 the treaty must be directly involved, and upon its construction the rights of the parties must rest. With-
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in these cases it cannot be said that the construction of any treaty is drawn in question herein when the rights of neither party are necessarily dependent upon such construction, but are dependent upon that which may be given the statute of 1882, and when the construction of that statute is independent of that which may be given any of the treaties mentioned, although weight may be given to the treaties in determining the question of the construction of the statute. See also *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28.

The motion is granted and the appeals dismissed.

WILLIAM H. POPE, *Plff. in Err.*,
v.

JOHN M. C. WILLIAMS and John W. Harper, Officers of Registration, Constituting the Board of Registry for Election District No. 7 of Montgomery County, Maryland.

(See S. C. Reporter's ed. 621-634.)

Constitutional law—validity of registration law requiring declaration of intent from persons moving into state.

The Federal Constitution is not violated by the provision of Md. Laws 1902, chap. 133, requiring persons coming into the state to reside to make a declaration of their intention of becoming citizens and residents of the state before they can claim the right to be registered as voters, as applied to persons who have moved into the state since the act went into effect.

[No. 503.]

Argued March 8, 9, 1904. Decided April 4, 1904.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment affirming a judgment of the Circuit Court for Montgomery County in that state, which had affirmed the proceedings of a board of registry, refusing to register as a legal voter a person moving into the state who had not made a declaration of his intention to become a citizen and resident of the state. *Affirmed.*

See same case below (Md.) 56 Atl. 543.

Statement by Mr. Justice Peckham:

This is a writ of error to the court of appeals of the state of Maryland, to review its judgment affirming that of the circuit court

NOTE.—As to how far the right to vote is absolute—see note to *State ex rel. Allison v. Blake*, 25 L. R. A. 480.

On the validity of registration laws—see note to *Mason v. Missouri*, 45 L. ed. U. S. 214.

for Montgomery county, which affirmed the proceedings of the board of registry of election district No. 7 of that county, *refusing to register petitioner as a legal voter on the ground of his noncompliance with the Maryland law making it necessary for a person coming into the state, with the intention of residing therein, to register his name with the clerk of the circuit court of the proper county, and thereby to indicate the intent of such person to become a citizen and resident of the state.

The act in question was passed March 29, 1902, as chapter 133 of the laws of that year, and as an amendment and supplement to the Public General Laws of the state, title *Elections*, subtitle *Registration*, as § 25*b*, and it is reproduced in the margin.†

Plaintiff in error on September 29, 1903, [623] presented his application *to the board of registry of election district No. 7, Montgomery county, Maryland, then sitting at a place within such district, to be registered and entered as a qualified voter on the registry of voters of that election district, which application the board refused and declined to comply with, for the sole reason that he had not complied with this law of Maryland. Thereafter the plaintiff presented a sworn petition to the circuit court for Montgomery county, in the state of Maryland, praying that court to enter an order to revise the action of the board of registry, and to order and direct that the name of the petitioner should be entered as a qualified voter on the registry of voters of the election district already named. In that sworn petition he alleged that he had, on June 7, 1902, with his wife and child, removed from the city of Washington, District of Columbia, into Montgomery county, in the state of Maryland, "having then had, and ever since and now having, the intention of making the state of Maryland the

permanent domicile of himself and his family, and of becoming a citizen of said state; and ever since said June 7, 1902, petitioner has resided in the subdivision of Otterbourne, near Chevy Chase, in said Montgomery county, and in the seventh election district of said county."

The petitioner further showed in his petition that he had made application to the proper board of registry in the election district mentioned, and the board had refused to enter his name as a qualified voter on the ground already stated, of noncompliance with the Maryland statute.

The petitioner admitted "that he did not, within a year prior to said application for registration as a qualified voter, or at any time during the year 1902, in any manner make or register, in the office of or before the clerk of Montgomery county, Maryland, or in a record book kept by said clerk, a declaration of intention to become a citizen and resident of Maryland, such as is required by the aforesaid law to be made by persons who remove into the state of Maryland after March 29, 1902, as a condition precedent to subsequent registration *of such [624] persons as qualified voters. Petitioner, however, claims and asserts that said § 25*b* of article 33 of the Code of Public General Laws of Maryland affords no justification for said refusal to register your petitioner as a qualified voter, because said alleged law contravenes and is repugnant to the Constitution of the United States and the Constitution of Maryland, and is, therefore, null and void."

The petitioner then asserts and sets forth in his petition several grounds which, as he therein alleges, render the state law a violation of the Constitution of the state of Maryland, and he also specially sets up and claims that the law is a violation of the Constitution of the United States in the

†Sec. 25*b*. All persons who, after the passage of this act, shall remove into any county of this state or into the city of Baltimore from any other state, district, or territory, shall indicate their intent to become citizens and residents of this state by registering their names in a suitable record book, to be procured and kept for the purpose by the clerk of the circuit court for the several counties, and by the clerk of the superior court of Baltimore city; such record to contain their names, residence, age, and occupation; and the intent of such persons to become citizens and residents of this state shall date from the day on which such registry shall be so entered in such record book by the clerk of the circuit court for the county, or of the superior court of Baltimore city, as the case may be, into which county or city such person shall so remove from any other state, district, or territory. And no person coming into this state from any other state, district, or territory shall be entitled to registration as a legal voter of this state un-

til one year after his intent to become such legal voter shall be thus evidenced by such entry in such record book, and such entry or a duly certified copy thereof shall be the only competent and admissible evidence of such intent. And the clerk of the superior court of Baltimore city and of the several courts of the several counties shall immediately, upon the passage of this act, procure a suitable record book for the recording therein of such entries, arranged alphabetically under the names of such persons. For every person so registered under the provisions of this section they shall be entitled to demand and receive the sum of 25 cents, to be paid to said clerks by the mayor and city council of Baltimore and the county commissioners respectively. A copy of such record, duly certified by said clerk, shall be evidence of the right of such person to registration as legal voters according to law, and each person so registered shall be entitled to such certified copy upon demand, without charge.

particulars named by him, and which are as follows:

"Said law is repugnant to that portion of § 1 of the 14th Amendment of the Constitution of the United States, which declares that, 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,' because by said law it is in effect ordained that male citizens of the United States of the age of twenty-one years and upwards, removing into the state of Maryland after March 29, 1902, with the intention of making said state their permanent domicil, shall not be treated as citizens or residents of Maryland, or given the rights and privileges of citizens of Maryland, until they have been naturalized in the mode prescribed by said law.

"Said law is also repugnant to that portion of § 1 of said 14th Amendment to the Constitution of the United States which prohibits a state from denying any person within its jurisdiction the equal protection of the laws, because said law operates an unjust and unreasonable discrimination against citizens of the United States coming into the state of Maryland to permanently reside therein after March 29, 1902, who may desire to become qualified voters therein.

[625] "Said law is also repugnant to the general spirit of the Constitution of the United States and the fundamental rights *of citizens of the United States, which deny to a state the power to attach unreasonable or burdensome conditions to the free movement of citizens of the United States out of, into, and settlement within, the confines of any state, district, or territory within the United States."

To this petition there was a general demurrer, which was sustained by the court, which thereupon entered judgment dismissing the petition, with costs to the defendants.

Mr. William H. Pope in propria persona argued the cause and filed a brief for plaintiff in error:

The deprivation of a political right or privilege dependent upon a state Constitution, if such deprivation be grounded upon an abridgment of a right or privilege conferred by the Constitution of the United States, presents a Federal question entitling this court to review the judgment of a state court.

Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

State citizenship is a right, privilege, or immunity of a citizen of the United States.
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Slaughter-House Cases, 16 Wall. 80, 21 L. ed. 409.

By the express terms of the 14th Amendment a state may not abridge the same.

The first sentence of the 14th Amendment is, in effect, a national naturalization law, and the acquisition of United States and state citizenship is solely regulated by it. The common law and general law of evidence in force at the time of the adoption of the amendment determine what is residence, and how it may be acquired.

United States v. Wong Kim Ark, 169 U. S. 654, 42 L. ed. 892, 18 Sup. Ct. Rep. 456; *United States v. Palmer*, 3 Wheat. 630, 4 L. ed. 477; *United States v. King*, 34 Fed. 306.

Section 1, art. 1, of the Constitution of Maryland confers the voting franchise upon adult male citizens of the United States who have resided in the state one year. The general assembly of Maryland cannot add to these qualifications.

Southerland v. Norris, 74 Md. 326, 28 Am. St. Rep. 255, 22 Atl. 137.

The term "resident," as employed in the clause of the state Constitution referred to, is synonymous with "citizen."

Md. Bill of Rights, art. 7; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449.

It is a privilege of a citizen of the United States, of his own volition, instantly to transfer his citizenship from one state to another.

Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Slaughter-House Cases*, 16 Wall. 80, 21 L. ed. 409.

Unlike citizenship of the United States (in the case of a foreign born person), no "declaration of intention" is required.

The Federal privilege of state citizenship, acquired by plaintiff in error on his removal into Maryland, was clearly abridged by the statute here assailed, which operates only against persons, after their removal into the state of Maryland, when, by force of the Constitution of the United States, many such persons immediately on removal became residents of the state of Maryland. The statute dates the residence and citizenship from the time of the making of the declaration of intention required by the statute, thus in effect annulling the residence and citizenship acquired by force of the Constitution of the United States, and compelling the acceptance of citizenship under the state law. Further, the requirement of attendance at the county seat to make the declaration in question—no matter how removed from the residence of the would-be voter and how great may be the pecuniary injury sustained by loss of time and money outlay for railroad fares, etc.—is an oppres-

sive and onerous burden, not imposed upon other citizens of the state. It deters and hinders citizens from establishing and exercising such right.

Federalist No. 61, by Alexander Hamilton, p. 281.

The statute naturally abridges the Federal right and privilege, and is therefore unconstitutional.

Crandall v. Nevada, 6 Wall. 36, 18 L. ed. 745; *Henderson v. Wickham*, 92 U. S. 268, 23 L. ed. 547; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 455, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 431.

The declaration of intention required by the Maryland law is a condition and qualification for the acquisition of the right to vote, and is not a rule of proof.

U. S. Rev. Stat. § 2165 (U. S. Comp. Stat. 1901, p. 1329); *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 455, 42 L. ed. 1100, 1106, 18 Sup. Ct. Rep. 674; *Sinnot v. Davenport*, 22 How. 227, 241, 16 L. ed. 243, 246.

It is immaterial to the right of the plaintiff in error to claim the benefit of the Federal privilege that the statute was enacted before his removal into the state.

Southern P. Co. v. Denton, 146 U. S. 207, 36 L. ed. 945, 13 Sup. Ct. Rep. 44.

On the transfer of residence from one state to another a citizen of the United States is vested with the same rights as other citizens of that state.

Slaughter-House Cases, 16 Wall. 80, 21 L. ed. 409.

This necessarily includes the right not to be arbitrarily discriminated against in the acquisition and enjoyment of political rights, because of his removal from another state. The statute may, therefore, properly be held also to be repugnant to § 2, art. 4, of the Constitution of the United States.

Blake v. McClung, 172 U. S. 249, 43 L. ed. 436, 19 Sup. Ct. Rep. 165.

Mr. John Prentiss Poe argued the cause, and, with Mr. Bowie F. Waters, filed a brief for defendants in error:

Residence in its legal sense is made up of two distinct elements: first, the physical, tangible fact of removal into the state; and second, the *quo animo* or intent with which such removal is made.

Mitchell v. United States, 21 Wall. 350, 22 L. ed. 584.

The legislature may change and modify pre-existing rules of evidence relating to the qualifications of voters, care being taken that the change does not disturb or impair vested rights, nor alter, add to, or abrogate the constitutional qualifications.

Cooley, Const. L. 7th ed. 524, 1903; 11 Am. & Eng. Enc. Law, 2d ed. title, *Evi-*
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dence, p. 550; 6 Am. & Eng. Enc. Law, 2d ed. title, *Constitutional Law*, p. 950.

Citizenship and suffrage are by no means inseparable; the latter is not one of the universal, fundamental, inalienable rights with which men are endowed by their Creator, but is altogether conventional. Suffrage is not a right of property or absolute personal right.

Anderson v. Baker, 23 Md. 531; Cooley, Const. L. 276, 277; *Gougar v. Timberlake*, 148 Ind. 38, 37 L. R. A. 644, 62 Am. St. Rep. 487, 46 N. E. 339; Black, Const. Law, 466; Story, Const. § 581.

Before the 14th Amendment the whole subject of the elective franchise was within the exclusive control of the several states, and the right or privilege of voting was (as it still is) a right or privilege arising under the Constitution of each state, and not under the Constitution of the United States.

Anderson v. Baker, 23 Md. 623; Cooley, Const. L. 277; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916; *Stone v. Smith*, 159 Mass. 413, 34 N. E. 521; *Gougar v. Timberlake*, 148 Ind. 38, 37 L. R. A. 644, 62 Am. St. Rep. 487, 46 N. E. 339; 16 Albany L. J. 272; *United States v. Anthony*, 11 Blatchf. 202, Fed. Cas. No. 14,459; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136.

Since the adoption of the 15th Amendment the whole control over suffrage and the power to regulate its exercise is still left with and retained by the several states, with the single restriction that they must not deny or abridge it on account of race, color, or previous condition of servitude.

United States v. Harris, 106 U. S. 636, 644, 27 L. ed. 292, 295, 1 Sup. Ct. Rep. 601; *James v. Bowman*, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; *Minor v. Happersett*, 21 Wall. 178, 22 L. ed. 631; *United States v. Reese*, 92 U. S. 214, 217, 218, 23 L. ed. 563-565; *United States v. Cruikshank*, 92 U. S. 542, 555, 556, 23 L. ed. 588, 592.

The states may prescribe any qualification of age, sex, residence, property or education which they shall see fit to prescribe, provided only that their Constitution and laws regulating the subject shall apply equally, uniformly, and impartially to white and colored, native and naturalized alike.

Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Gibson v. Mississippi*, 162 U. S. 582, 40 L. ed. 1079, 16 Sup. Ct. Rep. 904; *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639; *James v. Bowman*, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678.

The right which the plaintiff claims that the act denies or abridges is not, as he mistakenly calls it, a "fundamental and inalienable right." It is merely the right to

vote, the regulation of which right belongs exclusively to the state; nor is it even a civil right or privilege, but altogether a political right, not necessarily resulting from citizenship, and over the acquisition and enjoyment of which the judicial power of the United States has no jurisdiction or control whatever, except in cases falling within and governed by the 15th Amendment.

Scott v. Sandford, 19 How. 393, 15 L. ed. 691; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 442; *Slaughter-House Cases*, 16 Wall. 79, 21 L. ed. 409; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Amy v. Smith*, 1 Litt. (Ky.) 326; *Lanz v. Randall*, 4 Dill. 425, Fed. Cas. No. 8,080; *Short v. State*, 80 Md. 401, 29 L. R. A. 404, 31 Atl. 322; *Anderson v. Baker*, 23 Md. 531.

The protection designed by the clause of the 14th Amendment declaring that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States has no application to a citizen of the state whose laws are complained of.

Bradwell v. Illinois, 16 Wall. 130, 21 L. ed. 442; *Re Taylor*, 48 Md. 28, 30 Am. Rep. 451; *Re Maddox*, 93 Md. 728, 55 L. R. A. 298, 50 Atl. 487.

As to the privileges and immunities belonging to the citizens of a state, these must rest for their security and protection where they have heretofore rested,—that is, with the state in which the citizen resides.

Slaughter-House Cases, 16 Wall. 74, 75, 21 L. ed. 408; *Presser v. Illinois*, 116 U. S. 266, 29 L. ed. 619, 6 Sup. Ct. Rep. 580; *Short v. State*, 80 Md. 401, 29 L. R. A. 404, 31 Atl. 322.

Equality of protection extends only to civil rights as distinguished from those that are political, or arise from the form of government and its mode of administration.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676.

Equal protection of the laws is a pledge of the protection of equal laws.

Yiek Wo v. Hopkins, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

This clause contemplates persons and classes of persons. It is not violated by any diversity in the jurisdiction in the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.

Missouri v. Lewis, 101 U. S. 30, 31, sub nom. *Bowman v. Lewis*, 25 L. ed. 992.

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A statute applicable to all lands of the same kind is not in conflict with the clause.

Wurts v. Hoagland, 114 U. S. 615, 29 L. ed. 232, 5 Sup. Ct. Rep. 1086.

Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

Munn v. Illinois, 94 U. S. 134, 24 L. ed. 87; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 163, 24 L. ed. 95; *Barbier v. Connolly*, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; *Soon-Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Humes*, 115 U. S. 523, 29 L. ed. 467, 6 Sup. Ct. Rep. 114; *Kentucky Railroad Tax Cases*, 115 U. S. 337, 29 L. ed. 419, 6 Sup. Ct. Rep. 57; *Presser v. Illinois*, 116 U. S. 266, 29 L. ed. 619, 6 Sup. Ct. Rep. 580; *Hayes v. Missouri*, 120 U. S. 71, 72, 30 L. ed. 580, 7 Sup. Ct. Rep. 356; *Dow v. Beidelman*, 125 U. S. 691, 31 L. ed. 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *Powell v. Pennsylvania*, 127 U. S. 687, 32 L. ed. 257, 8 Sup. Ct. Rep. 992, 1257; *Walston v. Nevin*, 128 U. S. 582, 583, 32 L. ed. 546, 9 Sup. Ct. Rep. 192; *Minnesota & St. L. R. Co. v. Beekwith*, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; *Home Ins. Co. v. New York*, 134 U. S. 606, 607, 33 L. ed. 1031, 1032, 10 Sup. Ct. Rep. 593; *Marchant v. Pennsylvania R. Co.* 153 U. S. 389, 390, 38 L. ed. 756, 14 Sup. Ct. Rep. 894; *St. Louis & S. F. R. Co. v. Matheus*, 165 U. S. 24, 26, 41 L. ed. 620, 17 Sup. Ct. Rep. 243; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; *Fidelity Mut. Life Assn. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Short v. State*, 80 Md. 402, 29 L. R. A. 404, 31 Atl. 322; *Brannon's* 14th Amend. chap. 16; *Guthrie's* 14th Amend. 106, 142.

Did Massachusetts violate the 14th Amendment when she denied suffrage to her illiterate thousands? When Connecticut prescribed ability to read as the necessary test of the right of her citizens to vote, did she

deny to them the equal protection of the laws as guaranteed by the Amendment? Clearly not.

Cooley, Const. L. 291, 292.

Bearing in mind that the plaintiff is a white man, and that he concedes that the Maryland law is not at all repugnant to the 15th Amendment, it necessarily follows that, as a law relating solely to state suffrage, it is not repugnant to, or touched by, the 14th Amendment; and that, accordingly, this court has no power to declare it null and void.

Slaughter-House Cases, 16 Wall. 81, 82, 21 L. ed. 410.

Mr. Justice **Peckham**, after making the above statement of facts, delivered the opinion of the court:

This is not a case of a statute of the state having been passed subsequently to the time when the individual had removed from another state or from a territory or from the District of Columbia into the state of Maryland. There is, therefore, no alteration of any possible rights which the plaintiff in error might have already acquired and which he might claim were taken from him by the passage of such statute. On the contrary, this statute took effect on March 29, 1902, more than two months prior to the removal of the plaintiff in error from Washington in the District of Columbia to Montgomery county, within the state of Maryland. The objections of a Federal nature which are made by the plaintiff in error to the validity of the statute are set out in his [632] petition, and are *also contained in the above statement of facts, and are substantially reproduced in his assignment of errors.

We are of opinion that the statute does not violate any Federal right of the plaintiff in error which he seeks to assert in this proceeding. The statute, so far as it concerns him and the right which he urges, is one making regulations and conditions for the registry of persons for the purpose of voting. It was only for the purpose of thereafter voting that the plaintiff in error sought to be registered, and it was the denial of that right only which he can now review. His application for registry as a voter was denied by the board of registry solely because of his failure to comply with the statute. Whatever other right he may have as a citizen of Maryland by reason of his removal there with an intent to become such citizen is not now in question. So far as appears no other right, if any he may have, has been infringed by the statute. The simple matter to be herein determined is whether, with reference to the exercise of the privilege of voting in Maryland, the legislature of that state had the legal right to provide

that a person coming into the state to reside should make the declaration of intent a year before he should have the right to be registered as a voter of the state.

The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627, such persons were allowed to vote in several of the *states upon having declared their inten- [633] tions to become citizens of the United States. Some states permit women to vote; others refuse them that privilege. A state, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the Federal Constitution, already stated; although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Fed. Const. art. 1, § 2; *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17. But the elector must be one entitled to vote under the state statute. *Id.*, *Id.* See also *Swafford v. Templeton*, 185 U. S. 487, 491, 46 L. ed. 1005, 1007, 22 Sup. Ct. Rep. 783. In this case no question arises as to the right to vote for electors of President and Vice President, and no decision is made thereon. The question whether the conditions prescribed by the state might be regarded by others as reasonable or unreasonable is not a Federal one. We do not wish to be understood, however, as intimating that the condition in this statute is unreasonable or in any way improper.

We are unable to see any violation of the Federal Constitution in the provision of the state statute for the declaration of the intent of a person coming into the state before he can claim the right to be registered as a voter. The statute, so far as it pro-

vides conditions precedent to the exercise of the elective franchise within the state, by persons coming therein to reside (and that is as far as it is necessary to consider it in this case), is neither an unlawful discrimination against any one in the situation of the plaintiff in error nor does it deny to him the equal protection of the laws, nor is it repugnant to any fundamental or inalienable rights of citizens of the United States, nor a violation of any implied guaranties of the Federal Constitution. The right of a state to legislate upon the subject of the elective franchise as to it may seem good, [634] subject *to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them.

It is unnecessary in this case to assert that under no conceivable state of facts could a state statute in regard to voting be regarded as an infringement upon or a discrimination against, the individual rights of a citizen of the United States removing into the state, and excluded from voting therein by state legislation. The question might arise if an exclusion from the privilege of voting were founded upon the particular state from which the person came, excluding from that privilege, for instance, a citizen of the United States coming from Georgia and allowing it to a citizen of the United States coming from New York or any other state. In such case an argument might be urged that, under the 14th Amendment of the Federal Constitution, the citizen from Georgia was, by the state statute, deprived of the equal protection of the laws. Other extreme cases might be suggested. We neither assert nor deny that, in the case supposed, the claim would be well founded that a Federal right of a citizen of the United States was violated by such legislation, for the question does not arise herein. We do, however, hold that there is nothing in the statute in question which violates the Federal rights of the plaintiff in error by virtue of the provision for making a declaration of his intention to become a citizen before he can have the right to be registered as a voter and to vote in the state.

The plaintiff in error has no ground for complaint in regard to the decision of the courts below, and the judgment of the Court of Appeals of Maryland is therefore affirmed.

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*NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW YORK,
Plff. in Err.,

v.

FRANK V. BRAHAN.

(See S. C. Reporter's ed. 635-651.)

Error to state court—Federal question—impairment of contract obligation—construction of statute.

1. A Federal question is presented in time and in the proper form by requested instructions in a state trial court, asserting rights under the Federal Constitution, which, if they actually exist, entitle the party asserting them to an instruction directing a verdict in its favor.
2. The contract clause of the Federal Constitution cannot be invoked against a change of decision by a state court.
3. The interpretation of a state statute against usury by a state court as applicable to a loan made by a foreign building and loan association to a resident of the state through a local agent, and as expressing the public policy of the state, which the parties could not, by their contract, contravene, is binding on the Supreme Court of the United States on a writ of error to review a judgment of the state court which is claimed to have denied full faith and credit to the public acts and records of the state where the association is domiciled.

[No. 158.]

Argued February 25, 26, 1904. Decided April 4, 1904.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which affirmed a judgment of the Circuit Court of Lauderdale County in that state in favor of plaintiff in an action to recover usurious interest alleged to have been paid to a foreign building and loan association. *Affirmed.*

See same case below, 80 Miss. 407, 57 L. R. A. 793, 31 So. 840.

Statement by Mr. Justice **McKenna**:

This action was brought in the circuit court of Lauderdale county, Mississippi,

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hambin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; *Re Buchanan*, 39 L. ed. U. S. 884.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

On change of decision of state court as impairing obligation of contract—see notes to *Los Angeles v. Los Angeles City Water Co.* 44 L. ed. U. S. 886; *Allen v. Allen*, 16 L. R. A. 646.

to recover interest, claimed to have been usurious, paid by defendant in error to plaintiff in error upon a loan made by the latter to him. The action was brought under § 2348 of the Code of the state of 1892, which provides as follows:

"The legal rate of interest on all notes, accounts, and contracts shall be 6 per centum per annum; but contracts may be made, in writing, for the payment of a rate of interest as great as 10 per centum per annum. And if a greater rate of interest than 10 per centum shall be stipulated for, or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory; but this section shall not apply to a building and loan association domiciled in this state, dealing only with its members."

[636] *The case was tried to a jury, which, under the instructions of the court, returned a verdict for the defendant in error, upon which judgment was duly entered. The judgment was affirmed by the supreme court of the state. 80 Miss, 407, 57 L. R. A. 793, 31 So. 840. This writ of error was then sued out.

The plaintiff in error is a building and loan association, incorporated under chapter 123 of the Laws of the state of New York, passed April 10, 1851, entitled "An Act for the Incorporation of Building, Mutual Loan and Accumulating Fund Associations," and the acts amendatory thereof, to wit, —chap. 564, passed June 9, 1875; chap. 96, passed April 1, 1878.

The purpose of the association is to make loans only to its members, and for the further purpose of accumulating a fund to be returned to its members who do not receive advances on their shares.

The management of the association is vested in a board of directors, who have power to make by-laws. There is a president and other officers and a standing committee. The latter passes on all applications for loans. Membership is obtained by holding five or more shares of the association and subscribing for membership. Shares are divided into three classes,—instalment shares, paid-up shares, and interest-bearing paid-up shares. We are only directly concerned with the first class. They are described in the articles of the association as follows:

"Sec. 2. Instalment shares.—Instalment shares shall be issued in monthly series, and shall be dated the first business day of the month, and shall be due and become payable whenever the amount in the loan fund to the credit of such shares, consisting of monthly dues and profits apportioned to such shares, shall equal the face value of the shares."

It is provided, article 10, that dues on each instalment share shall be 60 cents per month until the maturity of the shares. There is also a provision for fines and forfeitures. The loan fund and loans are provided for as follows:

"Sec. 1. The loan fund of the association shall consist of *50 cents of the monthly [637] dues paid in on each share, interest, premiums, fines, and forfeitures, and the profits derived therefrom, and shall be loaned to members of the association by the board of directors upon approved applications for loans in the order in which they have been filed.

"Sec. 2. Interest at the rate of not more than 6 per cent per annum will be charged upon all loans, which interest must be paid monthly, with the monthly dues, on or before the last business day of each month, until the maturity of the pledged shares, and a premium of not more than 50 cents per month will be charged on each \$100 borrowed, which premium must be paid on or before the last business day of the month, for a period of eight years, or until the maturity of the pledged shares, should they mature before the expiration of the eight years. The premium for the first six months to be paid in advance.

"Sec. 3. A member may pay such loan at any time after one year, on giving thirty days' notice in writing to the secretary, upon the payment of the amount borrowed, with interest and premium thereon, and a redemption fee of 50 cents per share. No redemption fee shall be charged on matured shares."

It is also provided that loans on real estate shall be secured by a first mortgage on the property offered for security, by promissory notes, bonds, mortgages, and deeds of trust of the applicant, or such other instruments as may be required, "and for every loan of \$100 he shall, in addition thereto, transfer to the association at least one share thereof as collateral security."

In 1892 the plaintiff in error had an agent in the city of Meridian, Miss., who was authorized to receive applications for stock and loans, and to receive payment of dues, interest, and premiums, and to transmit the applications and payments to plaintiff in error at its office in New York. The domicile of the plaintiff in error was and is New York. The defendant in error in 1892 was a citizen of the city of Meridian, and made application, through the agent of plaintiff in error *at Meridian, for a loan of [638] \$2,500, and to subscribe for twenty-five shares of stock, as required by articles of plaintiff in error. The loan was granted by the executive committee, under the terms and according to the conditions of the arti-

cles of association. Defendant in error made the following payments "as dues, interest, premium, and fines on said stock and loan, to wit: Advance premium sent the association at New York, \$66.25; paid defendant's agent at Meridian, as shown by the receipt book hereto attached, \$668.75, and \$2,500 paid the association in New York by draft sent them on November 7, 1893, in full payment of said loan of May 21, 1892."

Defendant in error repaid this loan, but retained his twenty-five shares of stock, and paid his dues thereon for the months of December, 1893, to August, 1894, exclusive, amounting to the sum of \$135.

In October, 1894, he withdrew five shares and received from plaintiff in error \$73.90, the withdrawal value thereof.

In June, 1894, he made an application for another loan on his twenty shares, which was forwarded to plaintiff in error in New York by C. F. Woods, its agent. The loan was granted by the executive committee, and in consideration of the loan he executed to plaintiff in error a bond, assignment of shares, and mortgage of real estate.

The loan was repaid by crediting thereon the sum of \$649.70, the withdrawal value of his shares, payment by draft on New York of the sum of \$1,473.96; interest, dues, fines, and premiums, \$868. Part of the latter was paid through the agent and part was sent directly to plaintiff in error.

The bond and mortgage given by defendant in error to secure the loan recited that they were given in consideration of such loan, and expressed, as one of their conditions, that defendant in error would repay the sum loaned to plaintiff in error "at its office in New York city, with interest for the same at the rate of 6 per cent per annum until paid, together with a monthly premium of ten dollars and no cents for eight years, or until the earlier maturity [639] of said shares, should they mature *before the expiration of the eight years, and in addition thereto the sum of twelve dollars and no cents for the monthly dues on the said twenty shares, which interest, premium, and dues are payable monthly on or before the last business day of every month, at the office of the association in New York city, until the maturity of the said shares, except the said monthly premium, which is to be paid for eight years only, and also all fines which may be imposed by the said association for default in payment of said interest, premium, or dues."

To the declaration of defendant in error, plaintiff in error filed the general issue, with notice thereunder that plaintiff in error would give in evidence and prove the

facts substantially as above stated. Subsequently, April, 1901, and August, 1901, plaintiff in error made motions for leave to amend its notice under the general issue. The amendments claimed rights under the 14th Amendment of the Constitution of the United States, also under § 10 of article 1 of that instrument, and under § 1, article 4.

Defendant in error moved to strike out the amendments on the ground that they were filed without leave of the court. The motion was granted.

Testimony was introduced and at its conclusion defendant in error asked the court to direct the jury to find for him the excess paid over 6 per cent on both loans. The instruction was refused. The court, on the contrary, instructed the jury, at the request of plaintiff in error, that the first loan was not usurious. But the court charged the jury that the second loan was usurious, and directed them to find for defendant in error the sum paid by him in excess of 6 per cent on the loan (\$2,000), with interest at 6 per cent per annum from July, 1899, to date of trial.

Plaintiff in error asked the court to instruct the jury substantially as follows:

1. Defendant in error, as a borrowing shareholder, was entitled to and did share in the profits of the association, and the contract was, therefore, valid, and not usurious.

*2. The contracts were made and consummated in New York, and performable there, and are to be construed by the laws of New York, and under those laws the contract is valid, and not usurious. [640]

3. Under the 14th Amendment of the Constitution of the United States, defendant in error had a right to become a member and shareholder of the association, to be a borrower from it upon the terms and conditions of its articles, and make contracts with it performable in the state of New York, and reciprocally, plaintiff in error had the right to make the loan, and entitled under said amendments to have the "contracts considered and their validity determined by the laws of the state of New York," where they were performable; and under § 1, article 4, of the Constitution of the United States, was entitled to have the court give full faith and credit in determining the validity of the contracts with defendant in error, to the public records and judicial proceedings of the state of New York, especially the laws under which the plaintiff in error was incorporated, and the acts amending the same, and the decision in the case of *Concordia Sav. & Aid Asso. v. Read*, 93 N. Y. 474, and other decisions, which hold that the contracts are valid, and not usurious, under the laws of New York.

4. The contract is not usurious under the laws of Mississippi.

5. Section 2348 of the Annotated Code of Mississippi, as sought to be applied, impairs the obligation of the said contracts, in violation of § 10, article 1, of the Constitution of the United States.

6. The decision of the supreme court of Mississippi in *Sokoloski v. New South Bldg. & L. Asso.* 77 Miss. 155, 26 So. 361, and the decisions following it having been rendered long after the making of said contracts, in so far as they define the public policy of Mississippi in regard to foreign building and loan associations, are tantamount to judicial legislation, and in violation of § 10, article 1, of the Constitution of the United States.

[641] *7. The evidence shows that both loans have been voluntarily paid and settled by defendant in error with full knowledge of all the facts.

8. As to the loan of 1894, the evidence shows that defendant in error, being a shareholder in the association, had a right to demand and receive advances or loans upon his shares upon the terms and conditions set out in the articles of the association, and the association was obliged to grant the same, and the said contract was made in pursuance of said right and application, and that the Code of Mississippi does not govern said contract, and is, as to said contract, "both *ex post facto*, and impairing the obligation of said contract, and in violation of § 10, article 1, of the Constitution of the United States; and under § 1, article 4, of said Constitution and the laws of New York and the 14th Amendment to said Constitution the said contract of August 30, 1894, is valid and enforceable, and not usurious."

The instruction was refused, and plaintiff in error excepted. The jury found for defendant in error for the sum of \$677.96, being amount paid in excess of the loan, and for the sum of \$93.79 interest. Judgment was entered upon the verdict. It was affirmed by the supreme court of the state, as we have said.

Messrs. Albert S. Bozeman and J. S. Sexton argued the cause, and, with **Messrs. M. Green and G. M. Thompson**, filed a brief for plaintiff in error:

Constitutional rights cannot be stricken down by arbitrarily striking out pleadings seeking to present such questions.

Kipley v. Illinois, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550.

It is not at all necessary that the Federal questions presented in this case should

have been made to appear on the record in direct and unequivocal terms, in *ipsissimis verbis*, but it is altogether sufficient that they should have appeared as they did by clear and necessary intendment.

Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Armstrong v. Athens County*, 16 Pet. 281, 10 L. ed. 965; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Eastern Bldg. & L. Asso. v. Wellington*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531.

It is sufficient if the Federal question be first raised in the assignment of errors in the state appellate court.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Foster*, Fed. Pr. 2d ed. § 477; *Curtis*, Jurisdiction of U. S. Courts, 37-39; *Adams County v. Burlington & M. R. Co.* 112 U. S. 123, 129, 28 L. ed. 678, 680, 5 Sup. Ct. Rep. 77; *Fire Asso. v. New York*, 119 U. S. 110, 116, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner*, 139 U. S. 293, 295, 35 L. ed. 193, 194, 11 Sup. Ct. Rep. 528.

It is for this court to determine whether there is a Federal question in the record, and whether its decision was inevitably involved in the court below.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

There is no independent ground not involving a Federal question broad enough to maintain the judgment of the supreme court of Mississippi, found in the record.

Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Chapman v. Goodnow*, 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

The measure of the rights and obligation of the parties is the same when this contract comes to be construed by the courts of the state of Mississippi as if the courts of New York were called upon to construe the same contract.

3 Thomp. Corp. § 3046.

The rule announced nearly seven years after *Brahan* became a member of the appellant association cannot be applied to the contracts in question without impairing the obligation of the same.

Pine Grove Twp. v. Talcott, 19 Wall. 675,

22 L. ed. 233; 15 Am. & Eng. Enc. Law, 2d ed. p. 1046.

The supreme court of Mississippi by its decision deprived the appellant association of its liberty and property without due process of law, and also denied it the equal protection of the laws, contrary to the provisions of the 14th Amendment.

Brannon, 14th Amendment, pp. 111, 118, 315, 319, 320; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The law of the place of performance of a contract is purely a commercial question, and the Federal courts have disregarded the state courts on that question in the following cases:

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 30 L. R. A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201; *Andruss v. People's Bldg. Loan & Sav. Asso.* 36 C. C. A. 336, 94 Fed. 575; *Brower v. Life Ins. Co.* 86 Fed. 748; *Dakota Bldg. & L. Asso. v. Logan*, 14 C. C. A. 133, 30 U. S. App. 163, 66 Fed. 827.

Mr. Edward Mayes argued the cause and filed a brief for defendant in error:

This court cannot consider the Federal questions sought to be raised by this appeal because they were not raised in time and in the proper way.

Kipley v. Illinois, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

The contract clause of the Federal Constitution applies to statutes only, and not to judgments.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

This court will not undertake to review the decision of a state court on a bare question of fact, even though, had that question been determined differently, and had the judgment of the state court then gone against the plaintiff in error, he would have been entitled to his writ here.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct.

Rep. 581; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; *Gardner v. Bonestell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; *Western U. Teleg. Co. v. McCull Pub. Co.* 181 U. S. 92, 45 L. ed. 965, 21 Sup. Ct. Rep. 561; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

Nor will this court review the decision of a state court upon the ground that the finding was against the evidence or the weight of the evidence.

Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576.

There was still another controlling question of fact which was put in issue in the court below, and determined adversely to plaintiff in error, and that was an issue as to what was the law of the state of New York. In the trial of a case in Mississippi a question of that sort remains, and is a question of fact, and, however it may be determined in the state court, whether correctly or wrongly, this court will not review it for that reason.

Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566.

The instant case falls within the principle of *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

See also *Noble v. Mitchell*, 164 U. S. 370, 41 L. ed. 473, 17 Sup. Ct. Rep. 110; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 46, 44 L. ed. 664, 20 Sup. Ct. Rep. 518; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Especially will this court not undertake to review a decision of a state supreme court which holds a contract void as contrary to public policy. It is immaterial that such public policy is declared in a statute if the statute antedates the contract.

Parker v. Moore, 53 C. C. A. 369, 115 Fed. 799; *Tarver v. Keach*, 15 Wall. 67, 21 L. ed. 82; *Rockhold v. Rockhold*, 92 U. S. 130, 23 L. ed. 507; *New York L. Ins. Co. v. Hendren*, 92 U. S. 287, 23 L. ed. 709; *Bank of the Old Dominion v. McVeigh*, 98 U. S. 333, 25 L. ed. 110; *Dugger v. Boccock*, 104 U. S. 601, 26 L. ed. 848; *San Francis v. Scott*, 111 U. S. 769, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 624, 30 L. ed. 523, 7 Sup. Ct. Rep. 398; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 34, 31 L. ed. 613, 8 Sup. Ct. Rep. 741.

Mr. R. C. Beckett also filed a brief for defendant in error:

This court is bound by the interpretation by the state supreme court of its laws.

New York L. Ins. Co. v. Cravens, 178 U. S. 395, 44 L. ed. 1122, 20 Sup. Ct. Rep. 962.

Questions of fact, or of general or local law, are not reviewable on writs of error from state courts.

Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; *Avery v. Popper*, 179 U. S. 305, 315, 45 L. ed. 203, 207, 21 Sup. Ct. Rep. 94; *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 120, 121, 46 L. ed. 833, 22 Sup. Ct. Rep. 566.

Full faith and credit are not denied where a statute of another state is merely construed and its validity is not questioned.

Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Eastern Bldg. & L. Asso. v. Williamson*, 189 U. S. 125, 127, 47 L. ed. 736, 740, 23 Sup. Ct. Rep. 527.

A contract may be impaired only by subsequent laws, and not by erroneous decisions of the courts.

Weber v. Rogan, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Hanford v. Davies*, 163 U. S. 278, 41 L. ed. 159, 16 Sup. Ct. Rep. 1051; *McCullough v. Virginia*, 172 U. S. 116, 127, 43 L. ed. 387, 391, 19 Sup. Ct. Rep. 134.

There must be a bona fide Federal question involved; a mere allegation cannot create one where none in fact exists.

Sawyer v. Piper, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633; *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 311, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

It is objected that the Federal questions presented cannot be considered "because they were not raised in time and the proper way," and that the supreme court did nothing more than decline to pass on the questions because they had not been raised in the trial court, as required by the state practice.

The supreme court considered that plaintiff in error, by the motions to amend the notice, attempted to "inject" a Federal question into the record, and that the instruction asked by the plaintiff in error had the same purpose. The court said: "It was another ingenious but unsuccessful effort to inject the Federal question into the

record. If the court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have been an issue involving the Federal question, to which an instruction would have been appropriate."

Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion; but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States, based upon the case as presented. And if the rights asserted actually existed, plaintiff in error was entitled to an instruction directing a verdict in its favor. The claim was, therefore, made in time. *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Rothschild v. Knight*, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391; *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379. It was also sufficient in form.

*The Federal questions presented by the [647] record are reducible to two,—to wit: (1) That the decision of the supreme court of Mississippi was in effect an impairment of the contract between plaintiff in error and defendant in error. (2) That full faith and credit were not given to the public acts, records, and judicial proceedings of the state of New York.

1. This contention is untenable. We said in *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court. *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Central Land Co. v. Laidley*, 159 U. S. 103, 109, 40 L. ed. 91, 93, 16 Sup. Ct. Rep. 80."

In the case at bar there was no subsequent statute. There was a change in decision, it is contended, but against a change of decision merely § 10, article 1, cannot be invoked.

2. If the contract between plaintiff in error and defendant in error cannot be regard-

ed as controlled by the law of New York, there is no foundation for the contention that full faith and credit were not given to the public acts and records of New York.

A similar question was presented in the case of *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962. The plaintiff in error in that case was a New York corporation, having its principal place of business in the state of New York. It maintained agents and examiners in the state of Missouri. One of these agents solicited Cravens, at his residence in Missouri, to insure his life in the company. Cravens assented, and made a written application for the policy sued on. The application was made part of the policy and contained the following provisions:

[648] *"That inasmuch as only the officers of the home office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises, or information be reduced to writing and presented to the officers of said company, at the home office, in this application.

"That the contract contained in such policy and in this application shall be construed according to the laws of the state of New York, the place of said contract being agreed to be the home office of said company in the city of New York."

Four annual premiums were paid in Missouri. The fifth was not paid. Cravens died, and proof thereof was duly made. A controversy arose between the widow of Cravens and the company as to the amount due on the policy. Applying the law of New York, the company contended that there was due only the sum of \$2,670 of paid-up insurance, and tendered that amount. The widow contended, applying the law of Missouri, for \$10,000, less the amount of unpaid premiums, which left a balance of \$8,749.21, with interest at 6 per cent from the date of the death of Cravens, and suit was brought for that amount. She recovered judgment according to her claim, and the case was brought here.

Describing the contentions of the company, we said that they were reducible to one form,—to wit, that the statute of Missouri had been made by the supreme court of Missouri the measure of the rights and obligations of the parties against the agreement of the parties that the contract

should be considered as having been made in New York, and should be construed and interpreted according to the laws of that state. The supreme court of Missouri decided that the statute expressed a condition upon which the company, as a foreign corporation, *was permitted to do business in the state, and also expressed the public policy of the state which parties could not, by their contracts, contravene. We accepted that interpretation of the statute and affirmed the judgment.

In the case at bar the supreme court of Mississippi gave the same effect to the statute of that state as the supreme court of Missouri gave to the Missouri statute. The court applied and followed the doctrine of *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 955, 57 L. R. A. 800, 30 So. 51, expressed as follows:

"It must be remembered that the state has the power to prescribe the terms on which foreign corporations may do business. It is declared in § 849 of the Code of 1892, last clause, 'such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.' This is the plain mandate of our law, which must be rigidly enforced by the courts. And the Code otherwise provides that (§ 2348) domestic building and loan associations are excluded from the operation of the usury laws, but foreign building and loan associations are subject to them, and to enforce this public policy, thus declared by the statute, is not to give extraterritorial operation to our statutes. On the contrary, this corporation has come into the state, localized its business here through local boards scattered all over the state, and must submit such business thus localized to the operation of the laws of the state. To hold otherwise would operate the grossest injustice to our citizens, and would virtually abrogate our statutes against usury." And again, on p. 974: "Foreign corporations wishing to do business with our citizens, and localizing that business within our state through local boards, must comply with the laws of this state. They cannot, under such circumstances, enforce here stipulations in contracts allowed by the law of the state which created them, if these stipulations violate our laws or our public policy. Such laws of such foreign states can have, *ex proprio vigore*, no extraterritorial effect, and it is not *competent for a foreign corpora-[650] tion whose business has been localized in this state, or the borrower, or both, to abrogate, by attempted contract stipulations whose purpose it is to evade our laws

against usury, the laws of this state on that subject.

"This holding in no way interferes with the right of a foreign corporation whose business has not been localized here to make contracts with borrowers, to be governed by the laws of the state of their domicile, if there be no purpose therein to evade the usury laws of this state. Such liberty of contracting, exercised in good faith, is not herein interfered with. The authorities cited to that point by counsel for appellee are not pertinent to cases like the one before us. All the cases are admirably collected in a note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 171. In that note the learned editor points out, on page 202, the distinction to be observed, saying:

"The proper answer to this argument is that mere shams and evasions are not permitted to counteract and annul the law, and where it appears that the purpose of the parties in making the obligation payable in another state was to evade the law against usury of the state in which it was executed, it will be regarded as infected with usury."

These remarks bring the case at bar within the ruling of *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962. The decision of the supreme court is, that plaintiff in error had become "localized" in the state, had accepted the laws of the state as a condition of doing business there, and could not, nor could defendant in error, "abrogate, by attempted contract stipulations," those laws. See *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535.

In *Chattanooga Nat. Bldg. & L. Asso. v. Denson*, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630, we recognized the right of a state to impose conditions upon foreign corporations doing business in the state, to the extent of holding the contracts of the corporation void which were entered into in violation of the conditions.

There is nothing inconsistent with these [651] views in *Bedford v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597. In that case there was a consummated contract, and we held invalid a law enacted subsequently that made the enforcement of the contract depend upon the performance of onerous conditions. There was a question of usury in the case, but Tennessee, under the statute of which state usury was claimed, did not prohibit contracts which made the laws of another state applicable thereto. In that case, therefore,

the law of the contract stipulated by the parties could be applied.

Judgment affirmed.

Mr. Justice **White** took no part in the decision of this case.

UNITED STATES, *Appt.*,

v.

COMMONWEALTH TITLE INSURANCE & TRUST COMPANY, Trustee.

(See S. C. Reporter's ed. 651-656.)

Public lands—repayment of purchase price where entry is canceled—purchaser on foreclosure as assignee of entryman—presumption from findings.

1. A mortgagee who has foreclosed his mortgage and purchased the mortgaged property at sheriff's sale under a decree of the court is an "assign" within the meaning of the act of Congress of June 16, 1880 (21 Stat. at L. 287, chap. 244, U. S. Comp. Stat. 1901, p. 1415), § 2, providing for the repayment of the purchase price to a person making an entry of public land, or to his heirs or assigns, in case of the cancellation of such entry for conflict.
2. A surrender of the duplicate receipt required by the act of Congress of June 16, 1880 (21 Stat. at L. 287, chap. 244, U. S. Comp. Stat. 1901, p. 1415), § 2, as a condition of the repayment of the purchase price where an entry of public land has been canceled for conflict, will be presumed from a finding that the Secretary of the Interior ordered repayment "on the relinquishment by the claimants of all claim to the land so canceled," and a further finding that the relinquishment was made "as required by the rules and regulations of the Land Office."

[No. 172.]

Submitted March 3, 1904. Decided April 4, 1904.

A PPEAL from the Court of Claims to review a judgment for the repayment of the purchase price of an entry of public land which has been canceled for conflict. *Affirmed.*

See same case below, 37 Ct. Cl. 532.

The facts are stated in the opinion.

Assistant Attorney General Pradt and *Mr. George Hines Gorman* submitted the cause for appellant.

Mr. William R. Andrews submitted the cause for appellee.

Mr. Justice **McKenna** delivered the opinion of the court:

The question involved in this case is whether a mortgagee *who has foreclosed his [654] mortgage and purchased the property mortgaged at sheriff's sale under a decree of the

court is an assignee of the owner of the land within § 2 of an act of Congress approved June 16, 1880. 21 Stat. at L. 287, chap. 244, U. S. Comp. Stat. 1901, p. 1415.

The section reads as follows:

"Sec. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof or to his heirs or assigns."

It is provided by the rules of the General Land Office that application for repayment under this section shall be accompanied by a duly executed deed, where the title has become a matter of record, relinquishing to the United States all right and claim to the land under the entry or patent.

The case is this: In 1888 one Amanda Cormack made settlement upon 160 acres of land in the Helena land district of Montana, and paid \$200, being at the rate of \$1.25 per acre. Subsequently, May 10, 1890, she borrowed from the Northwest Guarantee Loan Company \$300, and gave her note therefor, due in three years, and secured the note by a mortgage on the land. On January 9, 1890, the said company assigned the note and mortgage to the Commonwealth Title Insurance Company, the appellee. The instruments were all duly recorded.

[655] *July 8, 1890, the General Land Office informed the local office that 120 acres of the land entered had been recommended and selected for reservoir purposes, and on August 16, 1894, the Commissioner of the General Land Office canceled all of the land entered except the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 28, as being in conflict with the Box Elder Reservation system. Subsequently appellee brought suit to foreclose said mortgage, and such proceedings were had therein that on August 16, 1897, the mortgaged property was duly sold to appellee for \$200, and a sheriff's deed duly executed and delivered to appellee.

Thereafter appellee applied to the Com-

missioner of the General Land Office for the repayment to him of the sum of \$150, being \$1.25 per acre paid by Amanda Cormack for the 120 acres canceled. The application was refused by the Commissioner. The Secretary of the Interior reversed the ruling and allowed the repayment upon the relinquishment by appellee of all claim to the land so canceled. The relinquishment was duly made and the claim was transmitted to the Treasury Department for final settlement. The auditor of that Department for the Interior Department passed the claim, but the decision was reversed, and the claim was finally disallowed by the Comptroller.

The court of claims rendered judgment for appellee for the amount claimed, to wit, \$150. 37 Ct. Cl. 533.

Section 2 of the act of 1880 was considered by this court in *Hoffeld v. United States*, 186 U. S. 273, 46 L. ed. 1160, 22 Sup. Ct. Rep. 927. We there distinguished between a voluntary assignment and one created by operation of law. The former "takes the property," it was observed, "with all the rights thereto possessed by his assignor, and, if he has paid a valuable consideration, may claim all the rights of a bona fide purchaser with respect thereto."

Is a mortgagee within the principle? A brief definition of a mortgage under modern law is not easy to make. At common law a mortgage was a conditional conveyance to secure the payment of money or the performance of some act, to be void upon such payment or performance. By more modern law and *under the statutes of many states a [656] mortgage is a mere lien upon land. Its dominant attribute is security, but nevertheless it must be regarded as "both a lien in equity and a conveyance at law." Pom. Eq. Jur. § 1191. The interest of a mortgagee in the land is, therefore, conveyed to him by the mortgagor, and even if, under the laws of Montana, a mortgage is primarily security for a debt, and creates a lien only, it is a lien which may become the title. The decree of the court conveying the title is, of course, the act of the law, but it is the act of the law consummating the act of the mortgagor. And the sale and deed relate to the date of the mortgage, conveying the title which was then possessed by the mortgagor. And for the purpose of this case we need go no farther in elaboration of the legal attributes of a mortgage. We regard the word "assigns," as used in the statute, as one who derives from the original entryman by the voluntary act of the latter. We regard also the right conferred by the statute as attaching to the land,—a kind of warranty upon the part of the United States to restore the consideration paid for the land if

the contingencies expressed in the statute occur.

It is insisted, however, that all of the conditions of the repayment have not been complied with; that there has not been a surrender of the duplicate receipt, as provided by the statute. *Hoffeld v. United States*, 186 U. S. 273, 46 L. ed. 1160, 22 Sup. Ct. Rep. 927. There is certainly no direct finding to that effect. There is a finding, however, that the Secretary of the Interior ordered repayment "on the relinquishment by the claimants of all claim to the land so canceled," and a further finding that the relinquishment was made "as required by the rules and regulations of the Land Office."

We must presume that the Secretary did his duty and exacted the performance of all the statute required, and infer, therefore, that he had received the duplicate receipt, and all that was necessary to fulfil the conditions of the statute and re-vest the title in the United States to the land canceled.

Judgment affirmed.

[657]*SAMUEL WRIGHT and Esdras B. Truby,
Appts.,
v.

MINNESOTA MUTUAL LIFE INSURANCE COMPANY *et al.*, Appellees.

(See S. C. Reporter's ed. 657-665.)

Constitutional law—impairment of contract obligation—change in plan of life insurance company—amendment of articles of association.

1. Legislative authority to change the plan of the business done by a life insurance company from the assessment plan to the legal reserve, flat premium plan of "old line" insurance does not work a violation of the contract with those certificate holders who failed to change to the new plan, although their assessments may have increased because of the lesser number subject to the assessment, and the death of members, where the right of amendment was expressly reserved in the articles of association.
2. A reservation of the right of amendment in the articles of association of a life insurance company, except with regard to keeping intact the fund pledged to secure payment of death losses, empowers the company to bind its members by a change in its plan of doing business from the assessment plan to the legal re-

serve, flat premium plan of "old line" insurance.

[No. 178.]

Argued March 15, 1904. Decided April 4, 1904.

APPEAL from the Circuit Court of the United States for the District of Minnesota to review a judgment dismissing a bill which sought a dissolution of an insurance company, the sequestration of its assets, and the appointment of a receiver with the view to wind up its affairs. *Affirmed.*

Statement by Mr. Justice Day:

This case originated in a bill filed in the circuit court seeking to declare a dissolution of the insurance company, the sequestration of its assets, and have a receiver appointed with a view to winding up the affairs of the association. On the 6th of August, 1880, an insurance association was organized under the laws of Minnesota, known as the Bankers' Association; afterwards, in 1884, its name was changed to the Bankers' Life Association of Minnesota. The general purposes of the association were to secure benevolent and fraternal co-operation between its members, and pecuniary assistance to the families of its deceased members and other designated beneficiaries. Its *general[658] plan of operation was declared to be to assess and collect from its members and to pay over to the beneficiaries certain stipulated sums, to be secured to them by sufficient pledges of money, which should be kept invested in United States registered bonds. Male persons, not less than eighteen years nor over fifty-five years of age, approved by the medical director, were eligible to membership upon a deposit of as many dollars as such person was years of age, as a part of the "guaranty trust fund," which fund was to be a pledge to secure payment to be made by the association upon the death of members, and was to belong to the association; also a membership fee equal to half the guaranty deposit, and the proportion of the annual expense assessment for the year was required. It was provided:

"Each member of this corporation shall pay thereto, on the last secular day of September, in each year, an assessment equal to 15 per cent on his contribution to the 'guaranty trust fund,' to meet the operating expenses, and to be known as his 'annual dues;' and upon the death of any member each surviving member shall also pay to said corporation, on demand, an assessment equal to 2 per cent on his contribution to said 'guaranty trust fund,' and out of this sum, obtained from said last-named assessment, which shall be known as the 'mor-

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

tuary assessment,' there shall be paid to such beneficiary as is designated in the membership certificate the sum of money in the said certificate named.

"All assessments upon members of this corporation shall be apportioned among all members thereof *pro rata*,—that is to say, in proportion to the amount that each member has paid into said guaranty trust fund. All assessments due or to be paid to this corporation shall be paid to such officers or persons and at such places as the said board of trustees shall name and specify. In order to secure prompt payment of all losses occasioned by death of its members, and to avoid unreasonable expense incident to the making and collection of assessments, and to promote the convenience of all parties, [659] said assessments *need not be made on account of such death loss separately, but may be made at stated intervals as said board of trustees may direct, to provide for all or any death losses of said corporation that have taken place prior to the making of any such assessment or assessments. Any assessment for the purpose of paying any death losses shall uniformly be 2 per cent of each surviving member's contribution to said 'guaranty trust fund' for each such death loss, and in case any such assessment shall produce a gross amount in excess of the amount needed to pay such death losses, then such excess may be used to discharge death losses subsequently occurring."

Article 10 provides as follows:

"All amounts pledged to this company to secure payment of assessments occasioned by death of the members shall be used only for that purpose and meanwhile the same shall be and remain invested in United States registered bonds, and shall constitute and be known as 'the guaranty trust fund.' Such bonds shall be made payable to this company, and shall be transferable or convertible only upon resolution of its board of trustees, and such board shall have the exclusive charge and control thereof.

"All interest realized from such bonds shall meanwhile be used to defray the company's operating expenses.

"This article shall never be amended, or in any way at all changed, without the consent of every member of this company, to be given in writing signed by him, and filed with the company's secretary, and reciting in full the proposed amendment or change."

It was provided that amounts payable to beneficiaries should be collected by the company from its members, and in case of death or default on the part of any member in payment of his assessments, the association might use his deposit in the guarantee fund to pay death losses in such manner as it

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might deem best, such use not to work a payment of any assessment as against the defaulting member.

Upon the death of a member the beneficiary was to receive *a sum equal to 2 per cent of the then subsisting guaranty trust fund, not exceeding, however, \$2,000 upon each full membership, and not exceeding in any case \$6,000. Power to amend the articles was vested in the trustees (except as therein otherwise provided), and they were to direct, manage, and control the business of the company. [660]

Wright became a member of the company on December 10, 1892, and Truby on March 13, 1893. On December 24, 1898, the board of trustees adopted amended articles of association and by-laws. The amended articles declared that the by-laws shall contain provisions which shall operate to preserve, continue, guard, and protect all of the existing rights and privileges of, and promises and pledges to, persons who were members at the time the amended articles became operative.

Under the new articles a form of policy was issued, known as the "guaranteed option policy." These policies were issued to new holders, and members under the assessment plan were permitted to transfer their membership so as to receive such policies, which required the payment by the insured of a stipulated annual premium in advance. The premiums were figured upon certain tables of mortality, and approximate those which would have been charged by an old line company on the legal reserve basis. This form of policy contained a condition providing that if the fund derived from such policies shall be reduced below the amount of the reserve, the company may require the insured to pay his just proportion of the deficiency within sixty days after written request therefor; or, at the option of the company, such proportion, with compound interest thereon at the rate of 4 per cent per annum, may be charged as a lien against the policy and any sum which may become payable thereunder. And in another form of policy it was stipulated that if unexpected losses and expenses shall be found to have reduced the funds derived from such policies below the amount of the reserve, the company shall have the right to apportion the deficiency ratably against it and each similar *policy in proportion to its re-[661] serve, and the amount so proportioned against each policy to be an indebtedness thereon, bearing interest at 4 per cent per annum thereon until paid by dividends or otherwise.

Afterwards, at a regular meeting and as provided in the laws of Minnesota (General Laws of Minnesota of 1901, chapter 143),

the company, on August 5, 1901, accepted the provisions of the statute making the company a regular reserve company, with a policy on which a stated premium is paid and a fixed sum is payable at death to the beneficiaries of the insured. The name of the company was changed to the Minnesota Life Insurance Company.

Section 21 of the act provides, among other things: "Any insurance company, not excepting companies transacting life or casualty business on the mortuary assessment or stipulated premium plan, or either thereof, may qualify and be governed by this chapter, anything in its special charter to the contrary notwithstanding. Provided, that nothing herein contained shall impair, or operate to impair, the obligation of any contract; and provided further, that after such qualification the company qualifying shall be governed solely by the act; and provided further, that nothing in this act contained shall apply to any town insurance, mortuary assessment, or stipulated premium company, unless and until it shall accept and qualify under the provisions hereof; and provided further, that notice of the acceptance of said act be filed with the insurance commissioner."

Section 1 of the by-laws of the reorganized company provides:

"Sec. 1. To the extent necessary to protect and continue the rights and privileges of any member holding a mortuary assessment certificate, and to preserve and secure the fulfillment of all contract obligations to him, and to continue and perpetuate in the company the power and authority to levy assessments and to do and perform all and everything necessary or expedient to enable it to carry out the mortuary assessment [662] contracts *in accordance with the terms thereof and with the law and present by-laws in such case made and provided, the present and existing by-laws shall continue in full force and effect."

A large amount of business has been done on the new plan, and the record discloses that the company has kept its contracts, is solvent, and doing business in many states.

Mr. John F. Byers argued the cause, and, with *Messrs. Dillon & Goetz*, filed a brief for appellants:

The supreme court of Minnesota, in considering the case of an assessment insurance association, where the trustees had attempted to put the older members into a class by themselves (*Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 116, 83 N. W. 506, 84 N. W. 457), said such a proceeding was in violation of the contract. The old members joined the association on the theory that it

was to be a living institution,—as old members drop out or die, and are paid off, new members come in, younger in years; thus adding strength and keeping up the vitality of the association. It would seem that this view of the contract should be binding on a Minnesota corporation.

No corporation has the right to change the business for which it was created, so as to engage in another and different business, without the consent of every member.

Livingston v. Lynch, 4 Johns. Ch. 573; *Natusch v. Irving*, 2 Coop. t. Cott. 358; *Pickering v. Stephenson*, L. R. 14 Eq. Cas. 322; *Kean v. Johnson*, 9 N. J. Eq. 401; *Byrne v. Schuyler Electric Mfg. Co.* 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833.

Assessment and the so-called old-line insurance are not the same kind of business. The ordinary life policy rests on the promise of the company to pay the sum therein named. The policy holder in such a company is under no obligation to pay anything for the benefit of the holder of other policies.

Smith v. Covenant Mut. Ben. Asso. 24 Fed. 689.

Mr. William D. Mitchell argued the cause, and, with *Messrs. Jared How, Carl Taylor, and Timothy R. Palmer*, filed a brief for appellees:

A power of amendment, contained in the charter of a corporation or in the laws under which it is organized, is a part of the contract with the members and stockholders.

Nugent v. Putnam County, 19 Wall. 241, 249, 22 L. ed. 83, 88; *Sparrow v. Evansville & C. R. Co.* 7 Ind. 369; *Witter v. Mississippi, O. & R. River R. Co.* 20 Ark. 463; *Fry v. Lexington & B. S. R. Co.* 2 Met. (Ky.) 314.

The character of the company as an assessment company was unchanged.

Haydel v. Mutual Reserve Fund Life Asso. 44 C. C. A. 169, 104 Fed. 718, 98 Fed. 200; *Rundle v. Kennan*, 79 Wis. 492, 48 N. W. 516; *Elliott v. Des Moines Life Asso.* 163 Mo. 132, 63 S. W. 400; *Williams v. St. Louis L. Ins. Co.* 97 Mo. App. 449, 71 S. W. 376.

The constitutional question in this case, relied on to support the jurisdiction of the court, is therefore manifestly frivolous. This court might well refuse to assume jurisdiction of this case on the ground that the claim is fictitious.

Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 695, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223.

However much the courts may differ as to what in fact constitutes a fundamental change, these principles are found in all the cases:

1. What is a fundamental change in the character and purpose of the enterprise in which the corporation is engaged is a ques-

tion to be determined from the facts and circumstances of each case.

2. To be considered fundamental the change must be more than an alteration or modification in the manner and method of transacting the corporate business. There must be such a radical change in the character of the business itself, as to constitute a new enterprise.

3. The underlying principle of the rule is that a member or stockholder may not be required to engage his capital in an enterprise to which he has never assented.

Natusch v. Irving, 2 Coop. t. Cott. 358; *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582; *Union Locks & Canals v. Towne*, 1 N. H. 44, 8 Am. Dec. 32; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383, 40 Am. Dec. 354; *Middlesex Turnp. Corp. v. Locke*, 8 Mass. 268; *Clearwater v. Meredith*, 1 Wall. 25, 17 L. ed. 604; *First Nat. Bank v. Charlotte*, 85 N. C. 433; *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56; *Kenosha, R. & R. I. R. Co. v. Marsh*, 17 Wis. 13; *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57; *Stevens v. Rutland & B. R. Co.* 29 Vt. 545; *Winter v. Muscogee R. Co.* 11 Ga. 438; *Alexander v. Atlanta & W. P. R. Co.* 108 Ga. 151, 33 S. E. 966; *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517; *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455; *Witter v. Mississippi, O. & R. River Co.* 20 Ark. 463; *Zabriskie v. Cleveland, C. & C. R. Co.* 23 How. 381, 396, 16 L. ed. 488, 496; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Irvin v. Susquehanna & P. Turnp. Road Co.* 2 Penr. & W. 466, 23 Am. Dec. 53; *Sprague v. Illinois River R. Co.* 19 Ill. 174; *Banet v. Alton & S. R. Co.* 13 Ill. 504; *Everhart v. West Chester & P. R. Co.* 28 Pa. 339; *Cross v. Peach Bottom R. Co.* 90 Pa. 392; *Wilson v. Wills Valley R. Co.* 33 Ga. 466; *Gray v. Monongahela Nav. Co.* 2 Watts & S. 156, 37 Am. Dec. 500; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39; *Payson v. Withers*, 5 Biss. 269, Fed. Cas. No. 10,864; *Picard v. Hughey*, 58 Ohio St. 577, 51 N. E. 133. See also *Com. ex rel. Claghorn v. Cullen*, 53 Am. Dec. 450, note, 13 Pa. 133; *Nugent v. Putnam County*, 19 Wall. 241, 248, 22 L. ed. 83, 88.

A feature of the present case in which it differs from any of the adjudicated cases on the question of what constitutes a fundamental change is the two-fold nature of the relation of the members to the company.

Condon v. Mutual Reserve Fund Life Asso. 89 Md. 99, 44 L. R. A. 149, 73 Am. St. Rep. 169, 42 Atl. 944.

Those cases which hold that the creation of one or more distinct corporations out of the old is a fundamental change have no ap-

plication to the case. The corporate identity was never changed.

Muller v. State L. Ins. Co. 27 Ind. App. 45, 60 N. E. 958; *Miller v. English*, 21 N. J. L. 317; *Wilson v. Chesapeake & O. R. Co.* 21 Gratt. 654.

It must be implied in the contract of the members, especially where, as in this case, amendments to the plan are contemplated in the original articles, that the majority of the members shall have the power to make changes in the mode of transacting the business which are shown to be essential, to protect the interests of its members and place the company on a sound and permanent basis, and to accomplish the purposes of its organization.

Supreme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

This is a bill on the part of two dissatisfied holders of certificates, issued while the company was doing business on the assessment plan, to wind up the affairs and distribute the assets of what appears, so far as the record discloses, to be a solvent and prosperous mutual insurance company with which others in interest are apparently satisfied. The Federal right alleged to be invaded, and the one adjudicated upon, which gives a right of direct appeal from the decree dismissing the bill to this court, is the constitutional guaranty against the impairment of the obligation of a contract contained in § 10 of article 1 of the Constitution of the United States. The complaining certificate holders allege that the laws of Minnesota, under which the changes in the plan of the insurance business done by the defendant company were made, from the assessment to the legal reserve, flat premium plan of "old line" insurance, work a violation of that provision. As this is the groundwork of the bill in the Federal court, it becomes necessary to make a case duly invoking protection of rights secured by the Federal Constitution. The statute in question expressly *provides that it shall not op-

purpose, and the same should remain invested in United States registered bonds. This article, it was expressly provided, should never be amended or in any way changed, without the written consent of every member of the company. It appears that in the changes through which this company has passed this article has not been amended, and the fund has remained intact for the uses and purposes stated. It is not every change in the charter or articles of associations of a corporation that will work such a departure from the purposes of its creation as to forfeit obligations incurred to it or prevent the carrying on of the modified business. A radical departure affecting substantial rights may release those who had come into the corporation on the basis of its original charter.

There is much discussion in the authorities as to when a charter amendment is of that fundamental character that a majority of the members or stockholders cannot bind the minority by agreeing to a change in the nature of the business to be carried on or the purposes and objects for which the corporation was created. Each case depends upon its own circumstances, and how far the right of amendment has been impliedly or expressly reserved in the creation of corporate rights. It would be unreasonable and oppressive to require a member or stockholder to remain in a corporation whose fundamental purposes have been changed against his will. On the other hand, where the right of amendment is reserved in the statute or articles of association, it is

[664] because the right to make changes *which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right. *Nugent v. Putnam County*, 19 Wall. 241, 251, 22 L. ed. 83, 89; *Picard v. Hughey*, 58 Ohio St. 577, 51 N. E. 133; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 167-185, 20 L. R. A. 765, 21 S. W. 39; *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479.

In the present case we have, by express stipulation, the right to amend the articles, with the reservation noted as to article 10. Nor does it appear that the changes were arbitrarily made without good and substantial reason. The testimony in this record discloses that the experience of this assessment insurance company was not anomalous or unusual. It was a case of history repeating itself. Insurance payable from as-

sessments upon members may begin with fine prospects, but the lapse of time, resulting in the maturing of certificates, and the abandonment of the plan for other insurance by the better class of risks, has not infrequently resulted in so increasing assessments and diminishing indemnity as to result in failure. The testimony that such was the history of this enterprise is ample. The changes of 1898 to a plan of issuing, in exchange for certificates and upon new business, a policy having some of the features of old line insurance, seems to have been fully justified by the state of the company's business. And the subsequent change to a policy with straight premiums and fixed indemnity was approved by the majority of the members upon proceedings had under the Minnesota statute, and has resulted in a successful business and a considerable change of the members to the new and more stable plan. It does not appear that any certificate has been unpaid, nor is any failure shown to levy assessments required under the original articles.

It is doubtless true that the assessments have increased owing to the lesser number subject to assessment, and the death of *members. What would have been realized [665] from assessments had there been no change of plan is matter of conjecture. The business is still that of mutual insurance, notwithstanding changed methods of operation. The new plan has been legally adopted and approved by the insurance commissioner of the state. The argument for appellants is that, having begun as an assessment company, the plan can never be changed without the consent of all interested. But we have seen that the right of amendment was given in the original articles of association. There was no contract that the plan of insurance should never be changed. On the contrary, it was recognized that amendments might be necessary. There was no vested right to a continuation of a plan of insurance which experience might demonstrate would result disastrously to the company and its members. We are cited to the statutes of many states authorizing similar changes and transfer of membership, but to no case holding legislative authorization of a change of this character to work the impairment by the state of the obligation of a contract.

The courts are slow to interfere with the management of societies, such as this mutual insurance company. While the rights of members will be protected against arbitrary action, such organizations will ordinarily be left to their own methods of action and management. The changes under consideration were made in good faith and have been accepted by many of the old members

as well as those who have taken policies since the changes in plan have been made. In our view of the case the law of Minnesota did not impair the obligation of any contract, nor were the changes in the method and plan of this company beyond its corporate powers. There is much testimony in the record as to the good faith of this proceeding and the motives of the complainants in bringing it, which we do not deem it necessary to consider, as the conclusions announced dispose of the case in favor of an affirmance of the judgment.

Judgment affirmed.

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MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[667] **Ex parte* IN THE MATTER OF ARTHUR P. SCHOFIELD, *Petitioner*. [No. —, Original.]

Motion for Leave to File Petition for a Writ of Habeas Corpus.

Messrs. John Burke and Guy C. H. Corliss for petitioner in support of motion.

Mr. Solicitor General Hoyt opposing. February 29, 1904. *Denied*.

INTERNATIONAL TRUST COMPANY, *Plaintiff in Error*, v. JOHN W. WEEKS, Agent, etc. [No. 485.]

In Error to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 125 Fed. 370.

Messrs. Robert M. Morse and Wm. M. Richardson for plaintiff in error.

Messrs. Eugene P. Carver, Edward E. Blodgett, and G. Philip Wardner for defendant in error.

March 7, 1904. *Dismissed* for want of jurisdiction. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Kirwan v. Murphy*, 170 U. S. 205, 209, 42 L. ed. 1009, 1010, 18 Sup. Ct. Rep. 592; *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786; *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, *Appellant*, v. CITY OF OWENSBORO, KENTUCKY. [No. 512.]

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Messrs. Wm. T. Ellis and J. D. Atchison for appellant.

Messrs. George W. Jolly, Reuben A. Miller, Charles S. Walker, and Robert S. Todd for appellee.

March 7, 1904. Decree affirmed, with costs, on the authority of *Joplin v. Southwest Missouri Light Co.* 191 U. S. 150, ante, 127, 24 Sup. Ct. Rep. 43.

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SOUTHERN RAILWAY COMPANY, *Plaintiff in Error*, v. MARY L. BEACH, *Administratrix*, etc. [No. 191.]

In Error to the *Supreme Court of the State of North Carolina. [668]

See same case below, 131 N. C. 399, 42 S. E. 856.

Messrs. Charles Price, W. A. Henderson, and F. H. Busbee for plaintiff in error.

No counsel for defendant in error.

March 21, 1904. Judgment reversed, with costs, on the authority of *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713, and cause remanded for further proceedings.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, *Plaintiff in Error*, v. TOWN OF PLYMOUTH *et al.* [No. 192.]

In Error to the Supreme Court of Errors of the State of Connecticut.

Mr. Wm. F. Henney for plaintiff in error.

Messrs. Charles E. Perkins and Samuel A. Herman for defendants in error.

March 21, 1904. *Dismissed* for the want of jurisdiction, on authority of *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Hooker v. Los Angeles*, 188 U. S. 314, 47 L. ed. 487, 23 Sup. Ct. Rep. 395; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

PAUL E. BERGER *et al.*, *Petitioners*, v. GEORGE A. FULLER. [No. 570.]

Petition for a Writ of Certiorari *to the United States Circuit Court of Appeals for the Seventh Circuit. [669]

Messrs. James H. Peirce, Geo. P. Fisher, Jr., and Wm. Henry Dennis for petitioners.

Mr. Douglas Dyrenforth for respondent. February 23, 1904. *Denied*.

M. J. COVENTRY *et al.*, *Plaintiffs in Error*,
v. J. W. DAVIS *et al.* [No. 193.]

In Error to the Supreme Court of the
State of Kansas.

See same case below, 65 Kan. 557, 70
Pac. 583.

Mr. Eugene F. Ware for plaintiffs in
error.

Messrs. J. D. McCleverty and W. P. Dil-
lard for defendants in error.

March 21, 1904. *Dismissed* for the want
of jurisdiction, on authority of *New Or-
leans Water Works Co. v. Louisiana*, 185
U. S. 351, 46 L. ed. 943, 22 Sup. Ct. Rep.
691; *Sayward v. Denny*, 158 U. S. 180, 39
L. ed. 941, 15 Sup. Ct. Rep. 777.

NILS O. LINSTROM, Administrator, etc.,
Petitioner, v. INTERNATIONAL NAVIGA-
TION COMPANY. [No. 572.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Second Circuit.

Mr. T. Lloyd Hollister for petitioner.

Mr. Henry Galbraith Ward for respond-
ent.

February 23, 1904. *Denied*.

M. H. MOMSEN, Claimant, etc., *Petitioner*, v.
NATIONAL DREDGING COMPANY. [No.
576.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fifth Circuit.

Messrs. J. Parker Kirlin, Harry Pillans,
and Charles R. Hickox for petitioner.

Messrs. G. L. Smith and H. T. Smith for
respondent.

February 23, 1904. *Denied*.

CHARLES GRING, *Petitioner*, v. WILLIAM J.
McILVAINE, Owner, etc., *et al.* [No. 577.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fourth Circuit.

Mr. James E. Heath, Jr., for petitioner.

Mr. Robert M. Hughes for respondent.

February 23, 1904. *Denied*.

G. B. HUNTER *et al.*, *Petitioners*, v. DAMP-
SKIBSSELSKABET, Tellus, etc., *et al.* [No.
579.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Ninth Circuit.

Mr. Milton Andros for petitioners.

Messrs. Charles Page and E. J. McCut-
chen for respondents.

February 29, 1904. *Denied*.

TWEEDIE TRADING COMPANY, *Petitioner*, v.
NEW YORK & BOSTON DYEWOOD COM-
PANY. [No. 589.]

*Petition for a Writ of Certiorari to the [670]
United States Circuit Court of Appeals for
the Second Circuit.

Mr. Everett P. Wheeler for petitioner.

Mr. Wilhelmus Mynderse for respondent.

February 29, 1904. *Denied*.

CIMIOTTI UNHAIRING COMPANY *et al.*, *Peti-
tioners*, v. AMERICAN FUR REFINING COM-
PANY *et al.* [No. 590.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Third Circuit.

Messrs. John W. Griggs and Louis C.
Raegener for petitioners.

Mr. Henry Schreiter for respondents.

February 29, 1904. *Granted*.

UNITED STATES, *Petitioner*, v. SING TUCK
OR KING DO *et al.* [No. 591.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the Second Circuit.

The Attorney General and Solicitor Gen-
eral Hoyt and Assistant Attorney General
McReynolds for petitioner.

Mr. Robert M. Moore for respondents.

February 29, 1904. *Granted*.

JESSE KERR, *Petitioner*, v. MODERN WOOD-
MEN OF AMERICA. [No. 365.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Eighth Circuit.

Mr. Isaac N. Flickinger for petitioner.

Mr. C. G. Saunders for respondent.

March 7, 1904. *Denied*.

THOMAS A. KELLEY *et al.*, *Petitioners*, v.
CUNARD STEAMSHIP COMPANY, Limited.
[No. 564.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the First Circuit.

Messrs. Wm. R. Sears and A. B. Browne
for petitioners.

Mr. George Putnam for respondent.

March 7, 1904. *Denied*.

JULIUS KING OPTICAL COMPANY, *Peti-
tioner*, v. FREDERICK F. BILHOFER *et al.*
[No. 573.]

Petition for a Writ of Certiorari to the
United States Circuit Court of *Appeals for [671]
the Second Circuit.

Mr. H. Albertus West for petitioner.

Mr. Wm. C. Strawbridge for respondents.

March 7, 1904. *Denied*.

OSCAR HAMPTON STEVENS, *Petitioner*, v. RICHMOND SMITH *et al.* [No. 586.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. H. C. McDougal for petitioner.

No counsel for respondent.

March 7, 1904. *Denied.*

RUDOLPH H. LANGE, *Petitioner*, v. UNION PACIFIC RAILWAY COMPANY. [No. 587.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. E. T. Wells for petitioner.

Messrs. Willard Teller, Clayton C. Dorsey, and W. R. Kelly for respondent.

March 7, 1904. *Denied.*

CITY NATIONAL BANK OF GREENVILLE, South Carolina, *Petitioner*, v. RICHMOND GUANO COMPANY. [No. 592.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. H. J. Haynsworth for petitioner.

Mr. Julius H. Heyward for respondent.

March 7, 1904. *Denied.*

ATLANTIC TRANSPORT COMPANY, Claimant, *Petitioner*, v. FRANCIS E. DODGE *et al.* [No. 601.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. J. Parker Kirlin and Chas. R. Hickox for petitioner.

Mr. Wilhelmus Mynderse for respondents.

March 7, 1904. *Denied.*

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY, *Petitioner*, v. KENNEDY J. HANLEY. [No. 602.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[672] *Messrs. W. B. Heyburn and *George Turner* for petitioner.

Messrs. M. A. Folsom and John R. McBride for respondent.

March 7, 1904. *Denied.*

ATLANTIC LUMBER COMPANY *et al.*, *Petitioners*, v. L. BUCKI & SON LUMBER COMPANY *et al.* [No. 612.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Richard H. Liggett for petitioners.

Messrs. H. Bisbee, Geo. C. Bedell, and Jas. E. Padgett for respondents.

March 14, 1904. *Denied.*

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WESTERN UNION TELEGRAPH COMPANY, *Petitioner*, v. PENNSYLVANIA RAILROAD COMPANY *et al.* [No. 605.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. H. D. Estabrook, Rush Taggart, and John F. Dillon for petitioner.

Mr. John G. Johnson for respondents.

March 21, 1904. *Granted.*

RIVERDALE COTTON MILLS, *Petitioner*, v. ALABAMA & GEORGIA MANUFACTURING COMPANY *et al.* [No. 595.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Thomas H. Watts, Louis D. Brandeis, and Wm. H. Dunbar for petitioner.

Messrs. John T. Morgan and Marion Erwin for respondents.

March 21, 1904. *Granted.*

D. N. HOLDEN *et al.*, *Petitioners*, v. J. A. STRATTON, Trustee. [No. 621.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Wm. E. Humphrey and P. P. Carroll for petitioners.

Mr. Frederick Bausman for respondent.

March 21, 1904. *Granted.*

LINDLEY E. SINCLAIR, *Petitioner*, v. DISTRICT OF COLUMBIA. [No. 599.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

**Messrs. C. C. Cole and J. J. Darlington* [673] for petitioner.

Messrs. Andrew B. Duvall and E. H. Thomas for respondent.

March 21, 1904. *Denied.*

WESTERN ASSURANCE COMPANY OF TORONTO, *Petitioner*, v. WILLIAM H. HALLIDAY *et al.* [No. 604.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Hartwell Cabell and J. H. Ralston for petitioner.

Messrs. Edward L. Taylor, Jr., Karl T. Webber, and A. T. Seymour for respondents.

March 21, 1904. *Denied.*

JOHN P. VIRDIN, etc., *Petitioner, v. STEAMER ANSGAR, etc.* [No. 619]; JOHN P. VIRDIN, etc., *Petitioner, v. OSCAR ELLEFSEN, Master, etc.* [No. 620.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Horace L. Cheyney and John F. Lewis for petitioner.

Mr. Frederick M. Brown for respondents.
March 21, 1904. *Denied.*

KELLER TOOL COMPANY *et al.*, *Petitioners, v. JOSEPH BOYER.* [No. 598.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. E. Hayward Fairbanks, Hector T. Fenton, and Wm. A. Maury for petitioners.

Mr. John R. Bennett for respondent.
April 4, 1904. *Denied.*

E. J. ROBERTS, *Petitioner, v. UNITED STATES.* [No. 610.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Cecil H. Smith and Frank Lee for petitioner.

No opposition.

April 4, 1904. *Denied.*

UNITED STATES *ex rel.* FRANK B. EDWARDS, Lieutenant of Artillery, United States Army, *Petitioner, v. ELIHU ROOT, Secretary of War, et al.* [No. 618.]

[674] *Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Joseph W. Catharine for petitioner.

The Attorney General and Solicitor General Hoyt for respondents.

April 4, 1904. *Denied.*

ROBERT MILLER, Special Master, etc., *Plaintiff in Error, v. NORTHERN ASSURANCE COMPANY.* [No. 594.]

In Error to the District Court of the United States for the District of Porto Rico.

No counsel for plaintiff in error.

Mr. J. S. Flannery for defendant in error.
February 23, 1904. Docketed and dismissed, with costs, on motion of Mr. J. S.

Flannery for the defendant in error.

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SAMUEL FARQUHAR *et al.*, *Plaintiffs in Error, v. EDWARD W. PRESNO et al., Street Commissioners of Boston.* [No. 213.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

Mr. Elmer P. Howe for plaintiffs in error.

Mr. Thomas M. Babson for defendants in error.

February 23, 1904. *Dismissed*, with costs, per stipulation.

L. C. SHATTUCK, *Appellant, v. MARTIN COSTELLO.* [No. 536.]

Appeal from the Supreme Court of the Territory of Arizona.

Mr. Wm. H. Barnes for appellant.

No counsel for appellee.

March 1, 1904. *Dismissed*, with costs on motion of counsel for the appellant.

DELBERT B. GRAY, *Petitioner, v. UNION CASUALTY & SURETY COMPANY.* [No. 184.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Mr. Ira J. Williams for petitioner. [675]

Mr. Maurice W. Sloan for respondent.

March 4, 1904. *Dismissed* for the want of prosecution.

WARD ROPER *et al.*, *Plaintiffs in Error, v. A. C. SCURLOCK et al.* [No. 179.]

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas.

See same case below 29 Tex. Civ. App. 464, 69 S. W. 456.

Mr. George Clark for plaintiffs in error.

Mr. C. K. Bell for defendants in error.

March 7, 1904. *Dismissed*, with costs, on motion of Mr. George Clark for the plaintiffs in error.

AMERICAN PRESS ASSOCIATION, *Appellant, v. DAILY STORY PUBLISHING COMPANY.* [No. 276.]

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 57 C. C. A. 70, 120 Fed. 766.

Mr. Albert H. Veeder for appellant.

No counsel for appellee.

March 7, 1904. *Dismissed* on authority of counsel for appellant.

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MAURICE RUNKLE, *Appellant*, v. WILLIAM HENKEL, United States Marshal. [No. 543.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Charles A. Douglas for appellant.

The Attorney General for appellee.

March 7, 1904. *Dismissed*, with costs, pursuant to the tenth rule.

LEUNG SING, OR LONG SING, *Appellant*, v. UNITED STATES. [No. 639.]

Appeal from the District Court of the United States for the Eastern District of New York.

No counsel for appellant.

The Attorney General and *Solicitor General Hoyt* for appellee.

April 4, 1904. Docketed and *dismissed* on motion of *Mr. Solicitor General Hoyt* for the appellee.

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ALEXANDER K. CONEY, *Appellant*, v. CONTINENTAL BUILDING & LOAN ASSOCIATION. [No. 640.]

Appeal from the District Court of the United States for the Northern District of California.

*No counsel for appellant.

Mr. Thomas H. Clark for appellee.

April 4, 1904. Docketed and *dismissed*, with costs, on motion of *Mr. Thomas H. Clark* for the appellee.

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HELEN POTTS HALL, *Appellant*, v. FIRST NATIONAL BANK OF BRIDGEPORT *et al.* [No. 567.]

Appeal from the Circuit Court of the United States for the District of Connecticut.

Mr. Daniel Davenport for appellant.

Mr. George P. Carroll for appellees.

April 4, 1904. *Dismissed*, per stipulation.

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THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1903.

[1]*PEOPLE'S GASLIGHT & COKE COMPANY of Chicago, *Appt.*,
v.
CITY OF CHICAGO.
(See S. C. Reporter's ed. 1-17.)

State regulation of gas rates—contract exemption—extension to consolidated corporation.

1. A reduction by the state of the price of gas to be furnished by a gas company availing itself of the general power to absorb its rivals conferred upon gas companies by Illinois act of June 5, 1897, was not precluded by the provision of § 11 of that act that such corporation should not exceed the rate it had been charging the year immediately preceding the acquisition of the absorbed corporations, since such provision was not intended to fix, and did not fix, a rate unalterable by either party, but simply a rate which the consolidated companies could not exceed.
2. Any contract exemption from state regulation of the price of gas, contained in the charter of a gas company, does not extend to the plants of, and territory occupied by, certain other gas companies, not possessing such immunity in their own right, when absorbed by the former company under the general power of consolidation and merger conferred upon gas companies by Illinois act of June 5, 1897, which provided that the consolidated corporation should be subject to the legal obligations of the companies absorbed.

[No. 132.]

Argued January 20, 1904. Decided April 4, 1904.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree dismissing a bill to enjoin the enforcement of a municipal ordinance regulating the price of gas. *Affirmed.*

See same case below, 114 Fed. 384.

NOTE.—On contract exemptions from legislative power to fix tolls, rates, or prices—see notes to *Detroit v. Detroit Citizens' Street R. Co.* 46 L. ed. U. S. 592; and *Winchester & L. Turnp. Road Co. v. Croxton*, 33 L. R. A. 177.
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The facts are stated in the opinion.

Mr. William D. Guthrie argued the cause, and, with *Messrs. James F. Meagher* and *William F. Sheehan*, filed a brief for appellant:

A new corporation was not created by the proceedings taken under Ill. act June 5, 1897.

People ex rel. Deneen v. People's Gaslight & C. Co. 205 Ill. 482, 68 N. E. 950; *People's Gaslight & Coke Co. v. Hale*, 94 Ill. App. 406.

This act was enacted with knowledge on the part of the legislature, derived from its own special enactments, that the People's company might acquire the properties of the other gas companies, and that the latter would turn over their properties to the People's company. A merger had already been attempted, but had failed because there was no statute authorizing it.

People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798.

The consent of the city to any purchase or merger was not essential. The legislature's power was supreme.

Cicero v. Chicago, 182 Ill. 301, 55 N. E. 351; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L. R. A. 696, 51 N. E. 758; *Atkin v. Kansas*, 191 U. S. 207, 220, ante, 148, 157, 24 Sup. Ct. Rep. 124; *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 91, 35 L. ed. 943, 947, 12 Sup. Ct. Rep. 142.

It cannot be argued that, as to the properties of the existing corporations acquired by the People's company, the latter assumed any greater obligation than was resting on the companies transferring their plants. In the case of each and every company which had a contract with the city fixing a maximum rate embodied in the consent to lay its pipe, the city council had no power to amend that contract at its will. The doctrine of the cases of *People ex rel. Bliss v. Chicago West Div. R. Co.* 118 Ill. 113, 7

N. E. 116, and *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 397, 46 L. ed. 592, 611, 22 Sup. Ct. Rep. 410, would clearly prevent any such attempt to so amend the city's consent after acceptance by the gas companies.

It has never been intimated in any case that where no new corporation was formed the old company into which others were merged lost any of its charter rights and powers by merely acquiring the property of other companies.

If any part of the bill was good, and entitled the complainant to relief as to the gas furnished by it through its own plant and mains or pipes, it was error to dismiss the bill and deny all relief. The demurrer was general, and covered the whole bill, and if any part of the bill was good the demurrer necessarily failed, and should have been overruled. Such has long been the established practice in equity.

Livingston v. Story, 9 Pet. 632, 658, 9 L. ed. 255, 264; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 520, 28 L. ed. 498, 503, 4 Sup. Ct. Rep. 583; *Heath v. Eric R. Co.* 8 Blatchf. 347, Fed. Cas. No. 6,306; *Savannah, F. & W. R. Co. v. Jacksonville, T. & K. W. R. Co.* 24 C. C. A. 437, 52 U. S. App. 51, 79 Fed. 35; 1 Dan. Ch. Pr. 6th Am. ed. p. 579; *Story*, Eq. Pl. § 443; *Fletcher*, Eq. Pl. & Pr. § 204; 1 Foster, Fed. Pr. § 107.

Nothing can be more clear than the intention of the city council, as expressed in the ordinance, that it should operate in all parts of the city, and upon the whole of the system of every gas company. There could be no clearer case of judicial legislation than to hold that this intention, thus clearly and emphatically expressed, may nevertheless be disregarded, and the ordinance by judicial interpretation be made to operate only upon some persons in some parts of the city, as to which the ordinance might have been valid had the city council seen fit so to enact it. It would be wresting the ordinance from the purpose with which it was enacted, and making it serve a different purpose.

James v. Bowman, 190 U. S. 127, 140, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; *Sprague v. Thompson*, 118 U. S. 90, 95, 30 L. ed. 115, 117, 6 Sup. Ct. Rep. 988; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 636, 39 L. ed. 1108, 1125, 15 Sup. Ct. Rep. 912; *Johnson v. State*, 59 N. J. L. 535, 38 L. R. A. 373, 37 Atl. 949; *State ex rel. Selliger v. O'Connor*, 5 N. D. 629, 67 N. W. 824; *Jones v. Memphis*, 101 Tenn. 188, 47 S. W. 136.

The intention of the legislature clearly was that the property of the transferring or merged corporations should be thereafter held, and their business thereafter conducted, under the charter rights and powers of the acquiring or merging company, and that

the duty of the latter to supply gas should depend upon, and be governed and measured by, its charter.

People ex rel. Deneen v. People's Gaslight & C. Co. 205 Ill. 482, 68 N. E. 950; *People's Gaslight & Coke Co. v. Hale*, 94 Ill. App. 406.

Even when it is clear that the legislature intends to preserve the existing several corporate rights, powers, and privileges of the transferring or merged companies, and to continue their several enjoyment in the portions of the road which had previously belonged to them, the result is not the loss of any existing immunity or exemption.

Branch v. Charleston, 92 U. S. 677, 682, 23 L. ed. 750, 752; *Tomlinson v. Branch*, 15 Wall. 470, 21 L. ed. 193.

In every case where an acquiring company retained its original charter. (*Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 206) it has been held that the question of the extension of its charter to the acquired property depends upon the intention of the legislature.

Mr. Granville W. Browning argued the cause, and, with Mr. Edgar Bronson Tolman, filed a brief for appellee:

The consolidated company, being the creature of the act of 1897, must derive any immunity from regulation by the express and clear language of the act itself.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Charles River Bridge v. Warren Bridge*, 11 Pet. 547, 9 L. ed. 824; *Delaware Railroad Tax*, 18 Wall. 225, sub nom. *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

Unless there is express language to the contrary in the original charter, or in the statute permitting the merger, immunities belonging to the old company do not pass.

Memphis & L. R. R. Co. v. Railroad Comrs. 112 U. S. 609, 28 L. ed. 837, 15 Sup. Ct. Rep. 299; *Wilson v. Gaines*, 103 U. S. 417, 26 L. ed. 401; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 184, 186, 29 L. ed. 121, 124, 5 Sup. Ct. Rep. 813; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Dow v. Beidelman*, 125 U. S. 689, 31 L. ed. 843,

2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Hoge v. Richmond & D. R. Co.* 99 U. S. 354, 355, 25 L. ed. 304; *Shields v. Ohio*, 95 U. S. 323, 24 L. ed. 358; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 362, 25 L. ed. 185, 187; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 586, 587, 41 L. ed. 562, 563, 17 Sup. Ct. Rep. 198; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

Decisions that, under the language of some statutes permitting consolidation, there was no new corporation, that the old corporations continued, and the immunities of each old company continued to be enjoyed in the territory only of the old company, do not apply here: (1) Because, under the language of the act of 1897, the consolidated company is the creature of the act alone, and is not the same company as either of the constituent companies; and (2) because the language of our statute expressly provides that the immunities of the constituent companies shall cease, except when temporarily necessary for an express narrow purpose.

Atlantic & G. R. Co. v. Georgia, 98 U. S. 364, 25 L. ed. 187; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 656, 39 L. ed. 569, 15 Sup. Ct. Rep. 484; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 673, 39 L. ed. 575, 15 Sup. Ct. Rep. 413; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill to restrain the city of Chicago from putting in force a general ordinance passed October 15, 1900, providing that corporations, companies, or persons manufacturing, selling, and distributing gas in the city of Chicago for illuminating or fuel purposes should not charge individual consumers more than 75 cents per thousand [8] cubic feet, and providing *penalties for violation of its provisions. The bill was demurred to, and an opinion delivered on hearing on demurrer. 114 Fed. 384.

The opinion took a wider range than the bill as framed called for, because of certain facts not therein set forth, but which were

admitted on the argument, and accordingly it was suggested that the bill be amended to bring in these facts, and, this having been done, the demurrer was renewed to the amended bill, whereupon, after argument, the court gave an additional brief opinion (which appears in the record), sustained the demurrer, and dismissed the bill, as amended, for want of jurisdiction. Subsequently it was stipulated and agreed by and between the parties that the decree as entered did not correctly recite what was intended by the court, and that it should be amended by striking out the words "for want of jurisdiction," and inserting in lieu thereof the words "upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the city council under the laws of the state of Illinois." An order was then entered by the court, amending its previous decree *nunc pro tunc* in the particulars named.

The facts presented by the amended bill were these: The People's Gaslight & Coke Company was incorporated by a special act of the general assembly of Illinois, approved February 12, 1855, creating it a corporation, with the usual powers and liabilities, with a capital stock not to exceed \$500,000, and with power to manufacture and sell gas in the city of Chicago and "to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with the consent of the city council," and by the 4th section it was expressly provided that the company should furnish and supply to the city, for its public uses, at the election of the proper authorities of the city, "a sufficient supply of gas, at a rate not exceeding \$2 per thousand feet, and the inhabitants of said city at a rate not exceeding \$2.50 per thousand feet." The city council passed an ordinance, August 30, 1858, *granting the [9] company permission and authority "to lay their gas mains, pipes, feeders, and service pipes in any of the streets, avenues, highways, public parks, or squares throughout said city, subject at all times, however, to the resolutions and ordinances of the common council of said city." The act of 1855 was amended February 7, 1865, so as to allow an indefinite increase of the capital stock, and by § 3 of this act all the corporate powers of the corporation were vested in a board of directors and such officers and agents as the board should appoint, with power to the board to "adopt such by-laws, rules, and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this state," the section continuing and concluding

ing, "and the 4th section of said act is hereby repealed; but ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than \$3 per thousand feet."

In 1870 a new constitution of the state of Illinois was adopted, providing that no law "making any irrevocable grant of special privileges or immunities shall be passed" (art. II., § 14); that the general assembly should not pass local or special laws "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever" (art. IV., § 22); and that no corporation should be "created by special laws, or its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state; but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created" (art. XI., § 1).

[10] June 5, 1897, an act was passed "in relation to gas companies," which authorized and empowered gas companies to *sell, transfer, convey, or lease their real and personal property, rights, franchises, and privileges, in whole or in part, to any other gas company doing business in the same city, town, or village, and provided that by complying with the provisions of the act, gas companies doing business in the same city, town, or village might consolidate and merge into a single corporation, which should be one of said merging and consolidating corporations. "The companies, parties to the agreement or agreements which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements." Laws Illinois 1897, p. 179, §§ 2, 8.

The 9th and 11th sections read as follows:

"§ 9. Any corporation purchasing or leasing the real and personal property of any other company or companies, as provided for in § 1, or any consolidated corporation, as authorized by § 2, shall be subject to and shall perform, for each of the companies so entering into said agreement or agreements, the legal obligations now resting upon each of them, respectively, under their respective charters and ordinances, except where the provisions thereof conflict with the exercise of the powers herein granted, in the same manner and to the same extent as if the companies had remained individual and dis-

tinnet; and such performance by said corporation so purchasing or leasing, or by such consolidated corporation, shall be held and considered as the performance by each of the respective companies' so selling, leasing, or consolidating, of the legal obligations theretofore resting upon each of them respectively: *Provided, however*, that nothing in this act shall be construed as extinguishing said companies entering into the agreement or agreements mentioned in this act, or annulling or impairing any of their respective franchises, licenses, or privileges, but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of upholding any right, title, or interest, power, privilege, or immunity ever exercised or enjoyed by any of them, may be necessary *for the protection of their re-[11] spective creditors or mortgagees, or any of them; the separate exercise of their respective powers, and the separate enjoyment of their separate privileges and immunities, being suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far as, and for such time as, the protection of such creditors or mortgagees may require."

"§ 11. Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions:

"Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation and merger.

"Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease or such consolidation and merger."

The People's Gaslight & Coke Company under this act became consolidated with some ten other gas companies, most of which were organized under general laws passed in pursuance of the Constitution of 1870. One of them, the Chicago Gaslight & Coke Company, was incorporated by special act of February 12, 1849, amended February 9, 1855, but this contained no restriction on the right of the general assembly or the city to regulate the price of gas from time to time.

The bill quoted from the 11th section of the act of 1897 the clause in reference to the increase of price for gas of the quality furnished consumers during any part of the

year immediately preceding purchase or lease, or consolidation and merger, and alleged the fact to be that during the year immediately preceding the acquisition by complainant of the various other gas companies, complainant charged the net rate or price of \$1 per thousand cubic feet, and [12] since the acquisition *of the plants and property of those corporations that complainant had uniformly charged the same net rate or price for gas sold by it in the city, which gas was better in quality and of higher candle power than the gas theretofore sold by the companies acquired; and complainant averred, as matter of law, that the price or rate thus fixed was a fixing and regulating by the state of the price or rate to be charged by complainant for gas supplied subsequent to the acquisition of said other companies.

The bill also set forth an agreement made between the city and the People's Gaslight & Coke Company, July 20, 1899, which recited that agreements had theretofore subsisted between the city and the People's Company, and between the city and certain other gas companies, which companies subsequently became merged into the People's Company, and provided for a continuance of the lighting of the streets on the same terms as it had been done, and for the payment by the People's Company to the city of a certain percentage of the gross receipts of the People's Company from the sales of gas during 1899, including therein the receipts from the operation of the properties of each of the gas companies consolidated with the People's Company, and for the payment by the city of amounts due or to become due to the People's Company or confession of judgment for amounts remaining unpaid; and the bill further set forth certain orders of the city between August 5, 1897, and March 11, 1901, for the laying of pipes and mains by the People's Company in the streets and avenues of the city. Certain mortgages were likewise referred to and it was alleged that bonds thereunder had been sold to parties who purchased the same in the belief that the city was prohibited by its charter from compelling the People's Company to furnish gas at a less rate than \$3 per thousand cubic feet.

The bill also averred that the People's Company, prior to the consolidation, distributed gas chiefly in the west division of the city, although its pipes and mains extended [13] into the south *division, and that the other companies, or nearly all of them, severally, had plants and were engaged in manufacturing and distributing gas in various other sections of the city.

On March 5, 1900, the city council passed
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an ordinance which provided "that no corporation, company or companies, firm or persons manufacturing, selling, supplying, or distributing gas in the city of Chicago for illuminating or for fuel purposes shall charge, exact, demand, or collect from any consumer thereof more than the sum of seventy-five (75) cents per one thousand (1,000) cubic feet of gas consumed or used."

The jurisdiction of the circuit court was invoked on the ground of impairment or deprivation by the ordinance of contract rights of complainant acquired by its charter; and the bill prayed, among other things, "that it may be adjudged and decreed that by said charter of the People's Gaslight & Coke Company, the people of the state of Illinois agreed with the People's Gaslight & Coke Company that the common council of the city of Chicago should never be authorized to compel the People's Gaslight & Coke Company to furnish gas at a less rate than \$3 per thousand cubic feet, and that such contract is a valuable property right of the said People's Gaslight & Coke Company."

The circuit court declined to specifically dispose of complainant's contention that by the act of February 7, 1865, the state had contracted that the city should never require the company to furnish gas at a less rate than \$3 per thousand feet, because it held that the limitation or exemption, even if conceded, did not apply to the territory and rights acquired by the merger, and that the bill did not seek divisional relief, and was not framed in that aspect; while most of the consolidated companies were organized under the general incorporation law passed in pursuance of the Constitution of 1870, and the right to fix reasonable rates was reserved, the works not having been installed under any explicit contract to the contrary, if such could have been entered into.

As to the clause of the 11th section of the act of June 5, *1897, providing: "Such cor-[14]poration shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger," the circuit court ruled that this did not fix a rate unalterable by either party, but a rate beyond which the consolidated companies could not go.

The circuit court further held that the contention that the state's power to regulate rates had not been delegated to the city was not a Federal question, and that, as the ground of impairment or deprivation of contract rights acquired by the charter failed under the bill as framed, the court could not go further and decide that question in this case. While the decree, as it

stands, amended by consent, in terms reserved the question, to be raised in some other appropriate suit in a proper court.

In these circumstances we are constrained to decline the consideration of that question so far as it relates to the contention that power to regulate was conferred by the general law of Illinois of 1871-2 providing for the incorporation of cities and villages under which the city of Chicago as now constituted was incorporated.

But the decree dismissed the bill "as to the alleged contract rights of complainant," and in so doing the circuit court dealt with the alleged fixing of rates by the act of 1897, as well as with the alleged contract of 1865, that the city should not be authorized to fix a rate of less than \$3; for although, as we have said, it was the impairment or deprivation of the latter which was made the ground of Federal jurisdiction, it was in effect as asserted to have been modified by the act of 1897. We agree with the circuit court that the clause of § 11 of the act of 1897, that "such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation or merger," read according to the plain and [15] ordinary signification of the words, it being a general law applicable to every gas company and to every city in the state, was not intended to fix, and did not fix, a rate unalterable by either party, but simply a rate above which consolidated companies could not go. This disposes of it as an independent ground of relief, and leaves to be considered the provision of the amended charter of 1865, that "ten years after the passage of this act the common council of the city of Chicago may, by resolution or ordinance, regulate the prices charged by said company for gas; but said common council of the city of Chicago shall, in no case, be authorized to compel the said company to furnish gas at a less rate than \$3 per thousand feet," as affected by the act of 1897. That is to say, Was the city cut off from reducing the price below \$1, conceding the power of the state to do so?

It is contended, on the one hand, that the first part of this provision granted the city the general power to regulate the price after ten years, and that the latter part then ceased to operate as a restriction. And, on the other hand, that the whole clause constituted a contract that the general assembly would not thereafter authorize the city to fix the rate at less than \$3. But it is expressly conceded that the general assembly possessed the power to regulate the price of

gas and to prescribe reasonable rates, and that, as complainant availed itself of the act of 1897, and thereby acquired the plants of other gas companies, it can now only charge the rate it had been charging the year immediately preceding the acquisition of those properties,—namely, \$1 per thousand cubic feet.

Assuming, but without intimating any opinion to that effect, that by the amended charter of 1865 the state contracted with the People's Gaslight & Coke Company that the city should not thereafter be empowered to reduce the price of gas below \$3 per thousand feet, the preliminary inquiry is whether, by the consolidation, that contract was extended to the plants of, and territory occupied by, the companies absorbed.

*The circuit court held that it was not so [16] extended, and that as the bill sought relief in respect of the entire plants and territory,—the entire system as consolidated,—it could not be maintained, because there was no such contract which the ordinance impaired or destroyed.

It is said that partial relief might have been accorded unless by the consolidation the alleged exemption was lost, but the bill was not framed in the alternative, and the ordinance itself did not contemplate a divided operation, although, if the exemption existed as to part of the system, the ordinance would not necessarily be wholly void, but might be held inoperative *pro tanto*, notwithstanding serious difficulties in so applying it. See *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310, and cases cited.

Was the alleged exemption extended by the act of 1897, when the other companies were acquired?

Prior to that time the operations of the People's Company were practically confined to the west division of the city, and although it was empowered to lay pipes in any of the streets or avenues, this was only with the city's consent. The city in 1858 authorized the company to do this, but this was "subject at all times" to the city's resolutions and ordinances.

It is true that after the acquisition of the other companies the city compromised with the People's Company in respect of claims for gas furnished, and also ordered the company to lay mains in streets which formerly did not have them, but this action was not equivalent to consent to the extension of the alleged restriction on rates to territory acquired under the merger, with the accomplishment of which the city had nothing to do.

The act of 1897 provided that the consolidated corporation should be subject to the legal obligations of the companies taken over, and most of these were not exempt from the right of regulation, and were obliged to submit to its exercise.

By the state Constitution the general assembly was forbidden to make "any irrevocable grant of special privileges or immunities," *and the general rule is that a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute. *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 656, 39 L. ed. 569, 15 Sup. Ct. Rep. 484; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 586, 41 L. ed. 562, 17 Sup. Ct. Rep. 198; *Minneapolis & St. L. R. Co. v. Gardner*, 177 U. S. 332, 41 L. ed. 793, 20 Sup. Ct. Rep. 656; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47. And the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature. An exemption held by the latter would not pass to the others unless so provided. So that the act of 1897 cannot be construed as extending any prior immunity the acquiring company possessed over the whole system of all the companies consolidated.

And if not, and the circuit court was right, as we think it was, in holding that under the present bill complainant's alleged exemption could not be enforced as to so much of the system as originally belonged to it, then the court was justified in declining to discuss whether, by the consolidation, the alleged exemption was lost altogether.

In short, agreeing with the circuit court, we are of opinion that the asserted immunity (conceding it *arguendo*) did not extend to so much of the system as passed to the consolidated company from companies not possessing such immunity in their own right; that under this bill relief could not be accorded in respect of part of the system; that no contract that the price of gas should not be reduced below \$1 per thousand feet was created, nor was the alleged original exemption merely modified and extended; and that the decree dismissing the bill because there were no such contract rights as alleged impaired or destroyed by the ordinance was right.

Decree affirmed.

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*EDWIN F. BROWN, as Receiver of the [18] People's National Bank of Denver, Colorado, *Appt.*,

v.

GEORGE C. SCHLEIER and the People's National Bank of Denver, Colorado.

(See S. C. Reporter's ed. 18-25.)

National banks—validity of transfer of bank building in consideration of release from ground rent.

The owner of real property leased to a national bank for building purposes is not liable to account to the bank's receiver for the bank building erected thereon, which the bank, while insolvent and in course of voluntary liquidation, turned over to him in consideration of a release from all further liability under the lease, the bank being at the time in arrears for rent and taxes, and the income from the property not exceeding the charges against it.

[No. 188.]

Argued March 17, 18, 1904. Decided April 4, 1904.

A PPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Colorado sustaining demurrers to, and dismissing, a bill filed by the receiver of a national bank in a suit to set aside a lease and its subsequent surrender and cancelation as *ultra vires* of the bank, and for an accounting, and a decree that the amount found due on such accounting be declared a prior lien upon the leased property and the building erected thereon by the bank. *Affirmed.*

See same case below, 55 C. C. A. 475, 118 Fed. 981.

Statement by Mr. Justice **McKenna**:

This suit was brought by the predecessor of appellant in the circuit court of the United States for the district of Colorado to set aside a lease of certain lots in the city of Denver, Colorado, and the subsequent surrender and cancelation of said lease, as *ultra vires* of the power of the National Bank of Denver, and for an accounting, and that the amount found due on the accounting be decreed a prior lien upon the lots and the building erected thereon by the bank. The case was presented upon bill and demurrers. The demurrers were sustained and the bill dismissed. 112 Fed. 577. The ruling was affirmed by the circuit court of appeals. 55 C. C. A. 475, 118 Fed. 981.

The People's National Bank of Denver was incorporated on the 1st of August, 1889, as a national bank under the national bank

ing act. Its capital stock was \$300,000, and its corporate existence to be twenty years. In September, 1889, the appellee Schleier was the owner of lots 1, 2, 3, and 4 in block [19] 75 in *the city of Denver, and on that day made a lease thereof to the bank for the period of ninety-nine years from the 1st day of November, 1890, with an option to extend the term for a further period of fifty years, at an annual rental of \$13,975, payable monthly. The bank covenanted to remove, at its expense, buildings located on the lots within a designated period, and to erect thereon a building four stories in height, at a cost of not less than \$100,000, which should at once become part of the realty. The bank also covenanted to keep the building and premises in repair and pay all taxes thereon. And it was covenanted that in case of default in the payment of rent, taxes, or performance of other conditions, for the period of fifteen days, Schleier should have the right, after thirty days' notice, to sell and dispose of the lease and all the right and title of the bank thereunder, or to maintain personal actions for the rent or taxes he might have to pay. The heirs, representatives, and assigns or successors of the parties were entitled to the benefits of the lease and were to be bound by its covenants.

The bank erected a building on the lots at an expense of \$305,735.30, completing the same January, 1891. The building contained necessary offices for the use of the bank, which were occupied by it until it ceased to do business. The building also contained other offices and rooms which the bank rented to parties not connected with it, and to the People's Savings Bank, a corporation organized under the laws of Colorado.

On the 19th of July, 1893, the bank being unable to pay its depositors, it was placed in the hands of the Comptroller of the Currency, and one J. B. Lazier was appointed receiver thereof, who remained in charge of its affairs until August 21, 1893. On that day the bank agreed to make a voluntary assessment to restore the impairment of its capital, and the receiver was discharged. The directors and officers of the bank then took charge of its business and conducted it until the appointment of the receiver herein.

[20] *The bill alleges that the affairs of the bank were very "much involved, mixed, and commingled" with those of the People's Savings Bank, and by reason thereof the latter was unable to proceed with its business, and made a general assignment of its assets to Fernor J. Spencer, who has ever since remained in charge and control thereof. As such assignee he sued the People's National Bank and recovered a judgment

for the sum of \$475,825.71, which has not been paid.

In January, 1897, the bank commenced to take steps looking to a voluntary liquidation and surrender of its charter, and on or about the 27th of April, 1897, the stockholders published a notice of the bank's intention to go into liquidation, and fixed the 27th of June as the last day on which claims could be presented. Prior to that day Spencer, having commenced suit against the bank for an accounting and adjustment of the matters between the banks, served a summons therein, and also having given notice to the Comptroller of the Currency of the United States of the claims and demands of the savings bank, an agreement was entered into between Spencer and the People's National Bank, whereby he agreed to refrain from taking any further steps in said suit until January 1, 1898, without prejudice by reason of the delay. The bank on its part agreed, in consideration of the delay, that it would "take no further action of any kind or nature whatsoever to the prejudice of the savings bank," or any action for the surrender of its charter or the disposal of its property, "to the prejudice of the savings bank."

On the 20th of September, 1897, the People's National Bank called and gave notice of a special meeting of its stockholders, for the purpose of considering the proposition to turn over its building to Schleier, the owner of the land, and at the meeting held October 27, 1897, in pursuance of the notice, it was resolved so to do in consideration of a release by Schleier to the bank and its stockholders from all liability which might thereafter accrue under the terms of the lease. The lease was thereupon canceled and the premises surrendered to Schleier. This *is alleged by appellant to have been in [21] violation of the statutes of the United States, and contrary to the principles of equity governing the distribution and disposition of assets in the payment of dividends on dissolution of insolvent corporations.

It is also alleged, on information and belief, that the notice of the stockholders' meeting stated that the income of the property was less than the fixed charges, and that it was so stated at the stockholders' meeting by the officers of the bank and by Schleier's attorneys and agents, but such was not the case. On the contrary, it is alleged, on information and belief, that the income of the property, even in the condition which the neglect of the bank had brought it, was sufficient to pay the rents and all charges due under the lease and keep the building in good order and repair.

The grounds of the demurrers were want

of equity and laches. The demurrers were sustained and the bill ordered to be dismissed.

The judgment of dismissal was entered December 30, 1901. On the 1st of February, 1902, appellant tendered an amended bill of complaint and moved for leave to file the same. The motion was denied. This action is assigned as error, as well as the ruling on the demurrers.

Mr. James H. Brown argued the cause, and, with **Mr. Harper M. Orahood**, filed a brief for appellant.

Mr. John M. Waldron argued the cause, and, with **Messrs. R. D. Thompson, G. C. Bartels, J. H. Blood, and John F. Shaproth**, filed a brief for appellees.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court:

The bill prayed for a decree declaring the lease between the bank and Schleier and the instruments surrendering and canceling the same to be declared void and "*ultra vires* of [22] the acts *of Congress of the United States in respect to the powers of national banks to acquire, own, and hold real estate or to be or become indebted in the exercise of corporate powers, and that no title or right, legal or equitable, could be acquired under the same or either thereof by the said defendant Schleier to the said bank building and the appurtenances thereunto belonging." An accounting was also prayed, and that the amount found due be declared a lien upon the building and lots, and they be sold to satisfy the lien. The circuit court of appeals regarded the bill as charging, not only the initial, but the dominant and determining, wrong to be the lease; that being Schleier's participation in the alleged diversion of the bank's funds, constituting him a trustee for creditors. It was, therefore, natural for the court to observe the theory of the bill was that the lease was void, and that Schleier was liable for the damages which the creditors of the bank sustained in consequence of its execution without lawful authority. The court discussed that theory, and decided (1) that the power conferred by § 5137 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3460) upon national banks to purchase real estate needed for their accommodation in the transaction of their business included the power of leasing property whereon to erect buildings suitable for their wants; (2) assuming the transaction to have been *ultra vires*, the complainant (appellant) was not, by virtue of his office as receiver, "authorized to challenge or impeach it."

Appellant now says that the conception of the bill by the circuit court of appeals 194 U. S.

was incorrect, and "not only limits, but completely reverses, the theory of the bill, in a manner totally inconsistent with the admitted allegations." And appellant concedes "that only the government may complain of an executed *ultra vires* conveyance of real estate to a corporation," and rests his case upon "loss of the moneys and assets of the bank,—in the form of the bank building,—to which Schleier claims title through the conveyance and surrender on October 30, 1897, under the terms of his lease to the bank."

"We may take appellant at his word and [23] omit extended discussion of the first proposition, although he has indulged in much argument which confuses his concessions. For instance, his counsel say: "While denying the sufficiency of the lease to lawfully bind either the bank or its title to its \$305,000 capital assets, we say, very well, then! Since in the completed building in the actual possession of the bank, it still had an asset, the then depositors, now judgment creditors of this bank, represented by this appellant receiver, want to know why Schleier, who is not an innocent purchaser for value, without notice, should not be held liable to account for this asset, the building?"

But pronouncing Schleier not an innocent purchaser, denominating the building an asset of the bank, does not change the issues in the case. It is only another way of presenting them. Why should Schleier account for the building? Necessarily, either because of the execution of the lease or its surrender. Of its execution we need not make much comment. The lease certainly was not different from any other interest in real estate acquired *ultra vires*,—no more vulnerable to attack, no more a diversion of funds. Whether it would be a gain or loss—an antithesis made much of in argument to distinguish between the lease and an absolute conveyance—was a matter of judgment. It seems now to have been a folly for the bank to have put its whole capital in a building. But maybe that is the confident conclusion which can be formed after experience. The judgment of the bank in making the lease and erecting the building seems not to have been thought by creditors to have been improvident, and the Comptroller of the Currency did not disapprove. The bill alleges that the Comptroller of the Currency, in the year 1893, deemed an assessment of 20 per cent sufficient to redeem the bank from embarrassment and establish it as a solvent concern; and its chief creditor, the People's Savings Bank, whose affairs, the bill avers, had become "commingled and mixed" with those of the bank and thereby associated with its

[24] fortunes, must *have had absolute confidence in the value of the building, even though it represented diverted funds. If depreciation came afterwards, it was a misfortune. Under the concession of appellant, therefore, the validity of the lease must be assumed as against him, and the inquiry confined to the validity of the surrender; and that depends upon the condition of the bank at the time it was done. In other words, the lease, with its benefits or burdens, and the condition of the bank at the time of its surrender, must be the test of the action of the bank officers and the rights of creditors.

The bank was insolvent, taxes on the property were unpaid, and three months' rent was due. Under the terms of the lease, Schleier could pay the taxes, and for reimbursement and the satisfaction of the rent could sell the lease and all the right, title, and interest of the bank therein, or maintain personal actions for such taxes and rent. Schleier, therefore, for what was then due and for his monthly accruing rent, had not only a lien upon the property, but had, as well, the personal obligation of the bank. Against this liability what had the bank? The bill alleges nothing but the lease, and to that no value is assigned. Its revenue did not exceed its obligations. It is true it is alleged that the building had been allowed to get out of order, and that, notwithstanding its condition, the rents from it would have paid the charges against it. But the fact establishes nothing definite. What can be inferred from it? Such disproportion between the value received by Schleier and that received by the bank as to shock the conscience, establish fraud, and that the surrender of the lease was an illegal preference? The situation must be kept in mind. The bank was and had been insolvent. It was compelled to go into liquidation; it was in arrears for rent and taxes, and was confronted with ever-recurring liabilities which it might not be able to discharge,—certainly could not discharge unless it remained a going concern, which was not possible. Under such circumstances the settlement with Schleier does not seem to have been even bad judgment.

[25] And it was openly done,—advertised *in advance to all who were interested to prevent,—and the reason for it declared to be that the income of the property was less than the fixed charges; in other words, had no value,—represented only liabilities. No one intervened. Creditors did not, and this suit was not brought until December, 1900,—three years after the surrender of the lease. The conclusion is irresistible that the judgment of the stockholders in surrendering the lease was honestly and prudently exercised. This is fortified by

the prayer of the bill. Appellant does not ask to have the surrender of the lease set aside and the bank restored to its relations and obligations to Schleier. He asks that the bank be relieved from all obligations, and the cost of the building imposed as a charge upon the real estate.

It is unnecessary to discuss the ruling of the circuit court on the motion to file an amended bill. The bill tendered was fuller and more explicit than either the original bill or the amendments thereto, but it alleged nothing which would affect the legal conclusions from the facts to which we have adverted. And we may observe that it is exceedingly disputable whether it is an abuse of discretion to deny a motion to file an amended bill after final judgment has been entered.

Decree affirmed.

INTERSTATE COMMERCE COMMISSION, *Appt.*,
v.

DANIEL G. BAIRD, Fred F. Chambers,
George O. Waterman, *et al.*

(See S. C. Reporter's ed. 25-47.)

Direct appeal from circuit court—in proceeding for compulsory production of evidence before Interstate Commerce Commission—refusal to produce, when not justified on ground of irrelevancy—constitutional guaranty against self-accusation—unreasonable searches and seizures—effect of protection against use of evidence.

1. A direct appeal to the Federal Supreme Court from a final decree of a circuit court in a proceeding to compel the production of papers and the giving of testimony before the Interstate Commerce Commission is authorized by the proviso in the act of February 19, 1903 (32 Stat. at L. 849, chap. 708, U. S. Comp. Stat. 1901, Sup. of 1903, p. 365), § 3, making applicable to "any case" brought

NOTE.—On the direct review by United States Supreme Court of circuit or district court judgments or decrees under the circuit-court-of-appeals act—see note to Gwin v. United States, 46 L. ed. 741.

On constitutional protection against unreasonable searches and seizures—see note to Shuman v. Ft. Wayne, 11 L. R. A. 378.

On privilege of witnesses,—see notes to Cooper v. State, 4 L. R. A. 766; and Rice v. Rice, 11 L. R. A. 591.

On the constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Court, 29 L. R. A. 818.

Sufficiency of statutory immunity to satisfy constitutional guaranty against self-incrimination.

Prior to the decision of the Federal Supreme

- under the direction of the Attorney General, in the name of the Commission, the provisions of the act of February 11, 1903 (32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. 1901, Sup. for 1903, p. 376), the 2d section of which authorizes direct appeals from the Federal circuit courts to the Supreme Court in cases brought under the anti-trust or interstate commerce acts, although this section has reference only to suits in equity, and the paragraphs preceding the proviso in the later statute do not include proceedings of this character.
2. The refusal to produce contracts under which railroad companies engaged in carrying coal from the anthracite regions in Pennsylvania to tidewater, or coal companies owned by the railroads, purchase coal from independent operators engaged in mining in that district, for which payment is made on the basis of a fixed percentage of the average price at certain tide points of coal of the same quality and size, cannot be justified on the ground of irrelevancy, in a proceeding before the Interstate Commerce Commission on a complaint charging the railroad companies with violating the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to regulate commerce, by unfair discrimination and by charging unreasonable and unjust rates in carrying anthracite coal.
 3. The immunity extended by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to regulate commerce, as amended by the act of February 11, 1893 (27 Stat. at L. 443, chap. 83, U. S. Comp. Stat. 1901, p. 3173), from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law, satisfies the guaranty of the 5th Amendment of the Federal Constitution against compelling witnesses to furnish evidence against themselves.
 4. The compulsory production of documentary evidence in a proceeding before the Interstate Commerce Commission on a complaint alleging violations by railroad companies of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to regulate commerce, does not infringe the immunity from unreasonable searches and seizures guaranteed by the 5th Amendment to the Federal Constitution, since that act, as amended by the act of February 11, 1893 (27 Stat. at L. 443, chap. 83, U. S. Comp. Stat. 1901, p. 3173), expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law.
 5. Contracts of railroad companies or coal companies owned by the railroads, which are otherwise relevant and competent, are not inadmissible in evidence in a proceeding before the Interstate Commerce Commission on a complaint charging such companies with violations of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to regulate commerce, because they are made with third persons not parties to the proceeding.

Court in *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, a number of courts had decided that a constitutional guaranty against self-incrimination was not infringed by refusing the witness his privilege, where the subsequent use of his testimony against him is prohibited. *Ex parte Rowe*, 7 Cal. 184; *Ex parte Buskett*, 106 Mo. 602, 14 L. R. A. 407, 27 Am. St. Rep. 378, 17 S. W. 753; *La Fontaine v. Southern Underwriters' Assn.* 83 N. C. 132; *State v. Quarles*, 13 Ark. 307; *Higdon v. Heard*, 14 Ga. 255; *Wilkins v. Malone*, 14 Ind. 153; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, Overruled in *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353.

Other courts had held that no statute could deprive a witness of his constitutional privilege, unless it afforded absolute immunity from prosecution for the offense to which the incriminating question relates. *Cullen v. Com.* 24 Gratt. 624; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22.

Since the Federal Supreme Court, in *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, lent the weight of its authority in support of the latter view, the courts have quite uniformly adopted it, although this has in some cases necessitated overruling prior decisions. *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230 (Compare *Ex parte Rowe*, 7 Cal. 184); *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *Ex parte Carter*, 166 Mo. 604, 57 L. R. A. 654, 66 S. W. 540 (Compare *Ex parte Buskett*, 106 Mo. 602, 14 L. R. A. 407, 27 Am. St. Rep. 378, 17 S. W. 753); *State v. Burrell*, 27 Mont. 282, 70 Pac. 982; *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353, Over-

ruling *People ex rel. Hackley v. Kelly*, 24 N. Y. 74; *Miller v. Brown*, 22 Pa. Co. Ct. 109.

The lower Federal courts have, of course, followed this ruling of the Federal Supreme Court. *Re Scott*, 95 Fed. 815; *Re Rosser*, 96 Fed. 305; *Re Feldstein*, 103 Fed. 269; *Re Walsh*, 104 Fed. 518; *Foot v. Buchanan*, 113 Fed. 156; *Re Shera*, 114 Fed. 207; *Re Nachman*, 114 Fed. 995. The exception furnished by the ruling in *Mackel v. Rochester*, 42 C. C. A. 427, 102 Fed. 314, that the immunity given by the provision of the bankrupt act of July 1, 1898, § 7, that no testimony given by the witness "shall be offered in evidence against him in any criminal proceeding," satisfies the constitutional guaranty against self-incrimination, is based upon a misconception of the decision in *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644.

A statute affording complete immunity will deprive the witness of his privilege. *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644; *Ex parte Cohen*, 104 Cal. 524, 26 L. R. A. 423, 43 Am. St. Rep. 127, 38 Pac. 364; *Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *State v. Nowell*, 58 N. H. 314; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033; *Floyd v. State*, 7 Tex. 215; *Kendrick v. Com.* 78 Va. 493. The decision to the contrary in *United States v. James*, 26 L. R. A. 418, 5 Inters. Com. Rep. 578, 60 Fed. 257, was rendered before *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644, and is overthrown by the ruling in that case.

This question is also discussed in notes to *Re Buskett*, 14 L. R. A. 407, and *United States v. James*, 26 L. R. A. 418.

6. The production of contracts under which railroad companies engaged in interstate carriage of anthracite coal, who had acquired certain collieries whose proprietors were about to build a competing line, guaranteed the stock and bonds issued in payment therefor by a corporation whose charter they had purchased for that purpose, may be compelled in a proceeding before the Interstate Commerce Commission on a complaint charging such railroad companies with violations of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to regulate commerce, by the pooling of freights and the charging of unreasonable rates in carrying anthracite coal.

[No. 409.]

Argued March 7, 8, 1904. Decided April 4, 1904.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment dismissing the petition of the Interstate Commerce Commission to compel the production of books and papers and the giving of testimony before the Commission in a proceeding on a complaint alleging violations of the Act to Regulate Commerce. *Reversed* and remanded for further proceedings.

See same case below, 123 Fed. 969.

Statement by Mr. Justice **Day**:

This is an appeal from an order made in the circuit court of the United States for the southern district of New York in the matter of the petition of the Interstate Commerce Commission for orders requiring the testimony of witnesses and the production of certain books, papers, and documents. The petition recites that the Attorney General of the United States, at the request of the Interstate Commerce Commission, instructed the United States district attorney for the southern district of New York to present the petition and institute proper proceedings for the enforcement of the provisions of the acts to regulate interstate commerce, as amended, and to invoke the aid of the court in requiring the attendance and testimony of witnesses and the production of books, papers, and documents, pursuant to the provisions of said acts.

[27] The *case grows out of a complaint of William Randolph Hearst, filed on November 2, 1902, with the Interstate Commerce Commission, against the Philadelphia & Reading Railway Company, Lehigh Valley Railroad Company, Delaware, Lackawanna, & Western Railroad, Central Railroad Company of New Jersey, New York, Susquehanna, & Western Railroad Company, Erie Railroad Company, New York, Ontario, & Western Railway Company, Delaware & Hudson Company, Pennsylvania Railroad

Company, and Baltimore & Ohio Railroad Company.

In the complaint it was charged: That the defendants are common carriers, engaged in the transportation of passengers and freight between points in different states of the United States, and are particularly engaged in the transportation of anthracite and bituminous coal mined in Pennsylvania, Maryland, and West Virginia, and shipped as interstate traffic over said lines, and are carriers subject to the provision of the act of February 4, 1887 [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], to regulate commerce, and the acts amendatory thereto; that the rates charged and exacted by the defendants for the transportation of anthracite coal in carloads from points in the anthracite coal region of Pennsylvania to New York city and New York harbor points and internal points of destination in the state of New York, to Boston and other points in the New England states, to Baltimore and other points in the state of Maryland, and to Washington, in the District of Columbia, are unreasonable and unjust, and subject consumers and producers of such coal who are not common carriers or corporations owned and controlled by common carriers, to undue and unreasonable prejudice and disadvantage in favor of, and to the undue and unreasonable preference and advantage of, said defendants and companies under their control, in violation of §§ 1 and 3 of the Act to Regulate Commerce; that the rates charged and exacted by the defendants for the transportation of anthracite coal are relatively unreasonable and unjust, and unjustly discriminating against the interests of dealers and consumers of that commodity *as compared with the rates con-[28] temporarily charged by said defendants for transportation of bituminous coal for much longer distances and to the points of destination above mentioned, and also as compared with the defendants' rates and charges on other carload freight generally, all of which is a violation of §§ 1, 2, and 3 of the Act to Regulate Commerce; that the defendant companies—Lehigh Valley Railroad Company, Central Railroad Company of New Jersey, Delaware, Lackawanna, & Western Railroad Company, New York, Susquehanna, & Western Railroad Company, and the Philadelphia & Reading Railway Company—are, in the absence of agreement, natural competitors in the business of transporting anthracite coal from the coal fields of Pennsylvania to tidewater at New York, two of said defendants—the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey—being substantially parallel lines; that in 1896, 1897,

1898, 1899, 1900, and 1901 the six defendants last named, by an agreement and combination with one another, pooled, and have, during the year 1902, pooled, freights and freight traffic in anthracite coal, so as to divide the same between their different lines in agreed proportions, in violation of § 5 of the Act to Regulate Commerce. The prayer of the petition was that the defendants be required to make answer to the charges, and, after hearing, for an order or orders commanding the said defendants, and each of them, wholly to cease and desist from each and every of the alleged violations of the Act to Regulate Commerce, and for such further order or orders and action by the Commission as its duty under the act and the cause of petitioner and others similarly situated may require. Answers were filed by the railroad companies, taking issue with the allegations of the petition and denying violation of the law. In the course of the hearing certain witnesses refused to produce contracts and answer questions when required so to do by order of the Commission, which refusal gave rise to the petition to the circuit court. The character of the testimony required by the order [29] of the Commission is sufficiently *set forth in the opinion hereinafter given. To the petition answers were filed too lengthy to abstract, and in substance setting forth the right of the defendants to refuse the production of the papers and documents and to decline to answer the questions because the same did not relate to any subject which the Commission had the right to investigate, and the contracts relate to the private business of persons not parties to the proceedings before the Commission; that the witnesses are protected in their right to refuse to produce the contracts or answer the questions by the 4th, 5th, and 10th Amendments to the Constitution of the United States; that the contracts were not relevant to the subject-matter of investigation before the Commission. The circuit court placed its decision on the latter ground, and dismissed the petition of the Interstate Commerce Commission.

Mr. William A. Day argued the cause and filed a brief for appellant:

The present proceeding is a "case" (*Interstate Commerce Commission v. Brimson*, 154 U. S. 478, 38 L. ed. 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and it is being prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

Every presumption is in favor of the view that the marked change in phraseology from "every suit in equity," in the earlier statute, to the much more comprehensive words "any

case," in the later statute, was designed and intentional.

Rich v. Keyser, 54 Pa. 86; Endlich, Interpretation of Statutes, p. 534.

If the text is clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference is irresistible.

Martin v. Hunter, 1 Wheat. 304, 337, 4 L. ed. 97, 105.

It has come to be a very common thing for legislatures to use the word "provided" in a loose, inartificial sense, rather than in the technical sense in which it is used in works on statutory construction.

Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 242, 46 L. ed. 1144, 1146, 22 Sup. Ct. Rep. 881.

This court has recognized the broad range which the examinations of the interstate Commerce Commission must necessarily take if it is to fulfil the purposes of its creation.

Interstate Commerce Commission v. Brimson, 154 U. S. 473, 38 L. ed. 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 506, 42 L. ed. 243, 255, 17 Sup. Ct. Rep. 896; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 212, 233, 40 L. ed. 945, 952, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The objection that the production of the evidence would subject the witnesses who are asked to produce it to a penal forfeiture is completely met by the act of February 11, 1893, extending to persons who testify in proceedings under the Act to Regulate Commerce absolute immunity from penalties or forfeitures on account of any evidence they may have given, and by the decision of this court in *Brown v. Walker*, 161 U. S. 608, 40 L. ed. 825, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, construing that act.

Mr. John G. Carlisle also argued the cause and filed a brief for appellant.

Mr. Adelbert Moot argued the cause, and, with **Mr. George F. Brownell**, filed a brief for appellees Richardson and Sturges:

This case is not unlike the case of a supervisory order in bankruptcy proceedings,—that is, not a final order (*Wiswall v. Campbell*, 93 U. S. 347, 23 L. ed. 923; *Conro v. Crane*, 94 U. S. 441, 24 L. ed. 145), or an order dissolving an injunction pending suit (*McCullum v. Eager*, 2 How. 61, 64, 11 L. ed. 179); or the case of a discretionary order refusing to open a decree (*Brockett v. Brockett*, 2 How. 238, 240, 11 L. ed. 251); or an order refusing to let one intervene as a party (*Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49). The ground of these and like decisions is that the order appealed from does not dispose of or affect the main

proceedings upon the merits. So here the main proceeding is still pending, and not decided. As the Commission can render its decision therein upon the merits upon the evidence before and afterwards given by both parties, the order complained of is merely interlocutory, and so no appeal from it will lie (*McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 545, 36 L. ed. 1079, 1083, 13 Sup. Ct. Rep. 170). Furthermore, all the relevant facts being proved and undisputed, and the evidence sought to be adduced, at most, merely cumulative, this court should apply the same rule here that it does in other cases where there is some evidence, and should hold that, this being a matter resting in the discretion of the trial court, the action of that court in the premises is not assignable for error (*Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 128, 134, 35 L. ed. 961, 963, 12 Sup. Ct. Rep. 181).

An appeal to this court does not lie unless the party appealing has an interest in the controversy.

Bryant v. Thompson, 128 N. Y. 426, 13 L. R. A. 745, 28 N. E. 522.

If a statute does not authorize the appeal the United States cannot maintain an appeal in this court (*United States v. Union P. R. Co.* 105 U. S. 264, 26 L. ed. 1021). Nor can an official succeed upon appeal when he is not legally aggrieved, even if other officials are aggrieved, who do not appeal (*Cherokee County v. Wilson*, 109 U. S. 626, 27 L. ed. 1055, 3 Sup. Ct. Rep. 352).

The principle is this: That a party not legally affected by a decision cannot appeal; as trustees of bondholders (*Farmers' Loan & T. Co. v. Waterman*, 106 U. S. 269, 27 L. ed. 116, 1 Sup. Ct. Rep. 131); a receiver (*Close v. Glenwood Cemetery*, 107 U. S. 474, 27 L. ed. 411, 2 Sup. Ct. Rep. 267); or an unaffected party generally (*Brown v. Smart*, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 958).

The Commission has, and can have, no legal controversy with the parties here, and, by submitting the case to the Commission for decision upon further evidence, without instituting this proceeding, Mr. Hearst has shown that he has no controversy to bring here, so no controversy is brought before this court by the appeal, and it must be dismissed.

Little v. Bowers, 134 U. S. 547, 558, 33 L. ed. 1016, 1020, 10 Sup. Ct. Rep. 620.

Neither branch of the government, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness, than the right of personal security, and that involves exemption of his private affairs, books, and papers from inspection and scrutiny of others.

Re Pacific R. Commission, 32 Fed. 241; *Interstate Commerce Commission v. Brimson*, 154 U. S. 478, 479, 38 L. ed. 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

It was not intended to give the Commission the power to inquire into the business of coal mining companies, or the business of coal mining, or the business of selling coal, even if coal mining corporations turn out to be railroad corporations, or corporations owned by railroads, where that is permitted, as in Pennsylvania.

Com. ex rel. Atty. Gen. v. New York, L. E. & W. R. Co. 132 Pa. 591, 7 L. R. A. 634, 19 Atl. 291, 139 Pa. 457, 21 Atl. 528.

The business of such corporations engaged in mining and selling coal in Pennsylvania, whether that business is regarded as appertaining to real estate (*Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858), or domestic commerce touching personal property (*United States v. E. C. Knight Co.* 156 U. S. 1, 11, 39 L. ed. 325, 328, 15 Sup. Ct. Rep. 249), is all domestic business subject to the laws of the state of Pennsylvania, and not subject to the provisions of the Interstate Commerce Act. It follows, therefore, that the coal-purchase contracts which appellee Sturges and appellee Richardson were asked to produce by the Commission are contracts touching mines and domestic business wholly within the state of Pennsylvania, and wholly outside of the jurisdiction of the Commission.

Mr. **Walter W. Ross** argued the cause and filed a brief for appellees Truesdale, Chambers, and Post:

The intention of Congress should govern in the construction of a congressional act.

Ogden v. Saunders, 12 Wheat. 331, 6 L. ed. 646; *Petri v. Commercial Nat. Bank*, 142 U. S. 650, 35 L. ed. 1146, 12 Sup. Ct. Rep. 325; *McKee v. United States*, 164 U. S. 293, 41 L. ed. 439, 17 Sup. Ct. Rep. 92; *Smith v. Townsend*, 148 U. S. 494, 37 L. ed. 534, 13 Sup. Ct. Rep. 634; *Van Patten v. Chicago, M. & St. P. R. Co.* 81 Fed. 547; *Smythe v. Fiske*, 23 Wall. 374, 380, 23 L. ed. 47, 49; *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517.

The reviewing of questions of relevancy of evidence is largely a matter of detail work, and it was for the purpose of relieving this court of such work, and that it might devote itself to the performance of more important duties, that Congress passed the act of March 3, 1891, commonly known as the Evans act.

McLish v. Roff, 141 U. S. 665, 35 L. ed. 894, 12 Sup. Ct. Rep. 118.

The motion to dismiss the appeal should be granted.

Interstate Commerce Commission v. Atchison, T. & S. F. R. Co. 149 U. S. 264, 37 L. ed. 727, 4 Inters. Com. Rep. 347, 13 Sup. Ct. Rep. 837.

Complainant, having no interest in these contracts, has no right to demand their production.

Greenl. Ev. § 298.

These contracts, made between citizens of the state of Pennsylvania, are private and the parties thereto are entitled to the protection guaranteed by the Constitution,—at least until they have been charged in the proper forum with having violated some law of the land.

Interstate Commerce Commission v. Brimson, 154 U. S. 478, 38 L. ed. 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

There can be no reasonable doubt that a contract made between citizens of the state of Pennsylvania, which provides that the owner will sell a part or all of the coal which he digs from his mines to the purchaser at a certain price, the coal to be delivered by the seller to the purchaser at the mines in the state of Pennsylvania, is wholly a domestic transaction, and governed exclusively by the domestic law, if such law is not in conflict with the Constitution of the United States. The coal which is the subject of the contract is a part of the general mass of property of the state, and subject to its jurisdiction. The purchase of the coal at the mines was a domestic transaction and subject exclusively to the laws of Pennsylvania, and the Interstate Commerce Commission exceeded its jurisdiction when it directed the witnesses, at the request of Hearst, to produce such contracts for his inspection, or when it directed the witnesses to produce papers showing the cost of such coal, or to answer questions as to the cost of producing coal or selling it. When, however, the coal started on its final movement for transportation from Pennsylvania to New Jersey—or any other state—the rate charged for its transportation became a proper subject of inquiry before the Commission, under proper circumstances. The witnesses did not refuse to give any evidence on that subject. But when the coal arrived at its destination in another state it forthwith became intermingled with the property of such state and subject to its jurisdiction, and the Commission was without jurisdiction to require the witnesses to answer questions as to the selling price of coal.

These principles are firmly established by the decisions of this court.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 194 U. S.

257, 5 Sup. Ct. Rep. 1091; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266.

Mr. John G. Johnson argued the cause, and, with *Mr. J. D. Campbell*, filed a brief for appellees Baer and Brown.

Messrs. John G. Johnson, Francis I. Gowen, and F. H. Janvier filed a brief for appellees Baird and Thomas.

Messrs. Robert Thorne and Robert W. DeForest filed a memorandum on behalf of appellee Waterman.

Messrs. John G. Johnson, J. D. Campbell, Robert Thorne, Robert W. DeForest, Francis I. Gowen, and F. H. Janvier, also filed a brief in support of the motion to dismiss.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court:

A motion is made to dismiss the appeal upon the ground that no direct appeal lies to this court from the order of the circuit court. The act of February 19, 1903 [32 Stat. at L. 849, chap. 708; U. S. Comp. Stat. *1901, Sup. of 1903, p. 365], to further regulate commerce with foreign nations and among the states, § 3, closing paragraph, enacts, "Provided. That the provisions of an act entitled [32 Stat. at L. 823, chap. 544; U. S. Comp. Stat. Supp. 1903, p. 376] 'An Act to Expedite the Hearing and Determination of Suits in Equity Pending or Hereafter Brought Under the Act of July Second, Eighteen Hundred and Ninety, Entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], "An Act to Regulate Commerce," Approved February Fourth, Eighteen Hundred and Eighty-seven [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], or Any Other Acts having a Like Purpose That May Be Hereafter Enacted, Approved February Eleventh, Nineteen Hundred and Three,' shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

The 2d section of the act of February 11, 1903 (U. S. Comp. Stat. 1901, Sup. for 1903, p. 376), provides, "That in every suit in equity pending or hereafter brought in

any circuit court of the United States under any of said acts [having reference to the anti-trust act of 1890 and the Act to Regulate Commerce mentioned in the preceding section] wherein the United States is complainant, including cases submitted but not yet decided; an appeal from the final decree of the circuit court will lie only to the Supreme Court, and must be taken within sixty days from the entry thereof."

In support of the motion to dismiss it is argued that the language of the proviso of § 3, above quoted, "shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission," must be read in connection with preceding paragraphs of the section, which provide for bringing actions by direction of the Attorney General in the circuit courts of the United States, and do not include proceedings of the character of the present action to compel the production of books and papers and the giving of testimony by witnesses called before the Commission.

It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality, and to prevent misinterpretation. [37] *Minis v. United States*, 15 Pet. 423, 10 L. ed. 791; *Austin v. United States*, 155 U. S. 417-431, 39 L. ed. 206-211, 15 Sup. Ct. Rep. 167; *White v. United States*, 191 U. S. 545, 551, ante, 295, 24 Sup. Ct. Rep. 171. It is apparent that this proviso was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of enlarging the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be admitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is, nevertheless, a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before.

In *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 242, 46 L. ed. 1144, 1146, 22 Sup. Ct. Rep. 881, 883, the subject was under consideration, and Mr. Justice Brewer, delivering the opinion, while recognizing the restrictive office of a proviso as stated by Mr. Justice Story in *Minis v. United States*, 15 Pet. 423, 445, 10 L. ed. 791, 799, added: "While this is the general effect of a proviso, yet in practice it is not always so limited. As said in *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47: 'The general purpose of a proviso, as is

well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.'"

The provision in the statute under consideration being intended to enlarge rather than limit the application of previous terms should not receive so narrow a construction as to defeat its purpose. It extends the [38] terms of the act of February 11, 1903, to "any case" brought under the direction of the Attorney General in the name of the Interstate Commerce Commission. The 2d section of the act of February 11 has reference, it is true, to a suit in equity under certain acts wherein the United States is complainant, and the argument is that the extension of the terms of this act in the act of February 19 is only to suits in equity. But for some reason Congress, in the act under consideration, saw fit not to limit the terms of the extension to suits or proceedings provided for in § 3 of the act of February 19, or to suits in equity, but broadly extended the rights and privileges of the act of February 11 to "cases" of the character designated. We cannot assume that this use of the broader term was without purpose. Before the passage of this act this court had held that a petition filed under § 12 of the Interstate Commerce Act (U. S. Comp. Stat. 1901, p. 3162) against a witness duly summoned to testify before the Commission, to compel him to testify or to produce books, documents, and papers relating to the matter in controversy, makes a case or controversy to which the judicial power of the United States extends. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125. The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers. We cannot read these statutes without perceiving the manifest purpose of Congress to facilitate the disposition of cases brought under the direction of the Attorney General to enforce the provision of the anti-trust and inter-

state commerce statutes. The present proceeding is not merely advisory to the Commission, but, as was said in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, a judgment rendered will be a final and indisputable basis of action as between the Commission and the defendant, and furnish a precedent for similar cases. While it has for its object the obtaining of testimony in aid of proceedings before the Commission, it is evident that important questions may be involved [39] *touching the power of the Commission and the constitutional rights and privileges of citizens. Congress deemed it imperative that such cases, affecting the commerce of the country as well as personal rights, should be promptly determined in a court of last resort.

If the appeal in the first instance was to the court of appeals the judgment of that court would not be final under the act of March 3, 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547], and in such case this court would still be required to consider the cases on final appeal. We think it was the purpose of the act to eliminate an appeal to the circuit court of appeals, and to permit the litigation to be shortened by a direct appeal to this court.

We pass, now, to the merits of the controversy. The record in this case is voluminous, and much of the discussion before the Commission is printed. We shall endeavor to classify and consider the questions made so as to indicate our holdings with a view to a proper judgment in the case.

It is urged that the complainant before the Commission did not show any real interest in the case brought and that the proceeding should, for that reason, have been dismissed. It is provided in the Act to Regulate Commerce, § 13, that "any person, firm, corporation," etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, etc. And certain procedure is provided for—and (said Commission) "may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made;" and the section concludes: "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant." In face of this mandatory requirement that the complaint shall not be dismissed because of the want of direct damage to the complainant, no alternative is left the Commission but to investigate the complaint, if it presents matter within 194 U. S.

the purview of the act and the powers granted to the Commission.

*Power is conferred upon the Commission, [40] under § 12 of the act as amended March 2, 1889 (25 Stat. at L. 858, chap. 382, U. S. Comp. Stat. 1901, p. 3162), and February 10, 1891 (26 Stat. at L. 743, chap. 128, U. S. Comp. Stat. 1901, p. 3162), to inquire into the management of the business of all common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.

In making the orders which were the basis of the application to the circuit court, and in the petition filed therein, it is set forth that the Commission, at the time when the witnesses refused to produce the contracts required was engaged "in the discharge of its duty to execute and enforce the provisions of the Act to Regulate Commerce, and in the exercise of its authority to inquire into the business of common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which said business is conducted, and to obtain from said common carriers full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created; and your petitioner is of the opinion that said contracts are not only material and relevant to the issues on trial in said proceeding, but that the production thereof as required by it, as aforesaid, is necessary to enable your petitioner to discharge its duty and execute and enforce said provisions of said Act to Regulate Commerce and to inform your petitioner as to the manner and method in which the business of said common carriers is conducted, and to enable your petitioner to obtain the full and complete information necessary to enable your petitioner to perform the duties and carry out the objects for which it was created."

But in the present case, whatever may be the right of the Commission to carry on an investigation under the general powers conferred in § 12, this proceeding was under the *complaint filed, and we will examine the [41] testimony offered with a view to its competency under the allegations made by the complainant.

Coming now to the specific items of testimony which the circuit court, in dismissing the petition, considered irrelevant to the controversy, we will first consider the so-called coal purchase contracts.

It is unnecessary for the present purpose

to go into detail as to the provisions of these contracts. In the main they were made with coal companies owned principally by the railroad companies and contain the same general provisions. Among others, the purchase price of anthracite coal above a certain size is to be 65 per cent of the average price, computed monthly, at certain tide points, of coal of the same quality and size. All the coal mined by the contracting operators is sold, shipments to be made as called for by the purchasers.

While the contracts were produced for inspection, the witnesses refused to permit them to be given in evidence. The circuit court held them to be irrelevant upon the ground that they related solely to an intrastate transaction,—the sale of the coal in Pennsylvania,—and had nothing to do with interstate commerce. It appears that the railroad companies proceeded against in the complaint are engaged in carrying coal from the anthracite coal regions to tidewater. The contracts are between certain coal companies and independent operators engaged in mining coal in that region. The testimony shows that the coal companies making the contracts are principally owned by the railroad companies. For what purpose this separate ownership is maintained it is not necessary now to inquire. The fact of such ownership is undisputed, and for the present purpose it may be conceded that the ownership is lawful under the laws of the state of Pennsylvania.

The railroads are all engaged in interstate commerce, and into their affairs and methods of doing business the Commission might be, and is, lawfully authorized by the commerce act to make investigation. In [42]speaking of this power as undertaken *to be vested in the Commission, this court said in the *Brimson Case*, 154 U. S. 472, 38 L. ed. 1055, 4 Inters. Com. Rep. 554, 14 Sup. Ct. Rep. 1131: "It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations, or preferences by carriers engaged in interstate commerce, in respect to property or persons transported from one state to another, is a proper regulation of interstate commerce, or that the object that Congress has in view by the act in question may be legitimately accomplished by it under the power to regulate commerce among the several states. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object to be accomplished. The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act, and to in-

vestigate the whole subject of interstate commerce as conducted by such carriers, and in that way to obtain full and accurate information of all matters involved in the enforcement of the act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation."

In *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 506, 42 L. ed. 243, 255, 17 Sup. Ct. Rep. 896, 903, this court held that the Commission had no power to fix rates. In the course of the opinion it was said: "It [the Commission] is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right, to compel complete and full information as to the manner in which such carriers are transacting their business."

The testimony shows that much of the coal purchased under these contracts is sold in Pennsylvania, but a considerable portion is carried to tide water. The coal is purchased *by companies owned by the railroads, [43] for which payment is made on the basis of 65 per cent of the general average price received at tidewater by the sale of sizes above pea coal, leaving 35 per cent for the purchaser, from which he must pay transportation charges and cost of sale. Here is a railroad company engaged at once in the purchase of coal through a company which it practically owns and the transportation of the same coal through different states to the seaboard. Why may not the Interstate Commerce Commission, under the powers conferred, and under this complaint, inquire into the manner in which this business is done? It has the right to know how interstate traffic is conducted, the relations between the carrier and its shippers, and the rates charged and collected. We see no reason why contracts of this character, which have direct relation to a large amount of its carrying trade, can be withheld from examination as evidence by the Commission. These contracts were made by the officials of the railroad companies, who were also officials of the coal companies, after protracted conferences. Upon the ground that they pertained to the manner of conducting a material part of the business of these interstate carriers, which was under investigation, we think the Commission had a right to demand their production. And, further, it was claimed that, while these contracts were in form purchases of coal, their real

purpose was to fix a rate for transportation to the carriers, who were in fact paid for the only interest they had in the coal,—the right to receive pay for its transportation,—by the percentage retained from the selling price after deducting charges and expenses in marketing the coal.

It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy, or deciding which of the contending claims will be finally established. This is a question of relevancy of proof before a body not authorized to make a final judgment, but to investigate and make orders which may or may not be finally embodied in judgments or decrees of the court. If the railroad companies in fact received [44] their *compensation for carriage from the sum retained by the coal companies as was claimed, then, whether they realized more or less than their published rates depended upon the price of coal. Taking the prices at times as shown in the statements filed with the Commission, it is apparent that the 35 per cent was less than published rates, and if that was the sum received for transportation, would work a discrimination against coal companies not having such contracts, and paying the full rate. On the other hand, if the coal companies paid the full rate, and failed to realize as much from the percentage of the selling price retained, they would be losing money, and as they were owned by the railroad companies the loss would be ultimately theirs, and not the coal companies. It may be that the Commission or the courts will ultimately find that these contracts do not fix the compensation received by the carriers, and that, as claimed, the full rate is paid by these purchasing companies, and if there is a loss on these contracts it is made up in other business; but, as we have said, the question concerns the relevancy of proof, and not whether it finally establishes the issue made, one way or the other. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. Relevancy is that "quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue between the parties to a suit." 1 Bouvier Law Dict. Rawle's Revision, 866.

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspond-

ence is required between allegation and proof.

It is contended in the answers filed in the circuit court that to require the production of these contracts would be to compel *the [45] witnesses to furnish evidence against themselves which might result in forfeiture of estate, in violation of the 5th Amendment to the Constitution; would subject the parties to unreasonable searches and seizure of their papers, contrary to the 4th Amendment, and would require them to produce papers pertaining wholly to intrastate affairs, in violation of the reserved rights of the people of the states, and beyond the power of the Commission, whose duties are limited to investigations pertaining to interstate commerce.

At the hearing the constitutional objections do not seem to have been relied upon; those argued pertained to the relevancy of the proof and the rights of persons not before the court to be protected from the publication of their private contracts. As to the constitutional objection based upon the 5th Amendment, the act as amended February 11, 1893 [27 Stat. at L. 443, chap. 83, U. S. Comp. Stat. 1901, p. 3173], expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. The full consideration of the subject and the decision of this court in *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, renders further consideration of this objection unnecessary.

The origin and interpretation of the 4th Amendment to the Constitution, securing immunity from unreasonable searches and seizures, was fully discussed by Mr. Justice Bradley in the leading case of *Boyd v. United States*, 116 U. S. 616, 26 L. ed. 746, 6 Sup. Ct. Rep. 524. In that opinion the learned Justice points out the analogy between the 4th and 5th Amendments, and the object of both to protect a citizen from compulsory testimony against himself which may result in his punishment or the forfeiture of his estate, or the seizure of his papers by force, or their compulsory production by process for the like purpose. In the course of the opinion it is said: "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th *Amendments run al- [46] most into each other." And see *Adams v. New York* (decided at this term), 192 U. S. 585, ante, 575, 24 Sup. Ct. Rep. 372.

As we have seen, the statute protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate. Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure. Indeed, the parties seem to have made little objection to the inspection of the papers, the contest was over their relevancy as testimony. Nor can we see force in the suggestion that these contracts were made with persons not parties to the proceeding. Undoubtedly the courts should protect nonlitigants from unnecessary exposure of their business affairs and papers. But it certainly can be no valid objection to the admission of testimony, otherwise relevant and competent, that a third person is interested in it.

As to the so-called Temple Iron Company contracts: It appears that in 1889 certain operators in the anthracite coal region organized a competing railroad, with a view to carrying their product from the coal regions to market at tidewater. It became evident that this company was likely to succeed, and to construct a competing railroad from the coal fields to the sea. With a view to acquiring its property, five of the leading railroad carriers purchased the collieries whose proprietors were developing the new scheme. To pay for these the charter of the Temple Iron Company was purchased and its capital stock increased. The company issued a large amount of stock and bonds, and the contracting railroad companies agreed among themselves and with the Guaranty Trust Company of New York, as trustee, to guarantee a 6 per cent dividend upon the Temple Iron Company stock and the payment of principal and interest of the bonds. This ended the building of an independent line, and the transportation of coal from the collieries is distributed among the carriers interested.

It is argued that these contracts, if given in evidence, will tend to show a pooling of [47]freights, in violation of the 5th *section of the commerce act. While this testimony may not establish such an arrangement as is suggested, it has, in our opinion, a legitimate bearing upon the question. There is a division of freight among several railroads, where, by agreement or otherwise, the companies have a common interest in the source from which it is obtained. Furthermore, we think the testimony competent as bearing upon the manner in which transportation rates are fixed, in view of determining the question of reasonableness of rates, into which the Commission has a right to inquire. To unreasonably hamper the Commission by narrowing its field of inquiry be-

yond the requirements of the due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purposes for which it was established by Congress.

An appeal is also prosecuted from the refusal of the circuit court to order the witnesses Eben B. Thomas and William H. Truesdale to answer certain questions respecting the prices and sale of coal. Upon the principles already discussed we think these questions had legitimate bearing upon the matters into which the Commission was making inquiry.

We are of the opinion that the circuit court erred in holding the contracts for the purchase of coal by the companies or directly by the railroad, where a percentage of the price was agreed to be paid for the coal, to be irrelevant, and in refusing to order their production as evidence by the witnesses who are parties to the appeal, and likewise erred as to the Temple Iron Company contracts, and in refusing to require the witnesses aforesaid to answer the questions stated in the petition, and *the order appealed from is reversed*, and the cause is remanded to the Circuit Court for further proceedings in accordance with this opinion.

Mr. Justice **Brewer** dissents.

*STATE OF MINNESOTA, *Appt.*, [48]
v.

NORTHERN SECURITIES COMPANY,
Great Northern Railway Company, Northern
Pacific Railway Company, *et al.*

(See S. C. Reporter's ed. 48-73.)

Removal of causes—case arising under Federal Constitution or laws—jurisdiction of circuit court—suit by state to enjoin violation of anti-trust act.

1. A case cannot be removed from the state

NOTE.—On removal of cause generally—see notes to *Whelan v. New York*, L. E. & W. R. Co. 1 L. R. A. 65; *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 346; and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

On removal of causes from state to Federal courts, where the Constitution of the United States, or an act of Congress, or a treaty, comes in question—see note to *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656. See also *Ferguson v. Ross*, 3 L. R. A. 322, and note, and *Austin v. Gagan*, 5 L. R. A. 476, and note.

As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308, and *Re Buchanan*, 39 L. ed. U. S. 884.

court to a Federal circuit court, as one arising under the Constitution or laws of the United States, unless plaintiff's statement of his own claim shows it to be a case of that character.

2. A state may not, by a suit in its own name, invoke the original jurisdiction of a Federal circuit court to restrain and prevent violations by competing interstate railway companies, of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), because, alone, of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by such carriers within its limits.
3. An allegation in a complaint that full faith and credit will not be given to the public acts of Minnesota if a New Jersey corporation organized for the purpose of acquiring the control of two competing interstate railway companies engaged in business in Minnesota is allowed to carry out the object of its incorporation does not present a cause arising under the Federal Constitution, of which a circuit court of the United States can take jurisdiction.

[No. 433.]

Argued January 7, 8, 1904. Decided April 11, 1904.

APPPEAL from the Circuit Court of the United States for the District of Minnesota to review a decree dismissing, on the merits, the bill in a suit to prevent and restrain the violation, by competing carriers, of the laws of that state and of the anti-trust act of Congress, which had been removed to that court from the District Court for the County of Ramsey, in the state of Minnesota. *Reversed*, and remanded with directions that the case be remanded to the state court.

See same case below, 123 Fed. 692.

The facts are stated in the opinion.

Messrs. W. B. Douglas and M. D. Munn argued the cause, and, with **Mr. George P. Wilson**, filed a brief for appellant on the merits.

Messrs. W. B. Douglas, M. D. Munn, and George P. Wilson, in response to the invitation of the court, also filed a brief for appellant on the question of the jurisdiction of the circuit court:

The circuit court has jurisdiction of all civil actions in part arising under, or depending upon, the construction of the Constitution or laws of the United States, or treaties made therewith.

Postal Teleg. Cable Co. v. United States, 155 U. S. 482, *sub nom. Postal Teleg. Cable Co. v. Alabama*, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *Ames v. Kansas*, 111 U. S. 462, 28 L. ed. 487, 4 Sup. Ct. Rep. 437; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 203, 24 L. ed. 658; *Shoshone Min.* 194 U. S.

Co. v. Rutter, 177 U. S. 507, 44 L. ed. 865, 20 Sup. Ct. Rep. 726; *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472.

It is settled that the Supreme Court of the United States is without original jurisdiction of this controversy.

Minnesota v. Northern Securities Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308.

Assuming the facts to be as stated in the affidavit of the president of the Northern Securities Company, to the effect that the Northern Securities Company is not the owner of any property situated in Minnesota, and never transacted any business therein, the courts of Minnesota cannot acquire jurisdiction to hear and determine the issues involved herein, for the reason that jurisdiction over the person of the Northern Securities Company cannot be obtained.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Cabanne v. Graf*, 87 Minn. 510, 59 L. R. A. 735, 94 Am. St. Rep. 722, 92 N. W. 461; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728.

It was settled in the case of *Minnesota v. Northern Securities Co.* 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308, that the Northern Pacific and Great Northern railway companies are necessary parties with the Securities company; and, being residents of different states, and not engaged in doing business in any single state, it follows that jurisdiction of the person of all the defendants cannot be obtained elsewhere than in this court, in which the Securities company has voluntarily appeared.

Under the construction of the Federal Constitution which obtained in *California v. Southern P. Co.* 157 U. S. 270, 39 L. ed. 698, 15 Sup. Ct. Rep. 591; and *Minnesota v. Northern Securities Co.* 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308, it follows, as prophesied by Mr. Justice Harlan and Mr. Justice Brewer in their dissenting opinion in *California v. Southern P. Co.*, unless a Federal question is deemed to exist in this record which gives to the circuit court of the United States jurisdiction over the subject-matter of the action, that, under our dual form of government, a sovereign state will be deprived of the right to invoke the jurisdiction of any court in the land for the purpose of enforcing its laws or protecting its proprietary interests from unlawful acts done in violation of the laws of the state or nation.

The pending controversy is one in part arising under and depending upon the construction of the laws of the United States.

Ames v. Kansas, 111 U. S. 462, 28 L. ed. 487, 4 Sup. Ct. Rep. 437; *Postal Teleg. Cable Co. v. United States*, 155 U. S. 482, *sub nom. Postal Teleg. Cable Co. v. Alabama*, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 203, 24 L. ed. 658; *Shoshone Min. Co. v. Rutler*, 177 U. S. 507, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; *Defiance Water Co. v. Defiance*, 191 U. S. 184, *ante*, 140, 24 Sup. Ct. Rep. 63; *Northern P. R. Co. v. Townsend*, 190 U. S. 270, 47 L. ed. 1046, 23 Sup. Ct. Rep. 671.

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defense, of the party, in whole or in part, by whom they are asserted.

New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 141, 26 L. ed. 98.

It is not sufficient, to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but, when a question, to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved.

Ibid.

If a Federal question is fairly presented by the record, and its decision is necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right within the meaning of Rev. Stat. § 709, as if it had been specifically referred to, and the right directly refused.

Chapman v. Goodnow, 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211.

This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court.

Willson v. Blackbird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; *Armstrong v. Athens County*, 16 Pet. 281, 10 L. ed. 965; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Eureka Lake & Y. Canal Co. v. Superior Court*, 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *Kaukauna Water Power Co. v. Green*
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Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

If that court could, by that assumption, bind this court, the supervising authority would be lost in every case by the simple assertion of the court below that it placed its decision on some particular ground of its own creation. To assent to any such doctrine would be to abrogate the jurisdiction of this court in a most important particular.

O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

Whenever a right is claimed under an act of Congress, and the determination of such claim is dependent upon the nature and effect of such act, its solution necessarily involves a Federal question.

Northern P. R. Co. v. Townsend, 190 U. S. 270, 47 L. ed. 1046, 23 Sup. Ct. Rep. 671; *Parker v. Winnipiseogee Lake Cotton & Woollen Co.* 2 Black, 551, 17 L. ed. 337; *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249.

A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property, must ensue.

Wynstanley v. Lee, 2 Swanst. 335; *Atty. Gen. v. Nichol*, 16 Ves. Jr. 342; *Cherrington v. Abney*, 2 Vern. 646; *Bathurst v. Burden*, 2 Bro. Ch. 64; *Nutbourn v. Thornton*, 10 Ves. Jr. 163; *Mohawk & H. R. Co. v. Arther*, 6 Paige, 83; *Waterman's Eden*, Inj. 659, note; *Parker v. Winnipiseogee Lake Cotton & Woollen Co.* 2 Black, 551, 17 L. ed. 337; *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249.

It will also give its aid to prevent oppressive and interminable litigation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damage at law, or is such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction.

Mitford, Eq. Pl. 144; *Jeremy*, Eq. Jur. 300; *Fishmongers' Co. v. East India Co.* 1 Dick. 163; *Atty. Gen. v. Nichol*, 16 Ves. Jr. 342; *New York v. Mapes*, 6 Johns. Ch. 46; *Mohawk & H. R. Co. v. Arther*, 6 Paige, 83; *Parker v. Winnipiseogee Lake Cotton & Woollen Co.* 2 Black, 551, 17 L. ed. 337; *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249.

A state may sue to redress injuries which are strictly analogous to those suffered by private individuals.

United States v. San Jacinto Tin Co. 125
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U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *United States v. American Bell Teleph. Co.* 128 U. S. 315, 317, 32 L. ed. 450, 9 Sup. Ct. Rep. 90; *Missouri v. Illinois*, 180 U. S. 240, 45 L. ed. 512, 21 Sup. Ct. Rep. 331; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552.

The question as to whether or not the case was properly removed from the state to the Federal court is in itself a Federal question.

Baltimore & O. R. Co. v. Koontz, 104 U. S. 15, 26 L. ed. 646.

The case having been appealed to this court, and this court, on its own motion, having questioned the correctness of the removal from the state to the Federal court, that establishes the jurisdiction of this court on appeal over the entire case should this court determine that the case was properly removed from the state to the Federal court.

Oakley v. Goodnow, 118 U. S. 44, 30 L. ed. 62, 6 Sup. Ct. Rep. 944; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687.

Messrs. **John G. Johnson** and **George B. Young** argued the cause, and, with Messrs. *M. D. Grover* and *C. W. Bunn*, filed a brief for appellees on the merits.

Mr. W. P. Clough also filed a brief for appellee the Northern Securities Company.

Messrs. *John G. Johnson*, *George B. Young*, *M. D. Grover*, and *C. W. Bunn*, in response to the invitation of the court, also filed a brief for appellees on the question of the jurisdiction of the circuit court:

The criterion of a suit arising under the Constitution or laws of the United States was stated as follows by Chief Justice Marshall: A cause may depend upon several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles, unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Under this construction, the judicial power of the United States extends effectively and beneficially to that most important class of cases which depends on the character of the cause.

Osborn v. Bank of United States, 9 Wheat. 738, 822, 6 L. ed. 204, 224.

This criterion of a suit arising under the Constitution or laws of the United States is the same that had already been stated by the chief justice and applied by the court in 194 U. S.

a case brought into this court on writ of error to the supreme court of a state.

Cohen v. Virginia, 6 Wheat. 264, 379, 5 L. ed. 257, 285.

This test, so long ago established, has ever since been recognized and followed, in whatever aspect and at whatever stage a suit may be brought to a Federal court. It has been quoted in nearly all, and has been the ground of decision in all, of the cases involving the question, whether suits by original process or removed suits. Among the principal of these cases are—

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 201, 24 L. ed. 656, 658; *Tennssec v. Davis*, 100 U. S. 257, 264, 25 L. ed. 648, 650; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 140, 26 L. ed. 96, 98; *Ames v. Kansas*, 111 U. S. 449, 462, 28 L. ed. 482, 487, 4 Sup. Ct. Rep. 437; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414-416, 28 L. ed. 794, 795, 5 Sup. Ct. Rep. 208; *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; *Starin v. New York*, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28; *Southern P. R. Co. v. California*, 118 U. S. 109, 112, 30 L. ed. 103, 104, 6 Sup. Ct. Rep. 993; *Metcalf v. Watertown*, 128 U. S. 586, 588, 589, 32 L. ed. 543, 544, 9 Sup. Ct. Rep. 174; *Shreveport v. Cole*, 129 U. S. 36, 41, 43, 32 L. ed. 589, 591, 9 Sup. Ct. Rep. 210; *Bock v. Perkins*, 139 U. S. 628, 630, 35 L. ed. 314, 315, 11 Sup. Ct. Rep. 677.

The foregoing cases were decided under the act of 1875.

In the act of 1887-8 Congress, using the same terms as in the act of 1875, did not mean to use them in any different sense from that already given to them by this court. On the contrary, it re-enacted them as thus construed.

And this court has never intimated that the criterion declared by Chief Justice Marshall, and adopted and applied by itself in so many cases, was erroneous in itself, or had been rendered inapplicable to any class of cases by the amending act of 1887-8.

The following cases originated after the latter act—

Cooke v. Avery, 147 U. S. 375, 384, 37 L. ed. 209, 212, 13 Sup. Ct. Rep. 340; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 133, 143, 37 L. ed. 1030, 1032, 14 Sup. Ct. Rep. 35; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 580, 581, 44 L. ed. 276, 281, 20 Sup. Ct. Rep. 222; *Patton v. Brady*, 184 U. S. 608, 611, 46 L. ed. 713, 715, 22 Sup. Ct. Rep. 493; *Swafford v. Templeton*, 185 U. S. 487, 494, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783; *Northern P. R. Co. v. Soderberg*, 188 U. S. 526, 528, 47 L. ed. 575, 576, 23 Sup. Ct. Rep. 365.

It is perfectly true that some removals that were authorized by the act of 1875 are not authorized by the act of 1887-8. The reason is not any change in the criterion of a suit arising under the Constitution or laws of the United States, but simply a difference in the cases to which the criterion is applied. The principle—the *ratio decidendi*—is the same in the original and in removed cases, and whether under the act of 1875 or that of 1887-8, the criterion of jurisdiction—the appearance of a Federal question on the face of the record—is the same. The only difference is in the records to which the test is applied.

In one or two cases there are expressions—inadvertent, no doubt—to the effect that the plaintiff's declaration must show that he asserts a right under the Constitution or some law of the United States, as if only such suits arose under the United States Constitution or laws. But this is directly opposed to the cases cited.

See *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *Osborn v. Bank of United States*, 9 Wheat. 823, 6 L. ed. 224; *Swafford v. Templeton*, 185 U. S. 487, 494, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783.

If such a requirement were essential to jurisdiction, one whose property was wrongfully seized by a United States marshal or revenue collector, or whose property was taken, or his person or property injured, by a Federal railway corporation, could have no redress in the Federal courts. His right of property or of personal security is not derived from the United States Constitution or laws, and when he asserts either in a declaration he is not asserting a right under the United States Constitution or laws.

For trespass against a marshal, see—

Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677; *Sonnentheil v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738.

For trespass against an internal revenue collector, see—

Venable v. Richards, 105 U. S. 636, 26 L. ed. 1196; *Harding v. Woodcock*, 137 U. S. 43, 34 L. ed. 580, 11 Sup. Ct. Rep. 6.

The books are full of cases against collectors of customs, and actions of tort against Federal railway companies, brought in the circuit courts.

The existence of a Federal question has been considered more important than a right asserted under an act of Congress; and such assertion of right has been held insufficient when the case did not involve a substantial controversy as to the construction or effect of the Constitution or laws of the United

States,—that is a substantial Federal question.

Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 243, 244, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867.

The bill presents Federal questions both in its aspect as to a bill by the state, as a sovereign, to enforce its local statutes, and as a landowner and shipper, for relief under those statutes. And these questions are the same whether the state sues as sovereign or as property owner and shipper, or in both of these capacities.

The following cases are closely analogous to, and some of them on all fours with, the present one:

State ex rel. Tillman v. Coosaw Min. Co. 45 Fed. 804; *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *South Carolina v. Port Royal & A. R. Co.* 56 Fed. 333; *People ex rel. Swceney v. Rock Island & P. R. Co.* 71 Fed. 753; *Minnesota v. Duluth & I. R. R. Co.* 87 Fed. 497.

The state asserts a right, as a property owner and as engaged in interstate commerce, to carry on that commerce free from obstruction by combinations in restraint of commerce, or by monopolies of such commerce,—substantially the same right as that asserted by the United States in —

Re Debs, 158 U. S. 564, 583, 584, 39 L. ed. 1092, 1102, 15 Sup. Ct. Rep. 900.

That a citizen's right to carry on interstate commerce is a constitutional right is declared by this court in —

Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92.

And there can be no doubt that a state has the same right as a citizen.

The bill directly asserts this right and charges a violation of it by the acts of the combination alleged in the bill. It also charges that such acts are in violation of the Federal anti-trust act, which is specially directed against violation of such rights by combinations in restraint of commerce. It plainly asserts a right under the Constitution as well as under the anti-trust act, and this gives jurisdiction. Whether the bill sufficiently alleges continuous or threatened injury to that right, to make a case for the relief prayed or for any equitable relief, is not a question of jurisdiction, but a question for the court to decide in the exercise of jurisdiction.

Swafford v. Templeton, 185 U. S. 487, 493, 494, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783; *Southern P. R. Co. v. California*, 118 U. S. 112, 113, 30 L. ed. 104, 6 Sup. Ct. Rep. 993; *Haw v. Casper*, 31 Fed. 499; *Lowry v. Chicago, B. & Q. R. Co.* 46 Fed. 83.

The rule that when a statute creates a

right, and also provides a remedy at law, the statutory remedy is exclusive, excludes only remedies at law, and does not oust the court of its equitable jurisdiction. In such cases the court possesses the same jurisdiction to entertain suits in equity, and to administer equitable relief, as if the right thus created by statute had owed its existence to the common law, and on the same grounds.

Cooper v. Whittingham, L. R. 15 Ch. Div. 501, 506; *Stevens v. Chown* [1901] 1 Ch. 894.

The circuit court in a case like this, upon acquiring jurisdiction of the cause by reason of the Federal questions presented by the bill (1) on the constitutionality of the state legislation, and (2) on the claim of rights under the Constitution and laws,—has jurisdiction to decide, not only these Federal questions, but every question, Federal or non-Federal, that may be presented by the bill, or arise upon the other pleadings or the evidence.

Osborn v. Bank of the United States, 9 Wheat. 823, 6 L. ed. 224.

And the court has jurisdiction to decide the cause on these non-Federal grounds, without deciding, or even considering, the Federal questions presented by the bill. And this is the proper course where the Federal questions are constitutional questions.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 410, 411, 416, 30 L. ed. 118, 123, 125, 6 Sup. Ct. Rep. 1132.

And its jurisdiction remains the same, although the plaintiff should fail to establish by proofs the facts alleged as showing a right under the Constitution or laws, or otherwise raising a Federal question; for the jurisdiction is determined by the averments of the bill.

Southern P. R. Co. v. California, 118 U. S. 109, 112, 113, 30 L. ed. 103, 104, 6 Sup. Ct. Rep. 993; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 562, 41 L. ed. 1114, 1116, 17 Sup. Ct. Rep. 653.

And the fact that the Federal questions may receive little or no attention in the argument in this court, or even in the circuit court, does not affect the jurisdiction of either court. It may pass by the questions argued, and decide the Federal questions, just as, in *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 410, 30 L. ed. 118, 123, 6 Sup. Ct. Rep. 1132, this court passed by the Federal questions and decided the cause on non-Federal grounds.

Mr. Justice **Harlan** delivered the opinion of the court:

By a statute of Minnesota passed March [57]9th, 1874, it was provided *that no railroad corporation or the lessees, purchasers, or

managers thereof should consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad corporation owning or having under its control a parallel or competing line; nor should any officer of such corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads were parallel or competing lines should, when demanded by the party complainant, be decided by a jury as in other civil issues. Minn. Laws, 1874, p. 154.

A subsequent statute, passed March 3d, 1881, provided that any railroad corporation, either domestic or foreign, whether organized under a general law or by virtue of a special charter, might lease or purchase, or become owner of or control, or hold the stock of, any other railroad corporation, when the respective railroads could be lawfully connected and operated together "so as to constitute one continuous main line, with or without branches," § 1; and that any railroad corporation, whose lines of railroad within or without the state might be lawfully connected and operated together to constitute one continuous main line, so as to admit of the passage of trains over them without break or interruption, "could consolidate their stock and franchises so as to become one corporation." § 2. But by the same statute it was provided that no railroad corporation should consolidate with, lease, or purchase, or in any way become owner of, or control, any other railroad corporation, or any stock, franchises, rights of property thereof, which owned or controlled "a parallel or competing line." § 3. Minn. Laws, 1881, p. 109.

At a later date, 1899, the legislature of Minnesota passed another statute relating principally to such restraints upon trade and commerce as interfered with competition among those engaged therein. That statute contained these provisions: "*§ 1.[58] Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country, or which limits or tends to limit or control the supply of any article, commodity, or utility, or the articles which enter into the manufacture of any article [of] utility, or which regulates, limits, or controls or raises or tends to regulate, limit, control, or raise the market price of any article, commodity, or utility, or tends to limit or reg-

ulate the production of any such article, commodity, or utility, or in any manner destroys, limits, or interferes with open and free competition in either the production, purchase, or sale of any commodity, article, or utility, is hereby prohibited and declared to be unlawful. § 2. That when any corporation heretofore or hereafter created, organized, or existing under the laws of this state, whether general or special, hereafter unites in any manner with any other corporation where-soever created, or with any individual, whereby such corporation surrenders or transfers, by sale or otherwise, in whole or in part, its franchise, rights, or privileges, or the control or management of its business to any other corporation or individual, or whereby the business, management, or control of the business of such corporation is limited, changed, or in any manner affected, and the purpose or effect of such union or combination is to limit, control, or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of any article or commodity, or the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce, or any part thereof, of this state or of the several states, such union,

[59] combination, agreement, arrangement, *or contract is hereby prohibited and declared to be unlawful. . . . § 3. Any corporation heretofore or hereafter created, organized, or existing under the laws of this state, which shall hereafter, either directly or indirectly, make any contract, agreement, or arrangement, or enter into any combination, conspiracy, or trust, as defined in § 1 of this act, shall, in addition to the penalty prescribed in § 2 of this act, forfeit its charter, rights, and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust, or monopoly, except as to the final disposition of its property under the laws of this state. . . .

§ 6. That for the purpose of carrying out the provisions of this act any citizen of this state may, and it is hereby declared to be the duty of the attorney general to, institute, in the name of the state, proceedings in any court of competent jurisdiction against any person, partnership, association, or corporation who may be guilty of violating any of the provisions of § 1 of this act, for the purpose of imposing the penalties imposed by this act, or securing the en-

forcement of § 2 hereof." Minn. Gen. Laws 1899, chap. 357.

These statutes being in force, the state of Minnesota instituted this suit in one of its own courts against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin, which, having filed its articles of incorporation with the secretary of state of Minnesota, became subject to the laws of that state relating to railroad corporations; and James J. Hill, as president of the Northern Securities Company, and individually.

What is the nature of the case as disclosed by the complaint filed in the state court?

The complaint alleged—

That the Great Northern Railway Company and the Northern *Pacific Railway[60] Company each owned or controlled and maintained a system of railways connecting the Great Lakes and the Pacific ocean, their main roads constituting, substantially, parallel and competing lines;

That pursuant to an agreement between the defendant Hill and other stockholders of the Great Northern Railway Company (representing a controlling interest in the stock of that company) and J. Pierpont Morgan and other stockholders of the Northern Pacific Railway Company (representing a controlling interest in the stock of that company) the Northern Securities Company was incorporated solely as an instrumentality through which the stock, property, and franchises of the Great Northern and Northern Pacific Railway Companies should be consolidated in effect, if not in form, and the management and control of their business affairs, respectively, including the fixing of rates and charges for the transportation of passengers and freight over any and all of the lines of railway of each of those companies, as well within as without the state, be vested in and controlled by the Securities Company, and all competition in freight and passenger traffic between the two systems of railway, within and without the state, to be suppressed and removed; that by means of such arrangement it was sought and intended to ignore, evade, and violate the laws of the state prohibiting as well the consolidation of the stock, property, or franchise of parallel or competing lines of railway therein, and the control or management thereof, as all combinations in restraint of trade or commerce within the state, and between the people of Minnesota and the people of other states and countries; and that, if the Securities Company was allowed to hold and control the stocks of the constituent railway companies,

and to carry out the purpose and object of its incorporators as well as its own, "full faith and credit will not be given to the public acts of this complainant, and it will be deprived of a further right guaranteed to it by the Constitution of the United States."

[61] That the said scheme had been consummated, and said two *railway systems were now under the absolute management and control of the Securities Company, and "by reason thereof all competition between said lines has been destroyed and a monopoly in railway traffic in Minnesota (as well as without said state) has been created, to the great and permanent and irreparable damage of the state of Minnesota, and to the people thereof, and in violation of its laws, and of the laws of the United States in such case made and provided, viz.: The act of Congress approved July 2d, 1890, entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies' [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200];" and

That the carrying out the above agreements and plan of consolidation and monopoly, and in every step taken to consummate it, the officers and directors of each of said railway companies were severally fully advised and consented thereto, and, unless restrained by this court, the Securities Company would continue to manage and control the business and affairs of Great Northern and Northern Pacific Railway Companies, and to suppress all competition between them for freight and passenger traffic, as well as to monopolize railway traffic in that state, to the irreparable damage of the state and the people thereof.

The substantial relief asked was a decree declaring, among other things, the alleged agreement and combination to be unlawful, and all acts done and to be done in pursuance thereof contrary to, and in violation of, the laws of Minnesota and of the United States; prohibiting the Securities Company, its agents and officers, from acquiring, receiving, holding, voting, or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific or the Great Northern Railway Company, or from exercising any management, direction, or control over the constituent companies; and enjoining those railway companies from recognizing or accepting the Northern Securities Company as the holder or owner of any shares of the capital stock of either of those companies, or from effect-

[62] ing any combination or agreement *that would disturb their independent integrity, management, and control, respectively, or that would, directly or indirectly, destroy free and unlimited competition between

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them by interchange of traffic, poolings of earnings, division of property, or otherwise.

The Securities Company, appearing specially for that purpose, filed its petition for the removal of the case into the circuit court of the United States upon the ground that the suit was of a civil nature, in equity, involved, exclusive of costs, the sum of \$2,000, and was one arising under the Constitution and laws of the United States.

The state court approved the required statutory bond for removal, and made an order reciting that the case was removed to the Federal court.

The Northern Securities Company, appearing specially for that purpose, gave notice of a motion to have the service of summons upon it vacated. Notice was also given of a like motion as to the service of summons upon defendant Hill in his capacity as president of that company. Subsequently, the company, and defendant Hill as its president, gave notice that the above notices were withdrawn, and they accordingly entered their appearance in the cause.

At a later date the defendants severally answered, and the state filed its replication to each answer. Proofs were taken, and, the cause having been heard, the bill was dismissed upon the merits. 123 Fed. 692.

After the cause was argued here the parties were invited to submit briefs upon the question whether the circuit court of the United States could take cognizance of the case upon removal from the state court. From the briefs filed in response to that invitation it appeared that both sides deemed the case a removable one, and insist that this court should consider the merits as disclosed by the pleadings and evidence. But consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, *so declare, and make such order as [63] will prevent that court from exercising an authority not conferred upon it by statute. *Mansfield, O. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 464, 4 Sup. Ct. Rep. 510; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *Parker v. Ormsby*, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912; *Mattingly v. Northwestern Virginia R. Co.* 158 U. S. 53, 57, 39 L. ed. 894, 895, 15 Sup. Ct. Rep. 725; *Great Southern Fire-Proof Hotel Co. v. Jones*, 177 U. S. 449, 453, 44 L. ed. 842, 844, 20 Sup. Ct. Rep. 690; *Continental Nat. Bank v. Buford*, 191 U. S. 120, ante, p. 119, 24 Sup. Ct. Rep. 54; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, ante, p. 140, 24 Sup. Ct. Rep. 63.

We proceed, therefore, to inquire whether

the circuit court could take cognizance of this case upon removal from the state court, and make a final decree upon the merits.

Of course, the circuit court could not take cognizance of the case as one presenting a controversy between citizens of different states, for the state of Minnesota is not a citizen within the meaning of the Constitution or the acts of Congress. *Postal Telegraph Co. v. Alabama*, 155 U. S. 487, 39 L. ed. 232, 15 Sup. Ct. Rep. 192.

But the 1st section of the judiciary act of 1887-8 (24 Stat. at L. 552, chap. 373, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508) provides, among other things, that the circuit courts of the United States may take original cognizance of all suits of a civil nature at law or in equity, arising under the Constitution or laws of the United States, where the matter in dispute, exclusive of costs, exceeds in value the sum of \$2,000. And the 2d section provides for the removal from a state court of "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States . . . of which the circuit courts of the United States are given original jurisdiction by the preceding section."

In *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 461, 38 L. ed. 511, 514, 14 Sup. Ct. Rep. 654, 657, which involved the scope and meaning of the acts of 1887-8, in respect of cases arising under the Constitution or laws of the United States, this court, after referring to § 1 said: "But the corresponding clause in § 2 allows removals from a state court to be made only by defendants, and of suits 'of which the circuit courts of the United States are given [64] *original jurisdiction by the preceding section,' thus limiting the jurisdiction of a circuit court of the United States on removal by the defendant under this section to such suits as might have been brought in that court by the plaintiff under the first section. 24 Stat. at L. 553, chap. 373; 25 Stat. at L. 434, chap. 866 (U. S. Comp. Stat. 1901, p. 508). The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the circuit courts of the United States." *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 208, 39 L. ed. 672, 675, 15 Sup. Ct. Rep. 563; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173. And in *Chappell v. Waterworth*, 155 U. S. 102, 107, 39 L. ed. 85, 87, 15 Sup. Ct. Rep. 34, 36, the court, referring to *Tennessee v. Union & Planters' Bank*, said that it was there adjudged, upon full consideration, that, under the act of 1887-8, "a case (not depending on the citizenship of the parties nor otherwise specially provided for) cannot be removed

from a state court into the circuit court of the United States, as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in the subsequent pleadings." To the same effect are *Postal Telegraph Co. v. Alabama*, 155 U. S. 487, 39 L. ed. 232, 15 Sup. Ct. Rep. 192; *United States v. American Bell Teleph. Co.* 159 U. S. 548, 553, 40 L. ed. 255, 257, 16 Sup. Ct. Rep. 69; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 494, 40 L. ed. 1048, 1050, 16 Sup. Ct. Rep. 869; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 608, 41 L. ed. 1132, 1134, 17 Sup. Ct. Rep. 703; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 258, 42 L. ed. 458, 459, 18 Sup. Ct. Rep. 62; *Walker v. Collins*, 167 U. S. 57, 59, 42 L. ed. 76, 77, 17 Sup. Ct. Rep. 738; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *Western U. Telegraph Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867. These cases establish, beyond further question in this court, the rule that, under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court as one arising under the Constitution or laws of the United States, unless the plaintiff's complaint, bill, or declaration shows it to be a case of that character. "If it does not appear at the outset," this court has quite recently said, "that the suit is one of which the circuit court at the time its jurisdiction *is invoked [65] could properly take cognizance, the suit must be dismissed." *Third Street & Suburban R. Co. v. Lewis*, 173 U. S. 457, 460, 43 L. ed. 766, 767, 19 Sup. Ct. Rep. 451.

We must, then, inquire whether the complaint presents a case arising under the Constitution or laws of the United States, in respect of which the original jurisdiction of the circuit court could have been invoked by the state.

The real purpose of the suit was to annul the agreement and suppress the combination alleged to exist between the defendant corporations, upon the ground that such agreement and combination were in violation, first, of the laws of Minnesota, and, second, of the anti-trust act of Congress. If relief had been asked upon the ground alone that what the defendant corporations had done and would, unless restrained, continue to do, was forbidden by the statutes of Minnesota, the circuit court of the United States could not have taken cognizance of the case; for confessedly such a controversy would not have been one between citizens of different states, nor could such a suit have been

deemed one arising under the Constitution or laws of the United States.

The contention, however, is that a case arising under the laws of the United States was presented by the allegation in the complaint that the combination and consolidation between the Great Northern and Northern Pacific Railway Companies and the control of their affairs and operations by the Northern Securities Company were also in violation of the anti-trust act of Congress of July 2d, 1890. An allegation in a complaint filed in a circuit court of the United States may, indeed, in a sense, confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits. *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, *ante*, 795, 24 Sup. Ct. Rep. 553, and *Pacific E. R. Co. v. Los Angeles* (decided at present term) 194 U. S. 112, *post*, 896, 24 Sup. Ct. Rep. 586. But if, notwithstanding such an allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its [66] jurisdiction, then, by the *express command of the act of 1875, its duty is to proceed no further. That is manifest from the 5th section of that act, which provides: "That if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear, to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." 18 Stat. at L. 470, chap. 137 (U. S. Comp. Stat. 1901, p. 508). That provision has not been superseded by any subsequent legislation.

Does the present suit really and substantially involve a dispute, or controversy properly within the jurisdiction of the circuit court? That is to say, could the suit, as disclosed by the complaint, have been brought by the state originally in that court? If it could not, then, under the act of 1887-8 and the adjudged cases, it should not have been removed from the state court, and should be remanded.

By the 1st section of the anti-trust act every contract, combination in the form of

a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal. The 2d section condemns the monopolizing or attempting to monopolize, or combining or conspiring to monopolize, any part of such trade or commerce. By the 3d section, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce in any territory of the United States or the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, *or [67] with any foreign states, or between the District of Columbia and any state or states or foreign nations, is declared to be illegal. A violation of the provisions of each section is made a misdemeanor, punishable by a fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Of course, a criminal prosecution under the act must be in the name of the United States and in a court of the United States,—the district attorney who conducts the prosecution being subject to the direction of the Attorney General as to the manner in which his duties shall be discharged. Rev. Stat. 362 (U. S. Comp. Stat. 1901, p. 208).

The 4th, 6th, 7th, and 8th sections of the act are as follows:

"§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

"§ 6. Any property owned under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of

property imported into the United States contrary to law.

[68] *§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"§ 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under, or authorized by, the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." 26 Stat. at L. 209, chap. 647 (U. S. Comp. Stat. 1901; p. 3200).

It thus appears that the act specifies four modes in which effect may be given to its provisions. It is clear that the present suit does not belong to either of those classes. It is not a criminal proceeding (§§ 1, 2, 3), nor a suit in equity in the name of the United States to restrain violations of the anti-trust act (§ 4), nor a proceeding in the name of the United States for the forfeiture of property being in the course of transportation (§ 6), nor an action by any person or corporation for the recovery of threefold damages for injury done to business or property by some other person or corporation. (§§ 7, 8.)

But it is said that as the act of Congress was for the benefit of all the states and all the people, this case is to be deemed one arising under the laws of the United States, and, therefore, cognizable by the circuit court, because one of the objects of the state of Minnesota by its suit is to protect certain of its proprietary interests, which, it is alleged, would be injured by violations, on the part of the defendants, of the act of Congress. Let us see what, in that view, is the case as presented by the complaint.

The complaint alleged that the state is the owner of more than three million acres of land, of the value of more than fifteen millions of dollars, obtained, by donation, from the United States, and that "the value of [69] said lands, and the *salability thereof, depends, in very large measure, upon having free, uninterrupted, and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway Companies."

The bill also alleges "that many of said lands are vacant and unsettled and located in regions not at present reached by railway

lines, and depend for settlement upon the construction of lines in the future; that it has heretofore been the practice of said Great Northern and Northern Pacific Railway Companies, respectively, to extend spur lines into territory adjacent to each of said roads, as well as into new territory, for the purpose of developing such territory, as well as to obtain traffic therefrom; that such new lines have been built in the past very largely by reason of the rivalry heretofore existing between said companies for existing, as well as new, business; that under the consolidation and unity of control hereinafter set forth such rivalry will cease, and many of the lands now owned by the state of Minnesota will not be reached by railroads for years to come, if at all, owing to such combination and consolidation removing all rivalry and competition between said companies; that the settlement and occupation of said lands will add very much to their value, and such occupation will depend entirely upon the accessibility of railway lines and transportation facilities for marketing the products raised thereon; that if said lands are sold and become occupied, they will add very largely to the taxable value of the property of the state, and that said lands cannot be so sold, or the income of the state increased thereby, without the construction of railroad lines to, or adjacent to, the same."

It was further alleged that the state is the owner of, and has maintained at large expense, a state university, hospitals for the insane, normal schools for teachers, a training school for boys and girls, schools for deaf, dumb, blind, and feeble-minded persons, a state school for indigent and homeless children, and a state penitentiary; that a great portion of the supplies of every kind for such institutions must, of necessity, be shipped *over the different lines of railway [70] owned and operated by the Northern Pacific and Great Northern Railway Companies; that the amount of taxes which the state must collect, and the successful maintenance of its public institutions, as well as the performance of its governmental functions and affairs, depend largely upon the value of the real and personal property situated within the state, and the general prosperity and business success of its citizens; and that such prosperity and business depend very largely upon maintaining in the state free, open, and unrestricted competition between the railway lines of those two companies.

The injury on account of which the present suit was brought is at most only remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a state by reason of the suppression, in violation of

the act of Congress, of free competition between interstate carriers engaged in business in such state; not such a direct, actual injury as that provided for in the 7th section of the statute. If Minnesota may, by an original suit, in its name, invoke the jurisdiction of the circuit court, because, alone, of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by interstate carriers within its limits, then every state, upon like grounds, may maintain, in its name, in a circuit court of the United States, a suit against interstate carriers engaged in business within their respective limits. Further, under that view, every individual owner of property in a state may, upon like general grounds, by an original suit, irrespective of any direct or special injury to him, invoke the original jurisdiction of a circuit court of the United States, to restrain and prevent violations of the anti-trust act of Congress. We do not think that Congress contemplated any such methods for the enforcement of the anti-trust act. We cannot suppose it was intended that the enforcement of the act should depend in any degree upon original suits in equity instituted by the states or by individuals to prevent violations of its provisions. On the contrary, taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several states and with foreign nations, to those instituted in the name of the United States, under the 4th section of the act, by district attorneys of the United States, acting under the direction of the Attorney General; thus securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the act, irrespective of any direct injury sustained by particular persons or corporations, interstate and international trade and commerce, and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought, on all sides and in every direction, to accomplish improper or speculative purposes. At any rate, the interpretation we have given of the act is a more reasonable one. It is a safe and conservative interpretation, in view as well of the broad and exclusive power of Congress over interstate and inter-

national commerce as of the fact that, so far as such commerce is concerned, Congress has prescribed a specific mode for preventing restraints upon it,—namely, suits in equity under the direction of the Attorney General. Of the present suit the Attorney General has no control, and is without any responsibility for the manner in which it is conducted, although, in its essential features, it is just such a suit as would be brought by his direction when proceeding under the 4th section of the anti-trust act.

The state presents still another view of the question of jurisdiction. Its complaint alleges that if the Securities Company be allowed to hold and control the stocks of the Great Northern *and Northern Pacific [72] Railway Companies and to carry out the purpose and object of its incorporation, full faith and credit will not be given to the public acts of the state. This, it is contended, presents a case arising under article 4 of the Constitution, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." It is said by the state's counsel that the "gravamen of the charge in appellant's complaint is that the defendants created a corporate device in New Jersey, and used it for the purpose and with the result that property rights in Minnesota were affected, in violation of its laws. Our contention is that article 4 must be so construed as to make the constitutional enactments of Minnesota effective throughout the United States, so far as they apply to and affect property rights within the state. Otherwise the policy and laws of any state may be easily evaded." We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting. Even if it be assumed that the word "acts" includes "statutes," the clause has nothing to do with the conduct of individuals or corporations; and to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States.

What was the duty of the circuit court when it ascertained that the suit was not one of which it could take cognizance? The answer is indicated by the clause of the judiciary act of March 3d, 1875, to which we have adverted.

For the reasons stated, we are of opinion that the suit does not—to use the words of the act of 1875—really and substantially

involve a dispute or controversy within the jurisdiction of the circuit court for the purposes of a final decree. *Western Union Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 243, 44 L. ed. 1052, 1054, 20 Sup. Ct. [73]Rep. 867. *That being the case, the circuit court, following the mandate of the statute, should not have proceeded therein, but should have remanded the cause to the state court.

The decree of the Circuit Court is reversed, and the case is sent back with directions that it be remanded to the state court.

GEORGE W. BEAVERS, Appt.,

v.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

(See S. C. Reporter's ed. 73-88.)

Criminal law—removal of defendant to another Federal district for trial — indictment as evidence of probable cause — complaint on information and belief—sufficiency of disclosure of sources of information — technical defects in indictment—impeachment of indictment.

1. An indictment is prima facie evidence of the existence of probable cause in proceedings for the removal, under U. S. Rev. Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716), to another Federal district for trial, of a person there charged with an offense against the United States.
2. Sources of information on which are based a complaint made on information and belief, in proceedings for the removal, under U. S. Rev. Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716), to another Federal district for trial, of a government official there charged with having received money for procuring a contract with the Federal government, are sufficiently disclosed by the statements in the supporting affidavit that such sources are the official documents with reference to the making of the contract, the transactions on file in the government records, letters and communications from the contractor, the indictment and bench warrant, and personal conversations with the parties having the various transactions with the defendant, and that deponent's information as to the whereabouts of defendant is derived from a recent conversation with him, and from the certificate of the United States marshal, indorsed on the warrant.
3. So far as respects technical objections, the sufficiency of an indictment, is not a matter of inquiry in proceedings for the removal, under U. S. Rev. Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716), to another Federal district for trial, of a person there charged

NOTE.—On the removal to another Federal district for trial of persons there charged with an offense against the United States—see note to *Greene v. Henkel*, 46 L. ed. U. S. 177.

with an offense against the United States, but is to be determined by the court in which the indictment was found.

4. The sufficiency of the indictment as evidence of probable cause in proceedings for the removal, under U. S. Rev. Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716), to another Federal district for trial, of a person there charged with an offense against the United States, cannot be impeached (if impeachable at all) by evidence tending to show that the grand jury did not have testimony before it sufficient to justify its action.

[No. 535.]

Argued March 9, 10, 1904. Decided April 11, 1904.

APPEAL from the Circuit Court of the United States for the Southern District of New York, to review a judgment denying an application for the discharge, on habeas corpus, of a defendant sought to be removed to another Federal district for trial. *Affirmed.*

Statement by Mr. Justice **Brewer**:

On July 23, 1903, a grand jury of the circuit court of the United States for the eastern district of New York found and returned an indictment under § 1781, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1212), charging George W. Beavers, an officer of the government of the United States, with having received money for procuring a contract with the government for the Edward J. Brandt-Dent Company. A warrant for the arrest of the official was issued to the marshal of the district, and returned "not found." Thereupon a complaint, supported by affidavit, was filed in the district court of the United States for the southern district of New York, alleging the finding of the indictment, the issue *of the warrant, the re-[74] turn "not found," and that Beavers was within the southern district of New York. Upon this complaint a warrant was issued, Beavers was arrested and brought before a commissioner. A hearing was had before that officer, and upon his report the district judge of the southern district signed an order of removal to the eastern district. Before this order could be executed Beavers presented his petition to the circuit court of the United States for the southern district of New York for a writ of habeas corpus. After a hearing thereon the application for discharge was denied, and thereupon an appeal was taken to this court.

Mr. Max D. Steuer argued the cause, and, with Messrs. Bankson T. Morgan and William M. Seabury, filed a brief for appellant:

Proceedings instituted under U. S. Rev. 194 U. S.

Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716), are in all respects similar to criminal proceedings instituted before a committing magistrate in the state where the arrest is made, and should be governed and controlled by the rules of procedure in force in that state, and the same rules of evidence apply.

Re Dana, 68 Fed. 886; *United States v. Rundlett*, 2 Curt. C. C. 42, Fed. Cas. No. 16,208; *United States v. Case*, 8 Blatchf. 251, Fed. Cas. No. 14,742; *United States v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393; *United States v. Brawner*, 7 Fed. 86; *United States v. Martin*, 9 Sawy. 90, 17 Fed. 150; *Re Burkhardt*, 33 Fed. 25; *United States v. Greene*, 100 Fed. 941.

It is the duty of the committing magistrate in New York to determine for himself whether or not a crime has been committed, and whether, from the evidence adduced before him, there is sufficient cause to believe the defendant guilty thereof.

United States v. Greene, 100 Fed. 943; *Re Dana*, 68 Fed. 886.

Such a determination must be made on legal evidence such as a court or jury might hear.

Ex parte Bollman, 4 Cranch, 75, 2 L. ed. 554.

The doctrine that a certified copy of an indictment is to be regarded as competent evidence of the facts therein alleged outside the district in which it was found, so as to dispense with further proof of criminality, seems first to have been announced in 1871 by Judge Lowell in *Alexander's Case*, 1 Low. Dec. 530, Fed. Cas. No. 162. That this ruling was out of harmony with all settled rules of evidence, was supported by no recognized principle of law, and was founded only on considerations of convenience, was subsequently admitted with amazing frankness by the very judge propounding it.

United States v. Pope, 24 Int. Rev. Rec. p. 29, Fed. Cas. No. 16,069.

This indictment failed to comply with the plainest requirements for the admission of secondary evidence in any court of law.

Re Dana, 68 Fed. 886.

It has been held in a number of cases that the fact that a witness testified and the nature of his testimony itself, as well as any irregularity or improper conduct in the grand-jury room, are open, in a proper case, to full and free judicial investigation.

United States v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858; *Burdick v. Hunt*, 43 Ind. 381; *Low's Case*, 4 Me. 439; *Hunter v. Randall*, 69 Me. 183.

Again, it has been held by a long and familiar line of authorities in New York and other states that a defendant may be entitled to an inspection of the minutes of the grand jury in a proper case shown, even when he

contends that the evidence on which the indictment was found is insufficient in law to sustain it; and these authorities hold that the fact that the defendant was indicted without preliminary examination is a strong inducement to the court to look with favor on such an application.

People v. Molineux, 27 Misc. 60, 57 N. Y. Supp. 939; *People v. Naughton*, 38 How. Pr. 430; *People v. Bellows*, 1 How. Pr. N. S. 149.

Whenever it becomes essential to ascertain what has transpired before a grand jury, it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted, or what they said during their investigation, because this cannot serve any of the purposes of justice.

United States v. Farrington, 5 Fed. 343.

A witness before the grand jury is not privileged to have his testimony treated as a confidential communication, but he ought to be considered as deposing under all the obligations of an oath in a judicial proceeding; and the oath of a grand juror is no legal or moral impediment to his solemn examination, under the direction of the court, as to the evidence before him whenever it becomes material to the administration of justice.

United States v. Kilpatrick, 16 Fed. 765.

There is no secrecy imposed upon a witness before a grand jury, either as to the fact of his being called before it, or as to what he testified to. The minutes of the evidence taken are given to the district attorney. This seems conclusive that the names of the witnesses, and their testimony before a grand jury, are not required by law to be kept secret.

People v. Naughton, 38 How. Pr. 430.

The proceedings of a grand jury, the fact that a witness testified before it, and the nature of his testimony are not necessarily secret, but may always be disclosed to the extent that a due administration of justice requires.

State v. Broughton, 29 N. C. (7 Ired. L. 96), 45 Am. Dec. 507; *State v. Horton*, 63 N. C. 595; *United States v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134; *People v. Northey*, 77 Cal. 634, 19 Pac. 865, 20 Pac. 129.

The indictment was offered as evidence of probable cause on which a removal was to be ordered, and was in fact recommended by the commissioner. It was the only evidence offered by the prosecution. It was offered as possessing probative force. If there is no obligation of secrecy as to what testimony was adduced before the grand jury, which will prevent inquiry in a proper case, and if an indictment may be attacked as a pleading because it was obtained on improper and incompetent evidence, or, as in New York

state, on evidence not prima facie sufficient (*People v. Restenblatt*, 1 Abb. Pr. 268; *People v. Strong*, 1 Abb. Pr. N. S. 244), it is, a fortiori, open to attack when it is offered as proof, and as the sole proof on which to base a removal. If the prosecution had offered witnesses to prove probable cause, whose testimony was incompetent or irrelevant, assuredly the defendant would have been entitled to destroy its probative force by showing that fact. The same rules of evidence govern before a grand jury as before any other judicial tribunal.

United States v. Kilpatrick, 16 Fed. 765; 1 Wharton, Crim. Law, § 493.

When, as evidence of probable cause, an indictment is offered which has been found on the testimony of witnesses, the probative force of the indictment must be open to attack in the same manner as the probative force of the testimony on which it was obtained.

Re Woods, 95 Fed. 288.

In the present case there was no attempt on the part of the appellant to disclose mere irregularities occurring in the grand-jury room. All such objections to the indictment as a pleading, it is conceded, may properly be left to the trial court.

Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218.

Even though primary evidence is shown to be unattainable, an indictment cannot be considered as secondary evidence of facts alleged in it, unless it presents a clear, consistent, and satisfactory statement of evidentiary facts.

Re Dana, 68 Fed. 886; *United States v. Pope*, 24 Int. Rev. Rec. 29, Fed. Cas. No. 16,069.

The evident object was to frame the indictment so that it might be sustained by proof of any one of several transactions. This may be unobjectionable in a pleading, but in an affidavit it has the effect to cast doubt upon the knowledge of the affiant, and to deprive the statement of whatever intrinsic force it would otherwise possess as an affidavit of facts known by the affiant to be true.

United States v. Greene, 100 Fed. 949; *United States v. Greene*, 108 Fed. 816.

The defendant is entitled to have the most favorable inferences drawn from the refusal of the commissioner to allow the questions propounded to be answered. Having offered in good faith to establish facts before the commissioner, and having been denied an opportunity, he is entitled before an appellate tribunal to the presumption that such facts exist.

Scotland County v. Hill, 112 U. S. 186, 28 L. ed. 693, 5 Sup. Ct. Rep. 93; *Powell v. Pennsylvania*, 127 U. S. 688, 32 L. ed. 257, 884

8 Sup. Ct. Rep. 992, 1257; *Rockefeller v. Merritt*, 35 L. R. A. 633, 22 C. C. A. 608, 40 U. S. App. 666, 76 Fed. 914; *Ankeny v. Clark*, 148 U. S. 355, 37 L. ed. 479, 13 Sup. Ct. Rep. 617.

The conduct of the prosecution upon the alleged preliminary hearing accorded the appellant, in preventing the introduction of the primary evidence shown to be conveniently accessible, and the rulings of the commissioner in support thereof, were such as to create a presumption that the testimony of the witnesses, if produced, would have been favorable to the accused.

Taylor v. Riggs, 1 Pet. 591, 7 L. ed. 275; *Hughes Case*, 2 East P. C. 1002; Greenl. Ev. § 82.

The presumption that the witnesses whose names are indorsed upon a certified copy of an indictment have sworn to the facts alleged in it, and that such an indictment is secondary evidence of those facts, is not of itself sufficient to overcome the presumption of innocence with which the law clothes every person accused of crime. If this presumption was not rebutted by the presumption of innocence alone, it was certainly totally destroyed, not only by the failure of the government to utilize the primary evidence which was shown to be conveniently available, but by the exclusion, in response to the objections of the government, of all the affirmative primary evidence which was offered to controvert the facts alleged in the indictment.

Dunlop v. United States, 165 U. S. 502, 41 L. ed. 804, 17 Sup. Ct. Rep. 375; *Kirby v. United States*, 174 U. S. 55, 43 L. ed. 893, 19 Sup. Ct. Rep. 574; *Graves v. United States*, 150 U. S. 121, 37 L. ed. 1023, 14 Sup. Ct. Rep. 40.

It is elementary that an affidavit or complaint entirely upon information and belief, without properly setting forth the sources of the affiant's knowledge and the grounds for his belief, is insufficient to confer jurisdiction upon the magistrate to cause the apprehension of the accused.

Re Blum, 9 Misc. 571, 30 N. Y. Supp. 396; *Blodgett v. Race*, 18 Hun, 132; *Blythe v. Tompkins*, 2 Abb. Pr. 468; *People v. Cramer*, 22 App. Div. 189, 47 N. Y. Supp. 1039; *Comfort v. Fulton*, 13 Abb. Pr. 276; *United States v. Sapinkow*, 90 Fed. 654; *Ex parte Hart*, 28 L. R. A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

The magistrate, before issuing the warrant, should have before him the oath of the real accuser to the facts on which the charge is based and on which the belief or suspicion of guilt is founded.

Re Rule of Court, 3 Woods, 502, Fed. Cas. No. 12,126; *United States v. Burr*, 2 Wheeler C. C. 573, Fed. Cas. No. 14,692.

It was held in construing a section of the Penal Code of the state of California, which statute is very similar to § 145 of the Code of Criminal Procedure of the state of New York, that a complaint on information and belief under such section did not give jurisdiction to issue a subpoena for a witness or a warrant for the arrest of the accused.

United States v. Collins, 79 Fed. 65; *Johnston v. United States*, 30 C. C. A. 612, 58 U. S. App. 313, 87 Fed. 187; *United States v. Polite*, 35 Fed. 59; *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619.

A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406.

But even if it should be granted that a complaint on information and belief without stating facts within deponent's knowledge sufficient to justify a belief is sufficient to justify the issue of a warrant, this complaint is further defective in that it fails to state in any adequate manner the source of affiant's information, and does not show why the affidavits of persons having knowledge were not obtained.

United States v. Sapinkow, 90 Fed. 654; *Comfort v. Fulton*, 13 Abb. Pr. 276.

The rule existing in the state of New York in this respect in attachment cases (*Steuben County Bank v. Alberger*, 78 N. Y. 253; *Yates v. North*, 44 N. Y. 271) is well settled, and there is abundant authority to sustain the proposition that in such cases affidavits which do not state with precision and sufficiency the source of affiant's information are invalid to sustain an attachment.

McCulloh v. Alby & Co. 31 N. Y. S. R. 125, 9 N. Y. Supp. 361; *Selsor Bros. Co. v. Potter Produce Co.* 77 Hun, 313, 28 N. Y. Supp. 428; *Harroway v. Flint*, 19 Misc. 411, 44 N. Y. Supp. 335.

So, too, in applications for injunctions, the rule is as stated by Mr. Justice Brown in *Rice v. Ames*, 180 U. S. 375, 45 L. ed. 581, 21 Sup. Ct. Rep. 406, that the material facts must be directly averred by a person having knowledge of such facts. Certainly, a citizen should not be deprived of his liberty on less or slighter evidence than is required by common practice in proceedings that affect only rights of property.

Assistant Attorney General **Purdy** argued the cause and filed a brief for appellee:

A certified copy of the indictment alone would in itself be sufficient information upon which to predicate a complaint of this character.

Rice v. Ames, 180 U. S. 371, 374, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406.

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Section 1014 of the Revised Statutes, when properly construed, is intended, in case of indictment, to furnish the government a convenient and summary method for securing the appearance of the defendant before the United States court in which the indictment is found.

Re Ellerbe, 4 McCrary, 449, 13 Fed. 530; *United States v. Yarborough*, 122 Fed. 293.

A certified copy of the indictment and proof of identity are sufficient to establish probable cause, and authorize a warrant of removal.

United States v. Burr, 2 Wheeler C. C. 573, Fed. Cas. No. 14,692; *United States v. Newcomer*, 12 Pittsb. L. J. 140, Fed. Cas. No. 15,869; *Re Clark*, 2 Ben. 540, Fed. Cas. No. 2,797; *Re Bailey*, 1 Woolw. 422, Fed. Cas. No. 730; *United States v. Jacobi*, 1 Flipp. 108, Fed. Cas. No. 15,460; *United States v. Shepard*, 1 Abb. U. S. 431, Fed. Cas. No. 16,273; *United States ex rel. Hendricks v. Harris*, Fed. Cas. No. 15,313; *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102; *United States v. Pope*, 24 Int. Rev. Rec. 29, Fed. Cas. No. 16,069; *Re Doig*, 4 Fed. 193; *Re Ellerbe*, 4 McCrary, 449, 13 Fed. 530; *United States v. Rodgers*, 23 Fed. 658; *United States v. White*, 25 Fed. 716; *United States v. Fowkes*, 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 13; *Re Beshears*, 79 Fed. 70; *United States v. Lee*, 84 Fed. 626; *Re Belknap*, 96 Fed. 614; *Re Richter*, 100 Fed. 295; *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; *United States v. Yarborough*, 122 Fed. 293; *Re Wolf*, 27 Fed. 606.

A certified copy of the indictment, together with proof of identity of the defendant, having been offered by the government, a prima facie case of probable cause was established, and the finding of the commissioner upon this question is not subject to review on a writ of habeas corpus.

Greene v. Henkel, 183 U. S. 249, 261, 46 L. ed. 177, 189, 22 Sup. Ct. Rep. 218.

The question as to whether there was any competent legal testimony presented to the grand jury for the eastern district of New York upon which this indictment is based, is a matter to be dealt with in the court where the indictment was found, and must be raised before and decided by the United States court sitting in the eastern district of New York.

Ibid.

Mr. Justice **Brewer** delivered the opinion of the court:

This case turns upon the efficacy of an indictment in removal proceedings. The government offered no other evidence of petitioner's guilt. His counsel state in their brief:

"The controlling questions to be discussed

on this appeal are whether the indictment offered in evidence before the commissioner can be regarded as conclusive evidence against the accused of the facts therein alleged; whether it was competent at all as evidence of such facts, and whether such indictment was entitled to be accorded any probative force whatever."

[83] At the outset it is well to note that this is not a case of extradition. There was no proposed surrender of petitioner by the United States to the jurisdiction of a foreign nation, no abandonment of the duty of protection which the nation owes to all *within its territory. There was not even the qualified extradition which arises when one state within the Union surrenders to another an alleged fugitive from its justice. There was simply an effort on the part of the United States to subject a citizen found within its territory to trial before one of its own courts. The locality in which an offence is alleged to have been committed determines, under the Constitution and laws, the place and court of trial. And the question is, What steps are necessary to bring the alleged offender to that place and before that court?

Obviously, very different considerations are applicable to the two cases. In an extradition the nation surrendering relies for future protection of the alleged offender upon the good faith of the nation to which the surrender is made; while here the full protecting power of the United States is continued after the removal from the place of arrest to the place of trial. It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting § 1014, Rev. Stat. (U. S. Comp. Stat. 1901, p. 716), which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial rather than a mere ministerial act.

In the light of these considerations we pass to an inquiry into the special matters here presented. Article 5 of the amendments to the Constitution provides:

"No person shall be held to answer for a capital or otherwise infamous crime unless

on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, *or in the militia, when in ac-[84] tual service in time of war or public danger."

While many states, in the exercise of their undoubted sovereignty, (*Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292), have provided for trials of criminal offences upon information filed by the prosecuting officer, and without any previous inquiry or action by a grand jury, the national Constitution, in its solicitude for the protection of the individual, requires an indictment as a prerequisite to a trial. The grand jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged. Blackstone says (vol. 4, p. 303):

"This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the King, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes."

The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. But the Constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry, and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able, without further litigation concerning that fact, to bring the party charged into *court for trial.[85] The existence of probable cause is not made more certain by two inquiries and two indictments. Within the spirit of the rule of giving full effect to the records and judicial proceedings of other courts, an indictment, found by the proper grand jury should be accepted everywhere through the United States as at least prima facie evidence of the existence of probable cause. And the

place where such inquiry must be had and the decision of a grand jury obtained is the locality in which, by the Constitution and laws, the final trial must be had.

While the indictment is *prima facie* evidence, it is urged that there are substantial reasons why it should not be regarded as conclusive. An investigation before the grand jury, it is said, is generally *ex parte*—although sometimes witnesses in behalf of the defendant are heard by it—and the conclusion of such *ex parte* inquiry ought not to preclude the defendant from every defense, even the one that he was never within the state or district in which the crime is charged to have been committed, or authorize the government to summarily arrest him wherever he may be found, transport him, perhaps, far away from his home, and subject him, among strangers, to the difficulties and expense of making his defense. It is unnecessary to definitely determine this question. It is sufficient for this case to decide, as we do, that the indictment is *prima facie* evidence of the existence of probable cause. This is not in conflict with the views expressed by this court in *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218. There it appeared that after an indictment had been found by a grand jury of the United States district court for the southern district of Georgia the defendants were arrested in New York; that on a hearing before the commissioner he ruled that the indictment was conclusive evidence of the existence of probable cause, and declined to hear any testimony offered by the defendants. Upon an application to the district judge in New York for a removal, he held that the indictment was not conclusive and sent the case back to the commissioner. Thereupon testimony was [86] offered *before the commissioner, who found that there was probable cause to believe the defendant guilty, and upon his report the district judge ordered a removal. We held that, under the circumstances, it was not necessary to determine the sufficiency of the indictment as evidence of the existence of probable cause, and that as the district judge found that probable cause was shown, it was enough to justify a removal.

It is further contended that—

“There was no jurisdiction to apprehend the accused, because the complaint on removal was jurisdictionally defective, in that it was made entirely upon information, without alleging a sufficient, or competent source of the affiant’s information, and ground for his belief, and without assigning any reason why the affidavit of the person or persons
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having knowledge of the facts alleged was not secured.”

This contention cannot be sustained. The complaint alleges on information and belief that Beavers was an officer of the government of the United States in the office of the First Assistant Postmaster General of the United States; that, as such officer, he was charged with the consideration of allowances for expenditures, and with the procuring of contracts with and from persons proposing to furnish supplies to the said Postoffice Department; that he made a fraudulent agreement with the Edward J. Brandt-Dent Company for the purchase of automatic cashiers for the Postoffice Department and received pay therefor; that an indictment had been found by the grand jury of the eastern district, a warrant issued and returned “not found,” and that the defendant was within the southern district of New York. This complaint was supported by affidavit, in which it was said:

“Deponent further says that the sources of his information are the official documents with reference to the making of the said contract and the said transactions on file in the records of the United States of America and in the Postoffice Department thereof and letters and communications from the Edward J. Brandt-Dent Company with reference to the said contract, *and from the in-[87] dictment, a certified copy of which is referred to in said affidavit as Exhibit A, and the bench warrant therein referred to as Exhibit B, and from personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto; and that his information as to the whereabouts of the said George W. Beavers is derived from a conversation had with the said George W. Beavers in said southern district of New York in the past few days, and from the certificate of the United States marshal for the eastern district of New York, indorsed on said warrant.”

This disclosure of the sources of information was sufficient. In *Rice v. Ames*, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, a case of extradition to a foreign country, in which the complaint was made upon information and belief, we said (p. 375, L. ed. p. 581, Sup. Ct. Rep. p. 408):

“If the officer of the foreign government has no personal knowledge of the facts, he may, with entire propriety, make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of the depositions of witnesses

having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant."

The indictment alone was, as we have seen, a showing of probable cause sufficient to justify the issue of a warrant.

With reference to other questions we remark that, so far as respects technical objections, the sufficiency of the indictment is to be determined by the court in which it was found, and is not a matter of inquiry in removal proceedings (*Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218); that the defendant has there no right to an investigation of the proceedings before the grand jury, or an inquiry concerning what testimony was presented to, or what witnesses were heard by, that body. In other words, he may not impeach an indictment by evidence tending to show that the grand jury did not have testimony before it sufficient to *justify its action. Such [88] seems to have been the purpose of most, if not all, of the testimony offered by the petitioner in this case. As his counsel stated during the progress of the examination before the commissioner: "We hold that we have an absolute right in a proper proceeding to expose what took place before the grand jury. We don't do it at all in order to make a disclosure of what transpired before a secret body. We do propose to show what transpired before that grand jury so as to show that there was not any evidence upon which that body could have found an indictment,—a legal, valid, lawful indictment—against George W. Beavers. We have no other purpose in calling this witness or any other witness who appeared before the grand jury." But the sufficiency of an indictment as evidence of probable cause in removal proceedings cannot be impeached (if impeachable at all) in any such manner. Neither can a defendant in this way ascertain what testimony the government may have against him, and thus prepare the way for his defense. There are no other questions that seem to us to require notice.

We see no error in the record, and the judgment is affirmed.

HENRY O. HOUGHTON, Trustee, *et al.*,
Appts.,
v.

HENRY C. PAYNE, Postmaster General.

(See S. C. Reporter's ed. 88-104.)

Postal rates—second-class matter—periodical
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cal publications—books issued at stated intervals — statutes — contemporaneous construction.

1. Books complete in themselves are not, because published at stated intervals and in consecutive numbers, entitled to second-class postage rates under the act of March 3, 1879 (20 Stat. at L. 355, 358, chap. 180, U. S. Comp. Stat. 1901, p. 2646), § 10, as "periodical publications," although they conform in every respect to the conditions of § 14 of that act, upon which a publication shall be admitted to the second class.
2. Contemporaneous construction is an available aid in construing a statute only where the language of such statute is ambiguous, and susceptible of two reasonable interpretations.

[No. 372.]

Argued March 10, 1904. Decided April 11, 1904.

ON APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of that District, enjoining the Postmaster General from canceling a certificate of entry admitting a publication of complainants to the mails as second-class mail matter, and dismissed the bill. *Affirmed.*

See same case below, 31 Wash. L. Rep. 390.

Statement by Mr. Justice **Brown**:

This was a bill in equity originally filed in the supreme court of the District of Columbia by the firm of Houghton, Mifflin, & Co., against the Postmaster General, praying that a certain publication, known as the Riverside Literature Series, be entered and transmitted through the mails as second-class mail matter, and for an injunction to restrain the cancelation of a certain certificate of entry, previously issued, allowing such transmission.

The answer denied that the Riverside Literature Series constituted a periodical within the meaning and intent of the statute; that, although complying with the external characteristics and conditions of second-class mail matter, nevertheless, internally and in substance, they have not the characteristics of second-class matter, but have the peculiarities of books, and are in fact books.

The case was heard upon the pleadings and an exhibit of the series, and a decree rendered in accordance with the prayer of the bill. 31 Wash. L. Rep. 178. An appeal was taken to the court of appeals of the District of Columbia, which reversed

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the decree of the supreme court, and dismissed the bill. 31 Wash. L. Rep. 390.

Messrs. William S. Hall and Holmes Conrad argued the cause and filed a brief for appellants.

Mr. John G. Johnson argued the cause, and, with *Mr. Henry H. Glassie*, filed a brief for appellee.

Mr. Justice Brown delivered the opinion of the court:

This case depends upon the construction of the following sections of the Postoffice appropriation bill of March 3, 1879 (20 Stat. at L. 355, 358, chap. 180, U. S. Comp. Stat. 1901, p. 2646):

"Sec. 7. That mailable matter shall be divided into four classes:

[94] *First, written matter;

Second, periodical publications;

Third, miscellaneous printed matter;

Fourth, merchandise."

Matter of the second class is thus described:

"Sec. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

"Sec. 11. Publications of the second class, except as provided in section 25, . . . shall be entitled to transmission through the mails at two cents a pound or fraction thereof. . . .

"Sec. 12. That matter of the second class may be examined at the office of mailing, and, if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the enclosed matter is subject:

"*Provided*, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"Sec. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information [95] of a public character, or devoted to *litera-
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ture, the sciences, arts, or some special industry, and having a legitimate list of subscribers:

"*Provided, however*, That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

And by the act of March 3, 1885 (23 Stat. at L. 385, chap. 342, U. S. Comp. Stat. 1901, p. 2669), it was provided that second-class matter (saving that excepted in § 25) shall, on and after July 1, 1885, be entitled to transmission through the mails at 1 cent a pound or fraction thereof.

Section 17 declared that mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, etc., and postage shall be paid at the rate of 1 cent for each two ounces or fractional part thereof.

Are the publications of the Riverside Literature Series periodicals, and, therefore, belonging to the second class of mail matter, and entitled to transmission at the rate of 1 cent a pound, or books, as designated in the third class, and subject to postage at the rate of 1 cent for each two ounces?

The publications are small books, 4½ by 7 inches, in paper covers, and are issued from the office of publication either monthly or quarterly, and numbered consecutively. Each number contains a single novel or story, or a collection of short stories or poems by the same author, and most, if not all of them, are reprints of standard works by Thackeray, Whittier, Lowell, Emerson, Irving, or other well-known writers, and from a literary point of view are of a high class. Each number is complete in itself and entirely disconnected with every other number. Upon the front page of the cover appear, at the top, the words "Issued Monthly," followed by the number of the serial and the date of issue. Below, the words "Riverside Literature Series" are prominently displayed, and in the center of the page appears the name of the book. Each number complies with the conditions of § 14, upon which the publication may be admitted to the second class, namely, *it is [96] regularly issued at stated intervals, at least quarterly, and bears a date of issue, and is consecutively numbered. It is issued from a known office of publication; is formed of printed paper sheets, without board, cloth, or leather, or other substantial binding, and is published for the dissemination of information of a public character; or devoted to literature, etc. The bill also avers that the series has a legitimate list of subscribers, but does not aver that they were reading

subscribers in the ordinary sense of the term. This distinction, however, is not pressed by the government. If the fact be that this series becomes a periodical by a compliance with the conditions of § 14, under which it is entitled to be transmitted as second-class mail matter, we shall be compelled to say that the decree of the court below was wrong.

But while § 14 lays down certain conditions requisite to the admission of a publication as mail matter of the second class, it does not define a periodical, or declare that upon compliance with these conditions the publication shall be deemed such. In other words, it defines certain requisites of a periodical, but does not declare that they shall be the only requisites. Under § 10 the publication must be a "periodical publication," which means, we think, that it shall not only have the feature of periodicity, but that it shall be a periodical in the ordinary meaning of the term. A periodical is defined by Webster as "a magazine or other publication which appears at stated or regular intervals," and by the Century dictionary as "a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself." By § 10 newspapers are included within the class of periodical publications, although they are not so regarded in common speech. By far the largest class of periodicals are magazines, which are defined by Webster as "pamphlets published periodically, containing miscellaneous papers or compositions." A few other nondescript publications, such [97] as railway guides, appearing *at stated intervals, have been treated as periodicals and entitled to the privileges of second-class mail matter. *Payne v. United States*, 20 App. D. C. 581. Publications other than newspapers and periodicals are treated as miscellaneous printed matter, falling within the third class.

While it may be difficult to draw an exact line of demarcation between periodicals and books, within which latter class the Riverside Literature Series falls, if not a periodical, it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue.

A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of

the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature.' If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects.

A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but in the fact that it ordinarily contains a story, essay, or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity *is not an element of their char- [98] acter. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals, and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

The fact that these publications are not bound when issued, or intended for preservation, is immaterial, since in France and most of the Continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character, and preservation in his library. It is true that in this subdivision of § 14 it is said that a periodical must be without such substantial binding as to distinguish printed books for preservation from periodical publications, but it is by no means to be inferred from this that to constitute a book the publication must have a substantial binding.

Great stress is laid by counsel upon the

original interpretation of the term "periodical," as applied to these books, which it is said was continued without change under different administrations and by several successive Postmasters General, and from 1879, the date of the passage of the act, until 1902, when the certificates granted by the former Postmasters General were revoked by the defendant and a different classification made of the publications now in issue; that the attention of Congress was repeatedly called to the evils and to the large expense incurred by the government by the admission of publications of this description to mail matter of the second class; that Congress seriously considered these [99] representations, *and committees made voluminous reports thereon, yet Congress persistently refused to change by legislation the ruling of the Postmasters General in that regard.

We had occasion to consider this subject at length in the case of the *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306, in which we held that this court would look with disfavor upon a change whereby parties who have contracted with the government on the faith of a former construction might be injured; especially when it is attempted to make the change retroactive, and to require from a contractor a return of moneys paid to him under the former construction. This case is not open to the same objections. No contract with the government is set up whereby the latter agreed to carry these publications as second-class mail matter. Much less is any repayment demanded of money paid by the government under the prior construction. The action of the government consists merely in the revocation of a certificate or license admitting these publications as mail matter of the second class. No vested right having been created by such certificate, no contract can be said to be impaired by its revocation. *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373, 20 L. ed. 611; *Grand Lodge, F. & A. M. v. New Orleans*, 166 U. S. 143, 147, 41 L. ed. 951, 952, 17 Sup. Ct. Rep. 523. It was said, in that case, that the construction is one which, though inconsistent with the literalism of the act, certainly consorted with the equities of the case. Whereas in the case under consideration, if we are to believe the statements of counsel, which are not denied, the carriage of these publications as second-class mail matter entails annually an enormous loss upon the government and constitutes an odious discrimination between publishers of books and publishers of the so-called periodicals.

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But in addition to these considerations it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States v. Graham*, 110 U. S. 219, 28 L. ed. 123, 3 Sup. Ct. Rep. 582; *United States v. Finnell*, 185 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. Rep. 633. Contemporaneous construction is a rule of interpretation, *but is not an ab-[100]solute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the Department, however, long continued by successive officers, must yield to the positive language of the statute. As was said in the *Graham Case* (p. 221, L. ed. p. 127, Sup. Ct. Rep. p. 583), "if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with the language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous. *Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603; *United States v. Temple*, 105 U. S. 97, 26 L. ed. 967; *Swift & C. & B. Co. v. United States*, 105 U. S. 691, 26 L. ed. 1108; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832." While it might well happen that by reason of the relative unimportance of the question when originally raised a too liberal construction might have been given to the word periodical, we cannot think that if this question had been raised for the first time after second-class mail matter had obtained its present proportions, a like construction would have been given. Some consideration in connection with the revocation of these certificates may properly be accorded to the great expense occasioned by this interpretation, and the discrimination in favor of certain publishers and against others, to which allusion has already been made. We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving a classification of them as periodicals, notwithstanding the length of time such classification obtained, and we are, therefore, of opinion that *the judgment of the Court of Appeals was correct, and it is affirmed.*

Mr. Justice **Harlan** (with whom concurred the CHIEF JUSTICE) dissenting:

The Chief Justice and myself are unable to concur in the opinion of the court.

*It was admitted at the bar that for more [101] than sixteen years prior to May 5th, 1902,

the Postoffice Department had acted upon the identical construction of the statute for which the appellants contend. During that period many different Postmasters General asked Congress to amend the statute so as to exclude from the mails, as second-class matter, such publications as those issued by the appellant, and which, under the present ruling of the Department are declared not to belong to that class of mailable matter. Again and again Congress refused to so amend the statute, although earnestly urged by the Department to do so.

Representative Cannon, now Speaker of the House of Representatives, in a speech in opposition to the proposed change of the statute, explained the reasons that induced Congress to pass the act of March 3d, 1879, chap. 180 [20 Stat. at L. 355] U. S. 1 Rev. Stat. Supp. 245 (U. S. Comp. Stat. 1901, p. 2646). He said: "Before speaking on the merits of this bill, I wish to say to the gentleman from Georgia that, according to my recollection, by legislation advisedly had, prior to 1879, while I was a member of the Committee on the Postoffice and Post Roads, this class of literature was allowed to pass through the mails, the policy of that legislation being to encourage the dissemination of sound and desirable reading matter among the masses of the people of the country at cheap rates, both as to the cost of the books themselves and as to the postage. The question was discussed, unless my memory greatly misleads me, and the legislation was advisedly had. Under this legislation the best classes of literature—for instance, the Waverly Novels, Dickens's works, and the new translation of the Bible—have been sent by publishing houses unbound, stitched, so that they could be sold to the people at 10 cents a volume. As a consequence of this you may now find in the homes of our farmers and laboring men throughout the length and breadth of the country in this cheap form, issued at 10 cents per volume, a class of literature to which, prior to the adoption of this policy, some people in very good circumstances could scarcely have access." Cong. Rec. vol. 19, p. 911.

[102] *The result is that after the Department had, for sixteen years, construed the statute to mean what the appellants say it plainly means, and after Congress had uniformly refused, upon full investigation, to comply with the requests of Postmasters General to so amend the statute that it could be interpreted as the government now insists it should always have been interpreted, the Postoffice Department ruled, on May 5th, 1902, that the appellants' publications, known as the "Riverside Literature Series," could not go through the mails as second-

class matter. This ruling was made notwithstanding a postoffice official, having power to act in the premises, had issued to the appellants a certificate declaring that the "Riverside Literature Series" had been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails as second-class matter.

Thus, by a mere order of the Department, that has been accomplished which different Postmasters General had held could not be accomplished otherwise than by a change in the language of the statute itself, which change, as we have said, Congress deliberately refused to make after hearing all parties concerned and after extended debate in each House.

It has long been the established doctrine of this court that the practice of an executive department through a series of years should not be overthrown, unless such practice was obviously and clearly forbidden by the language of the statute under which it proceeded. In *United States v. Finnell*, 185 U. S. 236, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633, 636, which case related to certain fees claimed by a clerk of a court of the United States, this court said: "It thus appears that the government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it *would be the duty of the [103] court to so adjudge. *United States v. Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *Wisconsin C. R. Co. v. United States*, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45. But if there simply be doubt as to the soundness of that construction,—and that is the utmost that can be asserted by the government,—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. ed. 603, 604; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; *United States v. Johnston*, 124 U. S. 236, 253, 37 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306 Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests."

In our judgment, the appellants properly construe the statute. We think it obviously means just what the Department held it to mean for more than sixteen years. But the very utmost that the government can claim is that the statute in question is doubtful in its meaning and scope. The rule in such a case is not to disturb the long-continued practice of the Department in its execution of a statute, leaving to Congress to change it when the public interests require that to be done. But the Department, after being informed repeatedly by Congress that the change asked by Postmasters General would not be made, concluded to effect the change by a mere order that would make the statute mean what the practice of sixteen years, and the repeated action of Congress, had practically said it did not mean and was never intended to mean. This is a mode of amending and making laws which ought not to be encouraged or approved.

[104] It is suggested that the ruling of the Department was changed because of the increased expense attending the carrying, as second-class mailable matter, of such publications as those of the appellants. But how could the fact of such expense justify a change in the settled construction of a statute? That was a matter to which the attention of Congress was specially and frequently called, and yet it refused to modify the language of the statute. It was not the function of the Postmaster General to sit in judgment on the policy of legislation, and to determine the extent to which Congress should authorize the expenditure of public moneys. The question of expense was entirely for the legislative branch of the government.

Something has also been said as to the discretion committed to the Postoffice Department in determining what is and what is not second-class mailable matter. But what about the discretion with which previous Postmasters General had been invested, when for many years they uniformly held that such publications as the plaintiffs' were second-class mailable matter? Is the discretion of one Postmaster General to be deemed of more importance than the discretion of five of his predecessors in office?

In our opinion the law is for the appellants, and it should have been so adjudged.

ORMOND G. SMITH *et al.*, Appts.,
v.

HENRY C. PAYNE, Postmaster General.

(See S. C. Reporter's ed. 104, 105.)

Postal rates—second-class matter—periodi-
194 U. S. U. S., Book 48.

cal publications—books issued at stated intervals — statutes — contemporaneous construction.

This case is governed by the decision in *Houghton v. Payne*, ante, 888.

[No. 481.]

Argued March 11, 1904. Decided April 11, 1904.

A PPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, enjoining the Postmaster General from canceling certain certificates of entry admitting complainant's publications to the mails as second-class mail matter, and dismissed the bill. *Affirmed.*

Statement by Mr. Justice **Brown**:

This was also a bill, filed by the firm of Street & Smith, to enjoin the Postmaster General from canceling certain certificates of entry admitting the publications of complainant firm to the mail as second-class mail matter. This case took the same course as the preceding one.

Messrs. Tracy L. Jeffords and Charles F. Moody argued the cause, and, with *Mr. E. Van Buren Getty*, filed a brief for appellants.

Mr. H. H. Glassie argued the cause, and, with *Mr. John G. Johnson*, filed a brief for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

Plaintiffs are the publishers of several different series of novels under the names of The Columbia Library, The Bertha Clay Library, The Magnet Detective Library, The Medal Library, The Undine Library, The Eden Series, The Arrow Library, and some others. The books of these series are apparently of an inferior class of literature, and are numbered consecutively; but the only thing to indicate that they are issued periodically is a notice upon the outside of the back cover, in small type, that they are weekly or semimonthly publications.

The considerations moving us to affirm the decree of the court of appeals in the case of *Houghton v. Payne* (just decided), 194 U. S. 88, ante, 888, 24 Sup. Ct. Rep. 590, apply with much greater persuasiveness to this case, and the decree dismissing the bill is, therefore, affirmed.

Mr. Justice **Harlan** and the CHIEF JUSTICE dissent in this case for the reasons stated in their dissenting opinions in *Houghton v. Payne*, 194 U. S. 88, ante, 888, 24

Sup. Ct. Rep. 590, and *Bates & G. Co. v. Payne*, 194 U. S. 106, *post*, 894, 24 Sup. Ct. Rep. 595.

[106] *BATES & GUILD CO., *Appt.*,
v.

HENRY C. PAYNE, Postmaster General.

(See S. C. Reporter's ed. 106-112.)

Discretion of Postmaster General—decision on second-class mail matter—when not reviewable.

The refusal by the Postmaster General to admit to the mails as a periodical publication, entitled to second-class rates, a monthly musical publication, each issue of which is complete in itself, treating of the works of a single master musician, with a greater portion of its pages devoted to specimens of his genius, is not so clearly an erroneous exercise of his discretion as to call for interference by the courts.

[No. 373.]

Argued March 10, 1904. Decided April 11, 1904.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, enjoining the Postmaster General from enforcing an order denying the admission to the mails of a publication of complainant as second-class mail matter, and dismissed the bill. *Affirmed.*

See same case below, 31 Wash. L. Rep. 395.

Statement by Mr. Justice **Brown**:

This was a bill to compel the recognition by the Postmaster General of the right of the plaintiff corporation to have a periodical publication, known as "Masters in Music," received and transmitted through the mails as matter of the second class, and to enjoin defendant from enforcing an order, theretofore made by him, denying it entry as such. This case took the same course as the preceding ones. 31 Wash. L. Rep. 395.

Messrs. William S. Hall and Holmes Conrad argued the cause and filed a brief for appellant.

Mr. John G. Johnson argued the cause, and, with **Mr. Henry H. Glassie**, filed a brief for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

The first number of *Masters in Music* was issued in January, 1903, and an application was immediately made to the Postmaster General for its admission to the mails as second-class mail matter. The application was denied, and plaintiff immediately, and before the issue of another number, filed this bill. The publication purports to be a "monthly magazine," *salable at 20 cents per number, and to subscribers at \$2 a year. The first number is devoted to the works of Mozart and contains a portrait, a biography of four pages, an essay of ten pages upon his art, and thirty-two pages of his music. The preliminary page contained a notice to the effect that "Masters in Music will be unlike any other musical magazine. Each monthly issue, complete in itself, will be devoted to one of the world's great musicians, giving thirty-two pages of engraved piano music, which will comprise those compositions or movements that represent the composer at his best, with editorial notes suggesting the proper interpretation; a beautiful frontispiece portrait, a life, and estimates of his genius and place in art, chosen from the writings of the most eminent musical critics. The text will thus constitute an interesting and authoritative monthly lesson in musical history; its selections of music will form a library of the world's musical masterpieces, and all at slight cost. . . . The announcement of the contents of the February issue, which will treat of Chopin, will be found on another page."

The Postmaster General placed his refusal to allow this magazine to be transmitted as second-class mail matter upon the ground that each number was complete in itself; had no connection with other numbers save in the circumstance that they all treated of masters in music, and that these issues were in fact sheet music disguised as a periodical, and should be classified as third-class mail matter.

Conceding the principle established in the two cases just decided to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of § 14 [20 Stat. at L. 359, chap. 180, U. S. Comp. Stat. 1901, p. 2647], cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications *as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong;

and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. In the case of *American School of Magnetic Healing v. McAnulty*, 187 U. S. 94, 104, 47 L. ed. 90, 94, 23 Sup. Ct. Rep. 33, the Postoffice authorities were held to have acted beyond their authority in rejecting all correspondence with the plaintiff upon the subject of the treatment of diseases by mental action; but while it was said in that case that the question involved was a legal one, it was intimated that something must be left to the discretion of the Postmaster General.

It has long been the settled practice of this court in land cases to treat the findings of the Land Department upon questions of fact as conclusive, although such proceedings involve, to a certain extent, the exercise of judicial power. As was said in *Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018, 1019: "Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions, is conclusive, and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined" (citing cases). See also *Johnson v. Drew*, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800; *Gardner v. Bonestell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399.

But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is, that where Congress has committed to the head of a department certain duties requiring the exercise of judgment *and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of *Decatur v. Paulding*, 14 Pet. 497, 10 L. ed. 599, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 324, 47 L. ed. 1076, 23 Sup. Ct. Rep. 702: "Whether he decided right or wrong is not
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the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever, under those circumstances, to review his determination by mandamus or injunction."

In *Marquez v. Frisbie*, 101 U. S. 473, 21 L. ed. 800, which was a bill in equity to review the decision of the Land Department in a pre-emption case, Mr. Justice Miller remarked (p. 476, L. ed. p. 801): "This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive." In *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62, it was held that the court would no more interfere by injunction than by mandamus to control the action of the head of a department; and in *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12, it was said that the courts will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, no appellate power being given them for that purpose. See also *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197.

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and *the courts [110] will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the decision of the Postoffice Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.

In the case of *Masters in Music* the question really is whether a pamphlet, complete in itself, treating of the works of a single master, with a greater part of the pamphlet

devoted to specimens of his genius, shall be controlled by the cover, which declared that these numbers will be issued monthly, at a certain subscription price per year. Although a comparison of the exhibit with the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent, guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a mixed question of law and fact. While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final. *The decree of the Court of Appeals is therefore affirmed.*

Mr. Justice **Harlan** (with whom concurred the CHIEF JUSTICE) dissenting:

The Chief Justice and myself are of opinion that the publication here in question is second-class mailable matter, and cannot [111] concur *in the opinion and judgment of the court. Our reasons for dissenting are stated in the opinion filed by us in *Houghton v. Payne* (just decided), 194 U. S. 88, ante, 888, 24 Sup. Ct. Rep. 590.

But there are some things in the opinion of the court in this case to which we shall advert. It is said that the case is one of doubt. Now, it was admitted at the bar by the government that the publication known as "Masters in Music" would be carried in the mails as second-class matter if the question be decided in accordance with the construction placed upon the statute by the Department for more than sixteen years continuously prior to the present ruling of the Department. We had supposed it to be firmly settled that the established practice of an executive department charged with the execution of a statute will be respected and followed,—especially if it has been long continued,—unless such practice rests upon a construction of the statute which is clearly and obviously wrong. In *United States v. Philbrick*, 120 U. S. 59, 30 L. ed. 561, 7 Sup. Ct. Rep. 413, which involved the construction placed by an executive department upon an act of Congress, this court said: "Since it is not clear that that construction was erroneous, it ought not now to be over-turned." So in *United States v. Healey*, 160 U. S. 145, 40 L. ed. 372, 16 Sup. Ct. Rep. 247, the court said that it would accept the uniform interpretation by the Interior Department of an act relating to the public lands, "as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure." The authorities

to that effect are numerous. *Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603; *Hahn v. United States*, 107 U. S. 402, 27 L. ed. 527, 2 Sup. Ct. Rep. 494; *United States v. Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *Brown v. United States*, 113 U. S. 571, 28 L. ed. 1080, 5 Sup. Ct. Rep. 648; *United States v. Philbrick*, 120 U. S. 59, 30 L. ed. 561, 7 Sup. Ct. Rep. 413; *United States v. Johnson*, 124 U. S. 236, 31 L. ed. 415, 8 Sup. Ct. Rep. 495; *United States v. Hill*, 120 U. S. 183, 30 L. ed. 632, 7 Sup. Ct. Rep. 510; *United States v. Finnell*, 185 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. Rep. 633; *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; *Hewitt v. Schultz*, 180 U. S. 139, 157, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309. Some of them are cited in the opinion of the court in *Houghton v. Payne*. The rule of construction which this court has recognized for more than three quarters of a century is now overthrown. For, it is adjudged that the practice *of the Postoffice Department, covering [112] a period of sixteen years and more, need not be regarded in this case, although the construction of the statute in question is admitted to be doubtful. We cannot give our assent to this view.

PACIFIC ELECTRIC RAILWAY COMPANY, Appt.,

v.

CITY OF LOS ANGELES, P. W. Powers,
W. H. Pierce, et al., etc.

(See S. C. Reporter's ed. 112-120.)

Courts—jurisdiction of circuit court—case arising under Federal Constitution—street railways—award of franchise to next highest bidder when successful bidder defaults.

1. A substantial controversy respecting rights under the Federal Constitution, presented by the averments of the bill, is sufficient to support the jurisdiction of a Federal circuit court, irrespective of the actual sufficiency of the facts alleged to justify the relief sought, or of the facts as they may subsequently turn out.
2. The acceptance of a bid already made when the successful bidder defaults is necessitated by the provision of Cal. act March 11, 1901, § 5, for the granting of a street railway franchise by a municipality to the

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308; *Re Buchanan*, 39 L. ed. U. S. 884.

"next highest bidder" therefor in case the successful bidder fails to make the requisite deposit of the amount of his bid within twenty-four hours after the sale.

[No. 175.]

Argued March 7, 1904. Decided April 11, 1904.

A PPEAL from the Circuit Court of the United States for the Southern District of California to review a decree dismissing a bill to enjoin municipal interference with the enjoyment of a street railway franchise. *Affirmed.*

See same case below, 118 Fed. 746.

Statement by Mr. Justice **McKenna**:

This is an appeal directly from the circuit court. The appellant asserts rights under the Constitution of the United States, in that a contract alleged to exist between it and the council of the city of Los Angeles, granting appellant a franchise under the statute hereinafter mentioned, was impaired by the action of the council. Also that the property of appellant was taken without due process of law.

[113] *By an act of the legislature of the state of California, passed March 11, 1901 (statutes of California, extra session thirty-third legislature, 1900, p. 265), it is provided that every franchise or privilege to operate street railroads upon the public streets or highways shall not be granted by the respective governing bodies of any city and county, city or town, except upon certain conditions; to wit, the applicant for the franchise must file with "the governing or legislative body" any application, and thereupon said body may, in its discretion, if the application be accompanied by a petition signed by the owners of three fourths of the frontage of the real property fronting along and upon the route of the franchise applied for, advertise the fact of the application and that it (the governing body) proposes to grant the same. The advertisement must be in some newspaper published in the municipality wherein the franchise is to be exercised, and must state that bids will be received for such franchise, and that it will be awarded to the highest bidder. The advertisement must state a number of other matters, but, as no point is made upon them, they are omitted.

In pursuance of the statute appellant made application to the council of the city of Los Angeles for an electric street railroad franchise. The application was referred to the board of public works, which board recommended the franchise be offered for sale. The report was adopted by the council and the franchise was offered for sale, and no-

tice thereof was given as required by the statute. The notice given was very full and circumstantial, but its contents are immaterial to the views we take of the case.

Bids were received by the council on the 10th of February, 1902. Appellant bid \$25,000; W. S. Hook, who, it is alleged, was president of the Los Angeles Traction Company, bid \$37,500; E. A. Davis, one of the appellees, bid \$139,000, and E. Murray bid \$415,000. There were no other bids.

Section 5 of the act of 1901 provides that at the time of opening of the bids any responsible firm or corporation present *or [114] represented may bid for the franchise or privilege a sum not less than 10 per cent above the highest scaled bid therefor, and said bid so made may be raised 10 per cent by any responsible bidder present, and said franchise or privilege finally be struck off, sold, and granted by said governing body to the highest bidder therefor, in gold coin of the United States, who shall deposit with the "governing body," or such person as it shall direct, the amount bid within twenty-four hours thereafter. In case of failure to do so "then the said franchise or privilege shall be granted to the next highest bidder therefor."

No person raising the bid of E. Murray, in accordance with § 5, his bid was accepted, and it was ordered that said franchise be struck off and sold to said Murray, and the city treasurer was ordered and directed to receive the money therefor. It was further ordered that the period of twenty-four hours within which he was allowed to pay for the franchise should expire at 3.15 P. M. on February 11, 1902.

The bids of Hook, Davis, and Murray were all made on behalf of the Los Angeles Traction Company and for its benefit, and with the fraudulent intent of preventing competition and further bidding when the bids should be open, well knowing that the franchise was not worth the sum of \$415,000 and that no advance on the same was to be made. And it is alleged that Murray has no financial standing, never intended to pay his bid, and did not pay the same or offer to pay the same within the time allowed, and never appeared again before the council.

On the 11th of February the traction company and Davis and Hook appeared before the council, and, in pursuance of their fraudulent scheme, claimed that the council had no authority or power to do any other thing than to accept the bid of Davis for \$139,000, and demanded that the said franchise be awarded to him. Such proceedings were had that the council declared the bid of Murray to be fraudulent and void, and the matter of the sale of the franchise was

again taken up. Appellant thereupon bid [115] the sum of \$152,000, and presented *with its bid a certificate of deposit on one of the banks in the city, drawn in the name of the city for said sum. Bids over and above said bid were called for by the council, but none was received, and the franchise was ordered to be sold and struck off to appellant. The treasurer was also directed to receive the purchase money, which was paid by appellant in United States gold coin, and it was accepted by the treasurer and the council. Appellant executed a bond in the sum of \$25,000 as required by the statute, and the franchise was thereupon struck off, sold, and granted to appellant. Subsequently the council passed an ordinance granting the said franchise to appellant, and presented the same to the mayor of the city, who returned the same to the council without his signature or approval, and with his objections to the same. On the 21st of February the question came up before the council for the passage of the ordinance, notwithstanding the veto of the mayor. The ordinance was not passed, but the council passed a resolution pretending and purporting to order any and all bids to be rejected, and ordered the treasurer of the city to refund to appellant the money paid, and the clerk to return the bond executed and filed by appellant—all of which was done by the council under the pretense that the approval of the mayor to the ordinance passed, as above stated, was necessary to give it validity or to make effectual the grant made by the city of the franchise to appellant.

It is alleged that the council of the city, under the statute of the state, had no discretion as to the bid of appellant, but were, on the contrary, by the operation of said statute, ordered to strike off, sell, and grant the franchise to appellant, and no ordinance was necessary to perfect the grant, and the mayor was not authorized to perform any function in, about, or concerning said franchise, and his veto was wholly unfounded; and the title of the appellant became fully vested under the statute, and there was no power in the mayor or the council, or in both, to in any manner affect the rights which had accrued to appellant by virtue of its franchise.

[116] *That appellant had become vested with the title to the franchise, and the orders and resolution of the council, pretending to reconsider the order granting the franchise as above stated, and readvertising the application, were made without any authority, and were intended to deprive appellant of its said property without due process of law, in violation of the provision of the Constitution of the United States prohibiting any

state from depriving any person of life, liberty, or property without due process of law.

That under the statute, notice of sale, and order granting the franchise, appellant was required to commence work for the construction of the road within four months from the 11th of February, 1902, and complete the same within three years from that date. That appellant was and is desirous of commencing such construction, but on the 26th of February, 1902, the council passed an order instructing the mayor, the street superintendent, and the chief of police to stop and prevent any attempt appellant might make to construct said road upon any of the streets with all the force at their command, and said officers, acting under such instructions, will undertake by violence to prevent appellant from constructing said road or exercising any rights under its franchise, or for any enjoyment of its property so acquired unless prevented by the court (circuit court).

That if the city should sell said franchise, rights, and privileges again it will aid the purchaser, with the police force of the city, to take possession of the city property, rights, and franchises, and construct a road over and along said route, and to oust and exclude appellant therefrom, and appellant will be compelled to resort to a multiplicity of suits to protect and defend its rights, privileges, and franchise purchased by it, and its right to exercise and enjoy the same, and appellant will suffer great and irreparable damage, which cannot be compensated in money.

The relief prayed is that appellant be declared the owner in fee simple of the rights and franchise described; that the orders *of [117] the council, reconsidering the order selling and granting the same, and all of the proceedings of the council subsequent thereto, be rescinded and vacated, and the appellees be restrained from preventing appellant from constructing the road and exercising the rights, privileges, and franchise granted.

The city of Los Angeles and the appellees composing its council demurred to the bill. The other appellees also demurred, and the grounds of demurrer were, among others, that the court had no jurisdiction of the subject-matter of the suit, and the bill was without equity. The circuit court overruled the demurrers on the first ground and sustained them on the second. 118 Fed. 747.

Mr. J. S. Chapman argued the cause, and, with Messrs. Bicknell, Gibson, & Trask, Hunsaker & Britt, Works & Lee, and Dunn & Crutcher, filed a brief for appellant.

Mr. W. B. Mathews argued the cause, and, with *Mr. Jonathan R. Scott*, filed a brief for appellees.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court:

The jurisdictional question first demands consideration. It will be observed that rights under the 14th Amendment of the Constitution of the United States were explicitly asserted. Besides, the circuit court treated the bill also as presenting for consideration rights under the contract clause of the Constitution, and entertained jurisdiction of the case on the authority of *Riverside & A. R. Co. v. Riverside*, 118 Fed. 736.

In *City Railway Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653, the railroad company occupied certain streets of the city of Indianapolis under ordinances of the city. Subsequently the city, in pursuance of an act of the general assembly of the state, gave the city railway permission to lay its tracks on some of the same streets which were occupied by the railroad company. The latter brought suit in the circuit court of the [118] United States for the district of Indiana against the railway company, to enjoin it from availing itself of the privilege attempted to be granted. The court granted the relief prayed for and the case was brought here directly. A question of the jurisdiction of the circuit court was raised, and, replying to it, we said: "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair." And it was further observed whether the contract was or was not impaired could not be passed upon "on the motion to dismiss so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one." This view was repeated in *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251.

In those cases the question of jurisdiction was presented on motion to dismiss. In the case at bar it is presented by demurrer; but, however presented, jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out. *City Railway Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653. Nor upon the actual sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for. We do not mean, however, that a mere claim in words is sufficient; a substantial controversy must be presented.

This requirement is satisfied in the case at bar. The circuit court, therefore, had jurisdiction, and the case was properly brought here from that court, since it involves the construction and application of the Constitution of the United States.

2d. The claim of appellant is that the order of the city council of the 11th of February, 1902, granting the franchise to it, appellant, constituted a contract, the obligation of which the subsequent orders of the council impaired, and, further, deprived appellant of its property without due process of law. The question upon which the claim depends is, in our view, a simple one. We need not quote the provision of the statute applicable to the contentions of the appellees, that the notice *given of the sale of the [119] franchise was insufficient, nor need we discuss that contention or the contention that the approval of the mayor of the city under the charter of the city and the Constitution of the state was necessary to a grant of franchises. We will assume the contentions are untenable, and we will also assume that all the steps preliminary to the bidding were rightfully taken, and that the order of the council striking off and selling to appellant the franchise was sufficient to vest title in appellant if its bid was properly and legally accepted under § 5 of the act of 1901. This narrows the question in the case to the construction of that section.

The notice of an application for a franchise is required to state that sealed bids will be received for the franchise "up to a certain hour and day named therein" (§ 3), and also to state that the franchise "will be granted to the person, firm, or corporation who shall make the highest cash bid therefor;" and any bid may be raised not less than 10 per cent "above the highest sealed bid," and the franchise finally struck off, sold, and granted to the "highest bidder." (§ 5). Section 5 also provides that the "successful bidder shall deposit with said governing body, or such person as it may direct, the full amount of his or its bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the *next highest bidder* therefor." We italicize the pivotal words. To what do they refer? To bids already made, as contended by appellees, or to a bid or bids to be made, as contended by appellant? More obviously the former. They express the relation between bids in existence,—those already made and pending before the council in pursuance of its notice. It is only in comparison with the *next* highest of those that the words have signification.

But this construction, it is said, permits the fraud which the bill alleges was prac-

tised upon the city council. We cannot say the argument is without force, but that fraud might be attempted may have been considered and weighed by the legislature. It may have been thought that in any plan [120] of *competition which could be devised there would be danger of illegal combinations, and that the safeguard against them must be the vigilance of the municipal officers, and, may be, that of competing interests. But be this as it may, the defects of the statute cannot control its plain letter. Obviously, to give them such effect would be to amend the statute, not to interpret it. And we think § 5 is plain, and was intended to express as an alternative of a bid not fulfilled the acceptance of one already made, not one to be made. We are fortified in this view by § 7 of the act. That section provides that the grantee of the franchise shall file a bond to fulfil the terms and conditions of such franchise, and also provides that if such bond be not filed "the award of such franchise shall be set aside and the same may be granted to the next lowest bidder, or again offered for sale," in the discretion of the governing body. In other words, when there is to be further competition it is explicitly provided for.

It follows that appellant's bid was not the next highest to that of Murray, and the order of the council selling and granting appellant the franchise was void, and *the decree of the Circuit Court dismissing the bill is affirmed.*

LENA M. SLATER, W. G. Slater, Jesse R. Slater, Annie E. Slater, and Henry G. Slater, *Petitioners,*

v.

MEXICAN NATIONAL RAILROAD COMPANY.

(See S. C. Reporter's ed. 120-135.)

Jurisdiction of Federal courts—action to enforce liability for death by wrongful act, created by Mexican statutes—evidence—proof of foreign law.

1. A Federal court is without jurisdiction of a common-law action founded on the lia-

NOTE.—On conflict of laws as to action for death or bodily injury—see note to Boston & M. R. Co. v. Hurd, 56 L. R. A. 193.

As to what law governs actions for wrongful death—see note to Burrell v. Fleming, 47 C. C. A. 606.

As to oral proof of foreign laws—see note to State v. Behrman, 25 L. R. A. 449.

On mode of proof of the statute law of foreign countries—see note to Nashua Sav. Bank v. Anglo American Land, Mortg. & Agency Co. 47 L. ed. U. S. 782.

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bility for a death by wrongful act, created by the Mexican laws, because of its lack of power to make a decree of the kind required by such laws, which demand that the damages be awarded as support in the nature of alimony or pension, by a decree which contemplates periodical payments, and which is subject to modification from time to time, as the circumstances change.

2. The admission in evidence of an agreed translation of the statutes of a foreign country does not preclude the use, upon any matter open to reasonable doubt, of the deposition of a lawyer of that country, respecting the accepted or proper construction of such statutes.

[No. 162.]

*Argued and submitted February 29, 1904.
Decided April 11, 1904.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Northern District of Texas in favor of plaintiffs in an action to enforce the liability for a death by wrongful act, created by the Mexican statutes, and ordered the dismissal of the action. *Affirmed.*

See same case below, 53 C. C. A. 239, 115 Fed. 593.

The facts are stated in the opinion.

Mr. **Mason Williams** submitted the cause for petitioners. Messrs. C. A. Keller and E. A. Atlee were with him on his brief:

The civil action for damages for injuries resulting in death, under the laws of Mexico, is a personal action, transitory in its nature; and, the right created by those laws not being contrary to the public policy of the state of Texas, or calculated to injure the state of Texas, or the United States, or their citizens, the same may be enforced at law in the Federal courts within the state of Texas,—and in this suit, where, by personal process and an appearance, the wrongdoer has been subjected to the jurisdiction of the court.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Huntington v. Attrill*, 146 U. S. 670, 36 L. ed. 1128, 13 Sup. Ct. Rep. 224; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387; *Frey v. Mexican C. R. Co.* 38 L. R. A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294; *Mexican C. R. Co. v. Marshall*, 34 C. C. A. 133, 91 Fed. 933; *Story*, Confl. L. § 625, note a; *Cooley*, Torts, pp. 270 *et seq.*; *St. Louis, I. M. & S. R. Co. v. Haist* (Ark.) 72 S. W. 893.

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Plaintiffs are citizens of the United States, having a right of action under the law of Mexico; their cause of action is transitory; they seek its enforcement in the forum where the wrongdoer has entered his plea; and the policy of our law has always been to find and apply a remedy wherever the right of action may be shown.

If contingencies have arisen, under which, according to the law of Mexico, the liability for damages for injuries resulting in death will cease, they may be pleaded in abatement, or as matter of defense, the effect of which would be to bar the remedy, rather than to extinguish the right; but, if they have not arisen, the court will not be called upon to construe the law relating thereto, and, while the action might abate under the procedure of the foreign country, it would not necessarily abate under the procedure of our country.

Baltimore & O. R. Co. v. Joy, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387.

Mr. Leroy G. Denman argued the cause, and, with *Messrs. Denman, Franklin, & McGown*, filed a brief for respondent:

The Texas statutes and procedure do not permit of the administration of these intricate Mexican statutes in Texas courts.

Mexican Nat. R. Co. v. Jackson, 89 Tex. 107, 31 L. R. A. 276, 59 Am. St. Rep. 28, 33 S. W. 857.

Since the United States circuit court is required by U. S. Rev. Stat. § 914 (U. S. Comp. Stat. 1901, p. 684), to conform their proceedings as nearly as may be to the form and modes of procedure of courts of record of the state where the cause is being tried, it would appear that that court has no procedure adapted to the administration of the right of support given by the Mexican law, and therefore no jurisdiction.

Jurisdiction is the power (1) to hear, (2) to determine, and (3) to enforce its decree.

Templeton v. Ferguson, 89 Tex. 54, 33 S. W. 329; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768.

If either of these powers is lacking, the court properly holds that it has no jurisdiction.

De Poyster v. Baker, 89 Tex. 160, 34 S. W. 106.

If the railroad company in Texas had entered into a contract agreeing to pay to the plaintiffs \$7,000, and subsequently the legislature of Texas had passed a law providing that contracts for the payment of money could be satisfied by the obligor undertaking the duty of support fixed by the Mexican law upon the railway in favor of plaintiffs under the provisions above, there could be no doubt that such a law would impair the obligation of the contract (*Edwards v. Keuzen*, 96 U. S. 595, 24 L. ed. 793). And

the same would be true if the railroad company had entered into a contract to support plaintiffs under the limitations of the Mexican law above referred to, and the legislature of Texas had afterwards passed a law providing that such a contract could be discharged by the rendition of a judgment *in solido*, as was done in this case.

Again, if this tort had been committed in Texas, where the law permits the wife and children to recover whatever damages they may have sustained by reason of the death of Slater, and after such death the legislature of Texas had passed a law applying to previous, as well as subsequent, torts, giving the very right now given by the Mexican law in such a case, it is clear that such a law would be contrary to the due-process-of-law clause, for such subsequent law would not merely take away from the plaintiffs some of the remedies which they had for the enforcement of the right growing out of the tort under the old law, but would take away a large part of the recovery itself.

Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211.

Again, if the death had occurred in Texas, and the Texas statute had then given the same right of support to plaintiffs as is given by the Mexican statutes, and subsequently the present Texas statute, above referred to, had been enacted giving the broader recovery *in solido*, it could not be doubted that such subsequent statute, applied to the previous cause of action, would take the property of the railway without due process of law.

These illustrations, based upon well-adjudicated principles of constitutional law, illustrate and make clear that the right administered by the circuit court was different in its nature from the right conferred by the Mexican statutes, and that it is not a mere question of difference of remedies.

Mr. T. W. Dodd and *Messrs. Denman, Franklin, & McGown* also filed a brief for respondent:

It is elementary that foreign unwritten laws, customs, and usages may be proved by parol evidence.

Greenl. Ev. 13th ed. p. 636, § 488.

The usual course is to make proof by the testimony of competent witnesses, learned and instructed in the laws, customs, and usages of such country.

Ibid.

It is competent to offer testimony in the nature of expert evidence as to the proper construction of a statute in a foreign tongue and country.

Aline v. Baker, 99 Mass. 254; *De Bode v. Reg.* 10 Jur. 217.

In a number of states of the United States statutes giving a right of action to certain

representatives of deceased persons wrongfully killed, or for injuries resulting in death, have prescribed limitations as to amounts; and no court, either Federal or state, in suits brought in another jurisdiction, has ever ignored such limitations. The statutes of Illinois limit the recovery of widows, children, or next of kin to \$5,000. In *Morris v. Chicago R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143, the court of Iowa took jurisdiction, but gave effect to the limitations fixed by the Illinois statute, the place where the cause of action occurred. In another class of cases the same principle is enforced. An administrator under the laws of Missouri is prohibited from instituting, maintaining, or prosecuting an action for damages resulting from the wrongful act or omission of another in causing the death of his intestate. The supreme court of Kansas (*Limekiller v. Hannibal & St. J. R. Co.* 33 Kan. 83, 52 Am. Rep. 523, 5 Pac. 401) holds that an administrator appointed under this Missouri law cannot prosecute such a suit in Kansas because he could not do so in Missouri, the state of his appointment.

Rights acquired in foreign jurisdictions depend for their validity, nature, and extent upon the laws of the place where they occurred, and, when pleaded and proved, such laws will be regarded as the rule of decision.

Crosby v. Huston, 1 Tex. 203; *Andrews v. Hoxie*, 5 Tex. 171; *Willard v. Conduit*, 10 Tex. 213; *Sadler v. Anderson*, 17 Tex. 246; *Bradshaw v. Mayfield*, 18 Tex. 21; *Powell v. De Blane*, 23 Tex. 66; *James v. James*, 81 Tex. 373, 16 S. W. 1087; *Poreheler v. Bronson*, 50 Tex. 561; *Alexander v. Pennsylvania Co.* 48 Ohio St. 623, 30 N. E. 69.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action brought in the United States circuit court for the northern district of Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico. The plaintiffs are the widow and children of William H. Slater, who was employed by the defendant as a switchman on its road, and was killed through the defendant's negligence while coupling two freight cars at Nueva Laredo, in Mexico. This action is to recover damages for the death. The laws of Mexico were set forth in the plaintiffs' petition, and the defendant demurred on the ground that the cause of action given by the Mexican laws was not transitory, for reasons sufficiently stated. The demurrer was [125] overruled, *and the defendant excepted. A similar objection was taken also by plea setting forth additional sections of the Mexi-

can statutes. A demurrer to this plea was sustained, subject to exception. The same point was raised again at the trial by a request to direct a verdict for the defendant. The judge who tried the case instructed the jury that the damages to be recovered, if any, were to be measured by the money value of the life of the deceased to the widow and children, and the jury returned a verdict for a lump sum, apportioned to the several plaintiffs. The judge and jury in this regard acted as prescribed by the Texas Rev. Stat. art. 3027. The case then was taken to the circuit court of appeals, where the judgment was reversed and the action ordered to be dismissed. 53 C. C. A. 239, 115 Fed. 593.

There is no need to encumber the reports with all the statutes in the record. The main reliance of the plaintiffs is upon the following agreed translation from the Penal Code, bk. 2. "Civil Liability in Criminal Matters." "Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family, or a third person for the violation of a right which is formal, existing, and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause a proximate and inevitable consequence." Coupled with these are articles making railroad companies answerable for the negligence of their servants within the scope of the servants' employment. Penal Code, bk. 2, arts. 330, 331; regulations for the construction, maintenance, and operation of railroads, art. 184. We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of article 11 of the *Penal Code, and, therefore, if the [126] above sections were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.

As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any de-

grec is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout v. Wood*, 1 Blackf. 71; *Dennick v. Central R. Co.* 103 U. S. 11, 18, 26 L. ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation (*Smith v. Condry*, 1 How. 28, 11 L. ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 199, 38 L. ed. 958, 961, 14 Sup. Ct. Rep. 978, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. See further, *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 801, 802, [127] 22 So. 53; *Morris v. *Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 731, 54 Am. Rep. 39, 23 N. W. 143; *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276, 33 S. W. 857; *Bruce v. Cincinnati R. Co.* 83 Ky. 174, 181; *Holmes v. Barclay*, 4 La. Ann. 64; *Atwood v. Walker*, 179 Mass. 514, 519, 61 N. E. 58; *Minor, Confl. L.* 493, § 200. We are aware that expressions of a different tendency may be found in some English cases. But they do not cover the question before this court, and our opinion is based upon the express adjudication of this court, and, as it seems to us, upon the only theory by which actions fairly can be allowed to be maintained for foreign torts. As the cause of action relied upon is one which is supposed to have arisen in Mexico, under Mexican laws, the place of the death and the domicile of the parties have no bearing upon the case.

The application of these considerations now is to be shown. The general ground on which the plaintiffs bring their suit is,

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as we have stated, that there is a civil liability imposed on the railroad company arising from an act contrary to the penal law,—a negligent crime, as it is called in the Code. But the Code contains specific provisions for the case of homicide. These necessarily override the merely general rule for torts which also are crimes. *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551, ante, 788, 24 Sup. Ct. Rep. 538. By article 311 the right is personal to the parties mentioned in art. 318, and is no part of the estate of the deceased. The specific cause of action is the killing of the deceased. So far as appears, apart from that and the following articles, these plaintiffs would have no right of action for the cause alleged. For article 304 seems to presuppose a right in the family, not to create one, and we cannot assume a general right of the members of a family to sue for causing death. By article 318 civil responsibility for a wrongful homicide includes, besides the expenses of medical attendance and burial and damages to the property of the deceased, the expenses “of the support not only of the widow, descendants, and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave.” Then, by article 319, “the obligation [128] to support shall last during the time that the deceased might have lived, calculated by a given life table, but taking the state of his health before the homicide into consideration; but “the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support.” It is unnecessary to set forth the detailed provisions as to support in other parts of the statutes. It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings,—a decree which contemplates periodical payments, and which is subject to modification from time to time, as the circumstances change. See also, arts. 1376, 1377, of the Code of Procedure, and Penal Code, bk. 2, art. 363.

The present action is a suit at common law, and the court has no power to make a decree of this kind contemplated by the Mexican statutes. What the circuit court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong, and was excepted to specifically. But we

are of opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by art. 225, concerning alimony, [129] the right *cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts. *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276, 33 S. W. 857; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 1 L. R. A. 804, 9 S. W. 540. The case is not one demanding extreme measures, like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case. See *Mulhall v. Fallon*, 176 Mass. 266, 54 L. R. A. 934, 57 N. E. 386.

So far as appears, the civil liability depends upon penal liability; no different suggestion has been made; and thus far we have taken it for granted that the defendant was within the penal law. The circuit court made the same assumption, although the question was one of fact, in case the jury should find the negligence relied upon to be proved. But whether or not a railroad company was subject to penalty for a homicide caused by the negligence of its servants did not appear. It has occurred to us, although no such argument was made, that it might be sought to sustain the liability on a different ground. The alleged cause of the accident was the different height of the draw heads on two cars which the deceased attempted to couple as they came together. By art. 52 of the Mexican railroad regulations it is required that "the cars which

enter into the make-up of a train shall have draw heads of the same height." By art. 208 of the same, "all violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to \$500, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through *criminal [130] acts and omissions committed by them." It might be argued that these sections, coupled with articles 301 and 304 of the Penal Code, to which we referred in the beginning, were enough to create the liability without regard to the question of homicide. To this it might be enough to answer that it does not appear that a law imposing a fine to be assessed by the department of public works is a penal law within the meaning of the Code,—that, as we have said in a different connection, when the tort relied on is a homicide the specific provisions for homicide override merely general rules, and that the plaintiffs come here relying, as they have to rely, upon a statute which gives them a right of action independent of the deceased, and that the statute is made expressly and only for the case of homicide. Penal Code, bk. 2, art. 311.

But what we last have said brings into consideration another error of the circuit court which hitherto we have not mentioned. The defendant offered the deposition of a Mexican lawyer as to the Mexican law. This was rejected, subject to exception, seemingly on the ground that the agreed translation of the statutes was the best evidence. So, no doubt, they were, so far as they went, but the testimony of an expert as to the accepted or proper construction of them is admissible upon any matter open to reasonable doubt. Many doubts are left unresolved by the documents before us. The expert would have testified that where no criminal proceedings had been had, the right of the widow and children was dependent upon the court's finding that the killing was a crime as defined by the Penal Code, and that the right was in the nature of alimony or pension, to be paid in instalments for periods of time fixed by the court. Without stating his testimony more fully, we have said enough to show that it should have been received. Seemingly he understood that he was testifying in a case against a railroad, and if so he furnished further reasons for denying any liability except on the footing of homicide. In a case of homicide he excluded the argument that there

was a right to a lump sum under articles 301, [131] 304, distinct from the right to alimony, *and he confirmed the conclusion drawn from the language of the Code as to what would be the nature of a Mexican decree in such a case. There may be other matters which would have to be considered before the verdict could be sustained, but what we have said seems to us sufficient to show that the judgment of the Circuit Court of Appeals should be affirmed.

Judgment affirmed.

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan** and Mr. Justice **Peckham**, dissenting:

Slater, the deceased, was a citizen of Texas, residing at Laredo in that state. The Mexican National Railroad Company was a corporation of Colorado, owning and operating a railroad from Laredo to the City of Mexico. Its superintendent resided in Laredo. Slater was fatally injured through the negligence of the company while working in its yard in New Laredo, just across the Rio Grande in Mexico, and died in Laredo from the injuries so inflicted. His wife and children, who resided in Laredo, brought this suit in the circuit court of the United States, diverse citizenship being the ground of jurisdiction, and no objection in that regard arises. Defendant did not "happen to be caught" in Laredo, but was domiciled there.

The laws of Texas provided that an action for damages on account of injuries causing death may be brought when the death is caused by the wrongful act, negligence, unskilfulness, or default of another, and without regard to any criminal proceedings in relation to the homicide. The jury are to give such damages as they may think proportioned to the injury resulting from the death, to be divided among the persons entitled in such shares as found by the verdict. The jury pursued that course in this case, under the instructions of the circuit court.

By the laws of Mexico, damages are recoverable for death by wrongful act, but they, it is said, are awarded as support by decree in the nature of alimony or pension.

[132] *As the two countries concur in holding that the act complained of is the subject of legal redress, the question is whether recovery in this cause must be defeated because the law of Mexico controls and cannot be enforced in Texas.

It seems to me that the method of arriving at and distributing the damages pertains to procedure or remedy,—that is to say, to the course of the court after parties are brought in, and the means of redressing the wrong,—and I think the general rule that procedure
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and remedy are regulated by the law of the forum is applicable. 2 Bouvier Law Dict. Rawle's ed. 870; *Kring v. Missouri*, 107 U. S. 231, 27 L. ed. 509, 2 Sup. Ct. Rep. 443; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

In *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 199, 38 L. ed. 958, 961, 14 Sup. Ct. Rep. 978, the company was not a corporation of Minnesota, and the ruling simply was that the right to recover was governed by the *lex loci*. The amount found was within the law of Minnesota as well as that of Montana.

The extent of damages does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. *Finch, J., Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L. R. A. 458, 26 N. E. 1050.

In *Scott v. Seymour*, 1 Hurlst. & C. 217, which was an action by one British subject against another for an assault committed in a foreign country, it was held unanimously by the courts of exchequer and of the exchequer chamber that the objection that, by the foreign law, compensation in damages could not be recovered until certain penal proceedings had been commenced and determined there, was an objection to procedure merely, and not a bar to the action in England. And many of the judges were of opinion that an action was maintainable for any act which would have been a tort if done in England, and, whether actionable or not, was unjustifiable or wrongful, in a broad sense, under the law of the foreign country where the act was done.

Mr. Justice Wightman (Willes, J., in effect concurring) specifically held that if an action would lie by the English law for a particular wrong, the English courts would give redress *for it, though it was committed [133] in a country by the laws of which no redress would be granted, if the parties were both British subjects.

This case has never been overruled, and is cited as authority by Mr. Pollock in his work on Torts, 6th ed. p. 201.

At all events, the rule in England is well settled, as thus laid down in *Machado v. Montez* [1897] 2 Q. B. 231: "An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed; but it is not necessary that the act should be the subject of civil proceedings in the foreign country." *Phillips v. Eyre* [1870] L. R. 6 Q. B. 1, and *The M. Mosham* [1876] L. R. 1 Prob. Div. 107, were there cited and applied.

In *Phillips v. Eyre*, Willes, J., delivering

the opinion of the exchequer chamber, said: "As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

In *The Halley*, L. R. 2 P. C. 202, Lord Justice Selwyn, speaking for the court, said: "It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign [134] law as part of the circumstances *attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordship's opinion, alike contrary to principle and to authority, to hold that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

The rule in this court goes further, for "by our law, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought." *Huntington v. Attrill*, 146 U. S. 670, 36 L. ed. 1128, 13 Sup. Ct. Rep. 229.

It is enough that the act complained of here was wrongful by both the law of Texas and the law of Mexico, and in such a case the action lies in Texas, except where the cause of action is not transitory, but is purely local, such as trespass to land. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 604, 36 L. ed. 833, 12 Sup. Ct. Rep. 905; *Ellenwood v. Marietta Chair Co.* 158 U. S. 105, 39 L. 906

ed. 913, 15 Sup. Ct. Rep. 771; *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75; *McKenna v. Fisk*, 1 How. 241, 11 L. ed. 117.

It is suggested that the Texas courts have held that there can be no recovery in Texas because of the dissimilarity in the ascertainment of damages between the law of Texas and that of Mexico. And this seems to have been so ruled in *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276, 33 S. W. 857; but the question is one of general law, and we are not bound by that ruling. Moreover, the railway company is stated in that case to have been "a Mexican corporation whose line of railway extended into Texas," whereas in this case the company is a corporation of Colorado, domiciled in Texas, and whose line of railway extends from Texas into Mexico. Again, after that decision was rendered, in *Mexican C. R. Co. v. Mitten*, 13 *Tex. Civ. App. 653, 36 S. W. 282, the com-[135] pany being a Massachusetts corporation and Mitten a citizen of Texas, the court of civil appeals for the fourth district of Texas held to the contrary.

The court said: "If the construction placed upon the decision in the *Jackson Case* be the true one,—and some of its expressions would seem to justify the construction,—it is a practical denial of remedies for wrongs that may be inflicted by one of our citizens upon another in Mexico, . . . " and: "We are not willing to subscribe to such doctrine, and will not extend the scope of the decision referred to beyond the purview of the facts of that case."

The supreme court of Texas apparently accepted this view, for it refused to grant a writ of error to review the judgment. 13 Tex. Civ. App. p. v. And see *Evey v. Mexican C. R. Co.* 38 L. R. A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294.

I entirely agree with the views expressed in *Scott v. Seymour*, to which I have referred. The legal relations of Slater with the United States and Texas were not destroyed by his crossing the Rio Grande to work in the railroad yard. This Colorado corporation was domiciled in Texas, as Slater was. The laws of Texas protected them alike. The injury was inflicted in Mexico and resulted fatally in Texas. The wrongful act was actionable in Texas and in Mexico.

The jurisdiction of the circuit court over person and subject-matter was unquestionable, and I cannot accept the conclusion that the form in which the law of Mexico provides for reparation to its own citizens constitutes a bar to recovery in Texas in litigation between citizens of this country.

My brothers Harlan and Peckham concur in this dissent.

[136]*SOUTHERN RAILWAY COMPANY, *Plff.*
in Err.,
v.

JAMES L. CARSON.

(See S. C. Reporter's ed. 136-141.)

Removal of causes—recovery against one of several defendants, who, if sued alone, might have removed the cause, not a denial of right to remove—due process of law—error to state court—what questions reviewable.

1. A recovery against one only of several defendants charged with joint and concurring negligence does not deprive such defendant of any Federal right because, if it had been sued alone, the diversity of citizenship existing between it and the plaintiff would have authorized the removal of the cause from the state court to a Federal circuit court.
2. An employer is not deprived of its property without due process of law by a recovery against it alone in a suit in which it and its servants are charged with joint and concurring negligence, on the theory that it was thereby deprived of the right of reimbursement from the servants.
3. A question which the Federal Supreme Court can review on writ of error to a state court does not arise under the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), requiring interstate carriers to equip their cars with automatic couplings, where no right under such act, or dependent upon its construction, was specially set up or claimed, and denied by the state court.

[No. 546.]

Submitted April 4, 1904. Decided April 18, 1904.

IN ERROR to the Supreme Court of the State of South Carolina, to review a judgment which affirmed a judgment of the Court of Common Pleas of Greenville County, in that state, entered on a verdict against the railway company in a suit against it and its employees to recover damages for personal injuries alleged to be due to their joint and concurrent negligence. On motion to dismiss or affirm, *Affirmed.*

See same case below (S. C.) 46 S. E. 525.

NOTE.—On removal of causes in cases of diverse citizenship—see notes to *Whelan v. New York, L. E. & W. R. Co.* 1 L. R. A. 65; *Seddon v. Virginia, T. & C. Steel & Iron Co.* 1 L. R. A. 108; *Huskins v. Cincinnati, N. O. & T. P. R. Co.* 3 L. R. A. 545; *Bierbower v. Miller*, 9 L. R. A. 228; *Brodhead v. Shoemaker*, 11 L. R. A. 567; *Delaware R. Constr. Co. v. Meyer*, 25 L. ed. U. S. 593; *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 346, and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note, 194 U. S.

Statement by Mr. Chief Justice Fuller:

Carson, a resident of Greenville county, South Carolina, brought this suit in the court of common pleas of that county against the Southern Railway Company, a corporation chartered under the laws of the state of Virginia, and engaged in running trains through several states as a common carrier, and J. C. Arwood and J. D. Miller, residents of Greenville county, to recover damages for personal injuries, which, he charged in his complaint, "were due to the joint and concurrent negligence, carelessness, and fault of the defendants, and to their joint and concurrent recklessness, carelessness, wilfulness, and wanton disregard of the plaintiff's rights and safety, in the following manner, to wit:"—setting forth the circumstances of his cause of action. Among other things, plaintiff alleged that he was a flagman in the employment of the Southern Railway Company, and on the day of the accident was ordered by Arwood, the conductor in charge of a certain freight train, on which Miller was engineer, to do the work of brakeman, and to couple some of the cars in the train; that these cars were provided with automatic couplers, but one of them was not in proper condition, which rendered it necessary for plaintiff to go between the cars to effect the coupling; and that the accident "thereupon happened" [137] by reason of defendants' "joint and concurrent carelessness, negligence, recklessness," etc., in particulars detailed.

Defendants severally demurred, the demurrers were overruled, and defendants excepted. Defendants then answered severally, in identical terms, denying all negligence on the part of defendant, and asserting "that the plaintiff's alleged injury was the result of his own negligence." Trial was had and the jury found for plaintiff, against the railway company, judgment was entered, and the railway company appealed to the supreme court of the state. That court affirmed the judgment (46 S. E. 525), and thereupon this writ of error was allowed.

and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hambin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998, and *Re Buchanan*, 39 L. ed. U. S. 884.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

Messrs. W. A. Henderson and T. P. Cothran submitted the cause for plaintiff in error:

The right of removal depending absolutely upon the allegations of the plaintiff's complaint, where he alleges a joint and concurrent tort the foreign defendant is thereby concluded. He should not therefore be allowed to recover upon a state of facts which, if alleged, would present a separable controversy, a removable cause. Effectually to defeat the right of the foreign defendant to remove a case to the Federal court at the inception of a suit, all that the plaintiff has to do is to join one of the servants as a co-defendant, and allege that the injury was caused by the joint and concurrent negligence of the master and servant.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67.

The doctrine is well settled that there is no contribution or reimbursement as between joint tort-feasors.

Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324.

Where the master and servant are sued upon an allegation of joint negligence, recovery should not be allowed except upon proof of such joint negligence. Otherwise the master could not enforce his right of reimbursement.

Gableman v. Peoria, D. & E. R. Co. 82 Fed. 790; *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572; *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; *Parsons v. Winehell*, 5 Cush. 592, 52 Am. Dec. 745; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637; Pom. Rem. § 308; *Landers v. Felton*, 73 Fed. 311; *Buswell, Personal Injuries*, 31; *Charleston Gaslight Co. v. Charleston*, 9 Rich. L. 342; *Bolan v. Williamson*, 1 Brev. 181.

A master is not liable in punitive damages for the wilful tort of one of his servants. To hold otherwise would deprive the master of his property without due process of law contrary to the 14th Amendment to the Constitution of the United States.

Camp v. Rogers, 44 Conn. 291; *Re Ah Lee*, 6 Sawy. 410, 5 Fed. 899; *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559; *Cooley*, Const. Lim. 438, 439.

Mr. J. Altheus Johnson submitted the cause for defendant in error:

The right of a defendant to remove his case for trial from a state to a United States court depends upon the act of Congress, and this court has repeatedly held that no such right has ever been conferred by Congress upon a defendant in a case like the one now before us.

Chesapeake & O. R. Co. v. Dixon, 179 U.

S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Pirie v. Tvedt*, 115 U. S. 41, 29 L. ed. 331, 5 Sup. Ct. Rep. 1034, 1161; *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735.

Furthermore, the right of removal, in cases where it exists, must be exercised by the defendant before his plea or answer is due; otherwise, the right is waived and lost.

Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Baltimore & O. R. Co. v. Burns*, 124 U. S. 165, 31 L. ed. 333, 8 Sup. Ct. Rep. 421.

Besides, the removal of a case on the ground of diverse citizenship does not in the slightest degree change the law under and by which the case is to be decided. If a case arising under and determinable by the laws of a state should, by reason of diverse citizenship, be transferred to a court of the United States, the latter tribunal would administer the identical law which, but for the transfer, the state court would have administered.

Texas & P. R. Co. v. Humble, 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526.

This court has often declared the conditions under which a writ of error will lie to bring before it for review the judgment of a state court.

Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; *Allen v. Southern P. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518; *McQuade v. Trenton*, 172 U. S. 636, 43 L. ed. 581, 19 Sup. Ct. Rep. 292; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.* 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Chemical Nat. Bank v. City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *De Saussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053.

It is apparent that the case at bar, under the testimony and the instructions to the jury of the trial court, does not in any wise depend upon, or involve, the automatic car-coupler act of Congress.

Hannibal & St. J. R. Co. v. Missouri River Packet Co. 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. Rep. 874; *Jersey City & B. R. Co. v. Morgan*, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276.

The mere construction by a state court of an act of Congress, however erroneous the construction may be, does not of itself present a Federal question within the jurisdic-

tion of this court. It is necessary that the plaintiff in error, or person complaining of the judgment of the state court, should have set up, or claimed, in the state court, some "title, right, privilege, or immunity," based upon or derived from, Federal law or Federal authority, and the judgment of the state court must have been adverse to his claim.

Murdock v. Memphis, 20 Wall. 590, 636, 22 L. ed. 429, 444.

This court, since the decision in *Murdock v. Memphis*, has persistently refused, on a writ of error to a state court, to consider any question not Federal in character, or to consider a Federal question, even, unless "the title, right, privilege, or immunity" constituting the Federal question were specially set up and claimed in the state court.

Myrick v. Thompson, 99 U. S. 291, 297, 25 L. ed. 324, 327; *Bonaparte v. Baltimore City Appeal Tax Ct.* 104 U. S. 592, 595, 26 L. ed. 845, 846; *Sayward v. Denny*, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; *F. G. Oxley Slave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

And it is not enough that the plaintiff in error set up and claimed a Federal question. The question, to give to this court jurisdiction, must be a real, and not a fictitious, one,—a real, substantial question, on which the case may be made to turn.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

This court has also, with persistent uniformity, declined to review the judgment of a state court upon a Federal question of even the most meritorious character, if the judgment of the state court is sustainable on other than Federal grounds.

Jenkins v. Loewenthal, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; *Adams County v. Burlington & M. R. Co.* 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; *Hale v. Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171.

It is interesting to note, in this connection, the careful regard which this tribunal, in the discharge of its high duty under the Federal Constitution, has always manifested for the rights of the state when acting within the sphere which belongs to the state.

Roberts v. Louis, 153 U. S. 367, 38 L. ed. 747, 14 Sup. Ct. Rep. 945; *Ohio v. Frank*, 103 U. S. 697, 26 L. ed. 531; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 486, *ante*, 268, 271, 24 Sup. Ct. Rep. 132.

This court, upon a writ of error to a state court, will not review the judgment of the state court upon a question of fact, even though a Federal question would or would

not be presented according to the way in which the question of fact was decided.

Dower v. Richards, 151 U. S. 658, 663, 672, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Egan v. Hart*, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This case comes before us on motions to dismiss or affirm. There was certainly color for the motion to dismiss, as we retain jurisdiction with hesitation, and we will dispose of the case on the motion to affirm.

By some of the many exceptions preserved on the trial, and disposed of by the state supreme court, it was sought to raise Federal questions in respect of the acts of Congress (1) providing for the removal of cases from a state court to a court of the United States, and (2) providing that railroad companies engaged in interstate commerce shall equip their cars with automatic couplers.

1. The railway company did not at any time apply for the removal of the case to the circuit court. Plaintiff below and the company's two codefendants were citizens of the same state, and the railway company did not make application to *remove before [138] trial on the ground of separable controversy or want of good faith in the joinder. Nor did it make such application when plaintiff's evidence was in, nor on the whole evidence. There was no suggestion throughout the trial that the joinder was in itself improperly made, but the contention, as exhibited by the exceptions, was that a verdict could not be rendered against the company alone, because, if it had been sued alone, it would have had the right of removal. The trial court charged the jury that if the proof failed to show joint and concurrent negligence on the part of all the defendants, yet showed negligence on the part of one or more of them, resulting in injury to plaintiff, as the sole and proximate cause thereof, the jury might find a verdict against such defendant or defendants as the proof showed were guilty of such negligence; and to this instruction the railway company preserved an exception.

The railway company also excepted to the refusal of the court to give several instructions asked on its behalf, to the effect that, as by the allegation of a joint and concurrent tort, the company had been deprived of the right to remove the cause, joint and concurrent tort must be made out against the company and at least one of the other defendants; that to allow plaintiff to recover without proof of joint and concurrent tort would deprive the company of the right of removal guaranteed by the Constitution and

laws; and of its property without due process of law, in contravention of the 14th Amendment, in that the company would be deprived of the right of reimbursement which would otherwise exist. But these are matters upon the merits, and recovery against one of several defendants does not depend on whether, if sued alone, that defendant might have removed the case. The right of removal depends on the act of Congress, and the company not only, on the face of the pleadings, did not come within the act, but it made no effort to assert the right. The rule is well settled, as stated by Mr. Justice Gray in *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep.

[139] 264, "that an action of *tort, which might have been brought against many persons, or against any one or more of them, and which is brought in a state court, against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers, and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

The view thus expressed was reiterated in *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67, where the subject was much considered, and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. *Schumpert v. Southern R. Co.* 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813. In that case it was held that under the state Code of Civil Procedure, in actions *ex delicto*, acts of negligence and wilful tort might be commingled in one statement as causes of injury; that master and servant are jointly liable as joint tortfeasors for the tort of the servant, committed within the scope of his employment, and while in the master's service; that the objection that if master and servant were made jointly liable for the negligence of the latter the master could not call on the servant for contribution was without merit, as the rule was, as laid down by Mr.

Cooley (Torts, page 145), that: "As between the company and its servants the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but *upon that of the servant himself." And see *Gardner v. Southern R. Co.* 65 S. C. 341, 43 S. E. 816. In *Rucker v. Smoke*, 37 S. C. 380, 34 Am. St. Rep. 758, 16 S. E. 40, and *Skipper v. Clifton Mfg. Co.* 58 S. C. 143, 36 S. E. 509, it was decided that in actions such as this exemplary damages may be recovered. The suggestion that the state deprived the company of its property by the rulings of the supreme court calls for no remark.

2. The act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), provided, in respect of common carriers engaged in interstate commerce, "that on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The trial court, in one of its instructions, set forth this provision, and told the jury that if they found the railway company was engaged, and these cars were being used, in interstate traffic, and that they were not equipped with the automatic couplers required, such failure was negligence; and it was further charged that railroads were required to keep their appliances in safe and suitable order. It is objected that the instructions assumed that if the automatic coupler was out of repair, the company failed to comply with the act of Congress; but we do not think so, and the supreme court of the state held that there was no error, as Congress must have intended that the couplers should be kept in proper repair for use, and moreover, as such was the law of the state, even if the act of Congress had not specifically imposed this duty. By this ruling no right specifically set up or claimed under the act of Congress by defendant below was decided against. There was no pretence that the act of Congress provided that the automatic couplers need not be kept in order, and whether the cars in question were used in moving interstate traffic and whether the coupling appliances were defective or not, were facts left to the jury, and determined by their verdict. The recovery *was not [141] sought on the single ground of want of safe appliances. That was important in its connection with Carson's being ordered to go between the cars, and it was negligence

while he was obeying that order, which was chiefly relied on. At all events, the company did not specially set up or claim any right under the act of Congress or dependent on its construction which was denied by the state courts, and the questions raised on these instructions, and numerous others on various aspects of the case, were not Federal questions, and need not be considered.

Judgment affirmed.

W. S. KIRBY, *Appt.*,
v.

AMERICAN SODA FOUNTAIN COMPANY.

(See S. C. Reporter's ed. 141-146.)

Appeal from circuit court — jurisdiction of circuit court—amount in dispute.

1. No pecuniary limit is imposed by the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), upon the appellate jurisdiction over the Federal district or circuit courts, which is conferred by that act upon the Supreme Court of the United States and the circuit courts of appeals.
2. A matter in dispute exceeding the value of \$2,000 is presented by a cross bill which seeks to recover a balance of \$1,700 due on a contract for the exchange of soda fountain apparatus, where the original bill, which was dismissed on complainant's own motion, asked for the cancellation of his agreement to pay \$2,025 in consideration of the exchange.
3. The jurisdiction of a Federal circuit court, once acquired on removal from a state court, cannot be divested by the dismissal of the bill on complainant's own motion after a cross bill has been filed, although the jurisdictional amount may no longer be in dispute.

[No. 357.]

Submitted March 21, 1904. Decided April 25, 1904.

A PPEAL from the Circuit Court of the United States for the Northern District of Texas to review a decree granting the re-

NOTE.—On direct review in the Federal Supreme Court of judgments of circuit and district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

As to amount necessary to give United States Supreme Court jurisdiction—see notes to *Schunk v. Moline, M. & S. Co.* 37 L. ed. U. S. 256, and *Commercial Bank v. Buckingham*, 12 L. ed. U. S. 169.

As to jurisdiction of United States circuit court as dependent upon amount—see *Auer v. Lombard*, 19 C. C. A. 72, and note, and *Myers v. Murray, N. & Co.* 11 L. R. A. 216, and note. And see notes to *Roberts v. Lewis*, 36 L. ed. U. S. 579, and *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455.

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lief sought by a cross complaint after dismissal of the original bill on complainant's own motion. On motion to dismiss or affirm, *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

Kirby filed his first original amended petition in the district court of Dallas county, Texas, against the American Soda Fountain Company, averring that he was induced by false representations by defendant to agree to exchange his soda fountain apparatus for the soda fountain apparatus of defendant, and pay defendant \$2,025 in addition, and signed a memorandum in relation thereto, which, however, plaintiff alleged did not contain all the terms of the contract; that the exchange was made, but defendant's soda fountain apparatus, instead of being superior in value by \$2,025, was, as matter of fact, less by \$2,500; and plaintiff prayed for the cancelation of the obligation to pay \$2,025, for \$2,500 damages, and for general relief. The original petition sought damages merely, and in the sum of \$1,500. [142]

On application of defendant the cause was removed to the circuit court of the United States for the northern district of Texas.

The case was entered in that court May 12, 1902, and on that day defendant filed its answer, denying all charges of fraud, and setting up the written contract between plaintiff and itself, which it alleged contained all the terms of the agreement between them, whereby defendant agreed to manufacture and ship to plaintiff, and plaintiff purchased of defendant, a certain soda fountain machine at the price of \$3,219; and defendant agreed to take plaintiff's machine in part payment, at the sum of \$1,194, leaving a balance of \$2,025, which plaintiff agreed to pay, and which was secured by a mortgage lien on the property. That defendant manufactured and shipped the machine to plaintiff and set it up in his store, and fully complied with the contract, but plaintiff, after paying \$325 on account of the \$2,025, failed and refused to further comply with the contract or to pay anything more thereon.

Defendant said plaintiff ought to take nothing by his suit, and prayed judgment for the sum of \$1,700 and for foreclosure of its mortgage lien. Together with its answer defendant filed its cross complaint, setting up the facts in detail and praying for judgment in the sum of \$1,700, and interest, and for a decree establishing its mortgage lien on the property, and for foreclosure and sale, and such further relief as equity might require.

Subpœna on the cross complaint was issued and served May 13, 1902.

June 20, 1902, plaintiff moved to transfer the cause to the law docket; and on that date

the following order was entered of record: "Complainant coming and asking that the original bill of complaint be dismissed with-
[143]out prejudice, and it appearing *to the court that said request should be granted, it is therefore ordered that the original bill of complaint herein be and the same is hereby dismissed without prejudice to the right of the plaintiff to proceed further on the cause of action set forth in said bill hereafter as he may be advised. It is further ordered that the costs of the original bill and proceedings thereon herein be adjudged against complainant, for which execution may issue."

July 24, 1902, plaintiff, as defendant in the cross complaint, filed his plea thereto, in which he averred that the original bill filed by him had been dismissed, and that the cross bill was not within the jurisdiction of the court because the amount sought to be recovered did not exceed \$2,000, exclusive of interest and costs. February 13, 1903, the plea to the jurisdiction of the court was argued and overruled, and plaintiff, defendant in the cross bill, was ordered to file an answer to said cross bill on or before the rule day of the court occurring in April, 1903. No further answer or plea to the cross bill having been interposed by the defendant therein, a decree *pro confesso* was rendered against him April 21.

On May 27, 1903, the court rendered a decree on the cross bill, which recited the various proceedings; found the allegations of the cross complaint and exhibits to be true; that Kirby was justly indebted to the American Soda Fountain Company in the sum of \$1,700, with interest; and that a valid mortgage lien to secure that sum existed; and decreed payment of the amount within sixty days, and that, if not paid, the property should be sold and the proceeds applied, with judgment for deficiency, if any.

An appeal from this decree was prayed and allowed, and the question of jurisdiction was certified. The case came on in this court on motions to dismiss or affirm.

Mr. Joseph McCormick submitted the cause for appellant.

Mr. John J. Weed submitted the cause for appellee.

[144] ***Mr. Chief Justice Fuller** delivered the opinion of the court:

This case was brought directly to this court on a certificate of jurisdiction under § 5 of the judiciary act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], and might, therefore, have been advanced under rule 32. The motions to dismiss or affirm may be treated as equivalent to submission under that rule, but as the motions were made, and the motion to dismiss

was chiefly rested on the ground that the value of the matter in dispute was not sufficient to give this court jurisdiction, we think it proper to say that "the act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or the circuit court of appeals, from a district or circuit court of the United States." *The Paquete Habana*, 175 U. S. 677, 683, 44 L. ed. 320, 322, 20 Sup. Ct. Rep. 290, 293.

On this appeal no question of error in matter of equity procedure in the retaining of the cross bill after the dismissal of the bill is open for consideration, but we do not intimate in the slightest degree that any error in that particular was committed. *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; *Dan. Ch. Pr.* 5th ed. 1553, note; *Bates, Eq. Proc.* § 386.

The contention is that the circuit court had no jurisdiction as a court of the United States to proceed on the cross bill because of the lack of the prescribed jurisdictional amount. But we think the circuit court was right in rejecting this contention and in overruling the plea.

In the first place, the whole record being considered, the value of the matter in dispute might well have been held to exceed \$2,000, exclusive of interest and costs. *Stinson v. Dousman*, 20 How. 461, 466, 15 L. ed. 966, 969; *New England Mortg. Security Co. v. Gay*, 145 U. S. 123, 131, 36 L. ed. 646, 649, 12 Sup. Ct. Rep. 815; *Shappirio v. Goldberg*, 192 U. S. 232, ante, 419, 24 Sup. Ct. Rep. 259; *Lovell v. Cragin*, 136 U. S. 130, 34 L. ed. 372, 10 Sup. Ct. Rep. 1024.

In *Stinson v. Dousman* the suit was brought to recover something less than \$500 as rent of a parcel of land under a written contract for the purchase of the land at \$8,000, *which provided that the covenantee [145] should pay rent on failure to comply with sundry conditions prescribed, and defendant not only set up in his answer a defense to the claim for rent, but also sought a decree affirming the contract as outstanding. It was objected in this court that the matter in dispute was not of the value of \$1,000, and that therefore there was no jurisdiction. Mr. Justice Campbell said: "The objection might be well founded, if this was to be regarded merely as an action at common law. But the equitable as well as the legal considerations involved in the cause are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at \$8,000. . . .

We think this court has jurisdiction." The case is cited and considered in *New England Mortg. Security Co. v. Gay* and in *Shapiro v. Goldberg*.

In *Lowell v. Cragin* it was held as correctly stated in the head notes: "When the matter set up in a cross bill is directly responsive to the averments in the bill, and is directly connected with the transactions which are set up in the bill as the gravamen of the plaintiff's case, the amount claimed in the cross bill may be taken into consideration in determining the jurisdiction of this court on appeal from a decree on the bill."

In the present case the circuit court in its decree referred to the plaintiff's bill and the relief thereby sought, in connection with the cross bill, and, we think, was justified in doing this, as the record had not passed from under its control, and it was apparent that the decree on the cross bill disposed of the contention of plaintiff in respect of the cancellation of the contract. Taking the bill, defendant's answer, and the cross bill together, the jurisdictional amount was made out.

[146] In the second place, it is the general rule that when the jurisdiction of a circuit court of the United States has once attached *it will not be ousted by subsequent change in the conditions. *Morgan v. Morgan*, 2 Wheat. 290, 4 L. ed. 242; *Clarke v. Mathewson*, 12 Pet. 165, 9 L. ed. 1041; *Kanouse v. Martin*, 15 How. 198, 208, 14 L. ed. 660, 664; *Roberts v. Nelson*, 8 Blatchf. 74, Fed. Cas. No. 11,907; *Cooke v. United States*, 2 Wall. 218, 17 L. ed. 755.

In *Morgan v. Morgan* it was laid down by Chief Justice Marshall that the jurisdiction of the circuit court, having once vested between citizens of different states, could not be divested by a change of domicile of one of the parties, and his removal into the same state as the adverse party *pendente lite*. This was so ruled in *Clarke v. Mathewson* and other cases there cited.

In *Kanouse v. Martin*, after petition to remove had been filed and bond tendered, the state court allowed the plaintiff to reduce the matter in dispute to less than the jurisdictional amount, and went on with the case. This was necessarily held to be erroneous, but the observations of Mr. Justice Curtis show that, in his opinion, the general rule to which we have referred also applied, and he cites *Morgan v. Morgan* and *Clarke v. Mathewson*.

In *Roberts v. Nelson* the amount claimed was reduced after the case had been removed, and Mr. Justice Blatchford, then district judge, held that the jurisdiction of the court having once attached, no subsequent event could divest it.

In *Cooke v. United States*, Mr. Chief Jus-

tice Chase said that "jurisdiction once acquired cannot be taken away by any change in the value of the subject of controversy."

This action, when brought in the state court, was an action to recover \$1,500 damages for deceit. Defendant demurred to and answered the original petition. Plaintiff subsequently filed his amended petition seeking to be relieved of the obligation to pay \$2,025, and damages in the sum of \$2,500. The matter in dispute having thus been made to exceed the sum or value of \$2,000, exclusive of interest and costs, defendant presented his petition and bond for removal, and the cause was thereupon removed. The jurisdiction thus acquired by the circuit court was not divested by plaintiff's subsequent action.

Decree affirmed.

*WILLIAM H. JONES, John Hill, and Edgar Poe Lee, Plffs. in Err.,
v.

ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia, et al.

(See S. C. Reporter's ed. 147-153.)

Appeal—moot case not reviewable.

The dismissal of a petition for a writ of prohibition to prevent the canvass of the votes cast at a congressional election cannot be reviewed in the Federal Supreme Court after the canvass has been made, and certificates of election have been issued, and the House of Representatives has admitted the parties holding the certificates to seats in that body.

[No. 189.]

Argued April 4, 5, 1904. Decided April 25, 1904.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia to review a judgment dismissing a petition for a writ of prohibition to prevent the canvass of the votes cast in that state at a congressional election. *Dismissed.*

Statement by Mr. Justice **Brewer**:

On November 14, 1902, plaintiffs in error filed in the circuit court of the United States for the eastern district of Virginia in behalf of themselves and others similarly situated, their petition for a writ of prohibition. The petition set forth that the petitioners were citizens of the United States, citizens and residents of the state of Virginia, and of the third Congressional district of that state,

and entitled to vote at the election held on November 4, 1902, for a member of the House of Representatives of the United States from that district; that they applied to the proper registration board for registration, and were refused. It was further alleged that in 1901 a constitutional convention was assembled in Virginia; that it framed a new constitution; that it did not submit such constitution to the people for approval, but, by a vote of forty-seven to thirty-eight, ordained it as the organic law of the state. Attached to the petition were copies of the constitution, of a schedule making provisions for putting in force the new constitution without inconvenience, and of an ordinance providing for the registration of voters, all of which were adopted by the same convention. The petitioners also charge that the purpose of the party in power was the disfranchisement of the colored voters of the state, and specifically set forth how this disfranchisement was to be accomplished. They averred that at the election held on November 4, 1902, only the registration lists provided for by the ordinance [148] were recognized; that abstracts *of the votes cast in the several cities and counties were certified to the secretary of the commonwealth, at Richmond, Virginia, and that the defendants, as the board of state canvassers, would assemble on the 24th of November, 1902, and would, unless prohibited, canvass the election returns, declare the result, and give certificates to the parties found to be elected. The prayer of the petition was that a writ of prohibition issue to the defendants, "prohibiting them, and each of them, from considering, canvassing, counting, determining upon, or certifying or otherwise acting upon, any returns or abstracts of returns in the office of the secretary of the commonwealth of Virginia, purporting to be returns of election held in the state of Virginia, Tuesday, November 4, 1902, for representatives in Congress from the state of Virginia, or in any wise dealing with or certifying the results of said returns as returns of a lawful election, held in Virginia on the date aforesaid. That by reason of the matters and things hereinabove set forth, said pretended election, and any and all precinct, county, district, or state returns made thereunder, may be held to be null, void, and of no effect, and the said board of state canvassers, and the members thereof, may be prohibited from in any wise proceeding to act upon the same as lawfully before them for their consideration. That pending the hearing, and until the final decision upon this petition for said writ of prohibition, an order may be granted by this honorable court suspending any and all proceedings, on the part of said board of state canvassers

and the members thereof, upon any and all of the matters sought to be prohibited until the final decision of this cause. And for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual."

After answer by defendants, the writ of prohibition was denied by the circuit court, and the petition dismissed. The dismissal was based on a want of jurisdiction; whereupon the petitioners brought the case on error directly to this court. A motion has here been made to dismiss the writ of error on the *ground that everything sought to be [149] prohibited has already been done, and that there is nothing upon which any order of the court can operate. In support of the motion an affidavit of the secretary of the commonwealth has been filed, to the effect that after the dismissal of the petition by the circuit court the board of canvassers convened at the office of the secretary in accordance with the law of the state, and, upon the returns then on file, canvassed the votes, determined the parties found by such canvass to have been elected, and that a certificate to that effect had been prepared and transmitted to each of the persons declared to have been elected a representative in Congress from the state of Virginia.

Mr. John S. Wise argued the cause and filed a brief for plaintiffs in error.

Messrs. William A. Anderson and **Frank W. Christian** argued the cause and filed a brief for defendants in error.

Mr. Justice Brewer delivered the opinion of the court:

Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132, is decisive, and compels a dismissal of the writ of error. That was a suit in equity, alleging the calling of a convention to revise the Constitution of South Carolina, and seeking to enjoin an alleged illegal, partial, and void registration by which the plaintiff, and others like him, would be deprived of the right to vote for delegates to the convention. An injunction was granted by the circuit court, but was dissolved by the circuit court of appeals, and the suit dismissed. Thereupon the election was held, the convention met and entered upon the discharge of its duties. An appeal to this court from the order of dismissal made by the circuit court of appeals was dismissed on the ground that the object of the suit could no longer be attained. **Mr. Justice Gray**, delivering the opinion, said (pp. 653, 657, 658, L. ed. pp. 294, 295, Sup. Ct. Rep. pp. 133, 134, 135):

"The duty of this court, as of every other judicial tribunal, *is to decide actual contro-[152] versies by a judgment which can be carried

into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. . . . In the case at bar the whole object of the bill was to secure a right to vote at the election, to be held, as the bill alleged, on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the circuit court of appeals dismissing his bill, that date had passed; and, before the entry of the appeal in this court, the convention had assembled, pursuant to the statute of South Carolina of 1894, by which the convention had been called. 21 Stat. of S. C. pp. 802, 803. The election of the delegates and the assembling of the convention are public matters, to be taken notice of by the court, without formal plea or proof. . . . It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the circuit court, no relief within the scope of the bill could now be granted."

See also *Codlin v. Kohlhausen*, 181 U. S. 151, 45 L. ed. 793, 21 Sup. Ct. Rep. 584; *Tennessee v. Condon*, 189 U. S. 64, 47 L. ed. 709, 23 Sup. Ct. Rep. 579.

The case before us is one in prohibition. It is so declared by the petitioners in their petition, and the thing sought to be prohibited was a canvass of the votes cast at the election on November 4, 1902. The facts alleged in respect to the Constitution, the purpose of the dominant party, the action of the convention, the refusal to submit the proposed Constitution to the vote of the people, and the registration ordinance, were all stated for the purpose of showing that the election on November 4, 1902, was illegal, and [153] that there ought to be no *canvass of the returns cast at that election. The prayer of the petitioners specifically is to restrain such canvass. Even the general clause at the close of the prayer is "for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual." But—as shown by the affidavit, and as, indeed, we might, perhaps, take judicial notice by the presence in the House of Representatives of the individuals elected at that election from the various congressional districts of Virginia—the thing

sought to be prohibited has been done, and cannot be undone by any order of court. The canvass has been made, certificates of election have been issued, the House of Representatives (which is the sole judge of the qualifications of its members) has admitted the parties holding the certificates to seats in that body, and any adjudication which this court might make would be only an ineffectual decision of the question whether or not these petitioners were wronged by what has been fully accomplished. Under those circumstances there is nothing but a moot case remaining, and the motion to dismiss must be sustained.

Dismissed without costs to either party.

WILLIAM S. SELDEN, William H. Anderson, and Clarence B. Gilpin, *Appts.*,
v.

ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia, *et al.*

(See S. C. Reporter's ed. 153, 154.)

Appeal—moot case not reviewable.

The denial of injunctive relief against a canvass of the votes cast at a congressional election cannot be reviewed in the Federal Supreme Court after the canvass has been made, and certificates of election have been issued, and the House of Representatives has admitted the parties holding the certificates to seats in that body.

[No. 190.]

Argued April 4, 5, 1904. Decided April 25, 1904.

A PPEAL from the Circuit Court of the United States for the Eastern District of Virginia to review a decree denying injunctive relief against the canvass of the votes cast in that state at a congressional election. *Dismissed.*

Mr. John S. Wise argued the cause and filed a brief for appellants.

Messrs. William A. Anderson and *Frank W. Christian* argued the cause and filed a brief for appellees.

**Mr. Justice Brewer* delivered the opinion—[154] ion of the court:

This is a suit in equity brought to obtain by injunction the same relief as was sought in the preceding case. The facts and conditions are substantially similar, and for the reasons there given *the appeal will be dismissed* without costs to either party.

SAMUEL M. DAMON, *Plff. in Err.*,
v.

TERRITORY OF HAWAII.

(See S. C. Reporter's ed. 154-161.)

Grants—conveyance of fishing right—effect of habendum clause referring only to land.

A definite "fishing right in the adjoining sea," described in the granting clause of a royal patent as "attached to this land," and which right is of a sort long recognized by the Hawaiian laws as private property, is included in the grant, although the habendum is to have and to hold "the above granted land," which, standing alone, might not include a fishing right.

[No. 207.]

Argued April 12, 1904. Decided April 25, 1904.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed the judgment of the Circuit Court for the First Circuit of that Territory, entered on a directed verdict in favor of defendant in an action at law to establish a fishing right. *Reversed.*

See same case below, 14 Hawaiian Rep. 465.

The facts are stated in the opinion.

Mr. Francis M. Hatch argued the cause, and, with Messrs. Reuben D. Silliman and J. J. Darlington, filed a brief for plaintiff in error.

Mr. Lorrin Andrews argued the cause and filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action at law, somewhat like a bill to quiet title, to establish the plaintiff's right to a several fishery of a peculiar sort, between the coral reef and the ahupuaa of Moanalua on the main land of the island of Oahu. The organic act of the territory of Hawaii repealed all laws of the Republic of Hawaii which conferred exclusive fishing rights, subject, however, to vested rights, and it required actions to be [158] started within *two years by those who claimed such rights. Act of April 30, 1900, chap. 339, §§ 95, 96 (31 Stat. at L. 141, 160). At the trial the presiding judge directed a verdict for the defendant. Exceptions were taken but were overruled by the supreme court of the territory, and the case comes here by writ of error.

The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing with-

in the limits for certain months, and to receive from all fishermen one third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right. *Wedding v. Meyler*, 192 U. S. 573, 583, *ante*, 570, 574, 24 Sup. Ct. Rep. 322.

The property formerly belonged to Kamehameha IV., from whom it passed to his brother, Lot Kamehameha, and from him by mesne conveyances to the plaintiff. The title of the latter to the ahupuaa is not disputed. He claims the fishery also under a series of statutes and a royal grant. The history is as follows: In 1839 Kamehameha III. took the fishing grounds from Hawaii to Kauai and redistributed them,—those named without the coral reef, and the ocean beyond, to the people; those "from the coral reef to the seabeach for the landlords and for the tenants of their several lands, but not for others." The landlord referred to seems to have been the konohiki, or overlord, of an ahupuaa, or large tract like that owned by the plaintiff. It is not necessary to speculate as to what the effect of this act of the king would have been standing alone, he then *having absolute power. It had, at [159] least, the effect of inaugurating a system, *de facto*. But in 1846, the monarchy then being constitutional, an act was passed, article 5 of which was entitled "Of the Public and Private Rights of Piscary." By the 1st section of this article it was provided again that the same fishing grounds outside the reef should be free to the people, etc.; and then by the second it was enacted that the fishing grounds from the reefs to the beach, or, where there are no reefs, for one mile seaward, "shall in law be considered the private property of the landlords whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries the said landholders shall not be molested except," etc.

By § 3 "the landholders shall be considered in law to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use the fish-

eries of their landlords subject to the restrictions in this article imposed." Then follows a statement of the rights of the landlord as they have been summed up above, and a provision that the landlords shall not have power to lay any tax or to impose any restrictions upon their tenants regarding the private fisheries other than those prescribed.

The Civil Code of 1859, § 387, repeated the enactment of § 2, that the fishing grounds within the reef or one mile seaward "shall, in law, be considered the private property of the konohiki," etc., in nearly the same words, and other sections codified the regulations just mentioned. There was a later repetition in the Penal Laws of 1897, § 1452, etc., and this was in force when the organic act of Congress was passed, repealing, as we have said, the laws conferring exclusive fishing rights, but preserving vested rights.

[160] The foregoing laws not only use the words "private property," but show that they mean what they say by the restrictions cutting down what otherwise would be the incidents of private property. There is no color for a suggestion that they *created only a revocable license, and if they imported a grant or a confirmation of an existing title, of course the repeal of the laws would not repeal the grant. The argument against their effect was not that in this case the ahupuaa did not belong to the fishery, within the words "landlords whose lands, by ancient regulation, belong to the same" (the land seems formerly to have been incident to the fishery), but that citizens have no vested rights against the repeal of general laws. This is one of those general truths which become untrue by being inaccurately expressed. A general law may grant titles as well as a special law. It depends on the import and direction of the law. A strong example of the application of the rule intended by the argument is to be found in *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, ante, 229, 24 Sup. Ct. Rep. 107, where a railroad company was held to have no vested right to exemptions proclaimed in a general tax act. The statute was construed not to import an offer, covenant, or grant to railroads which might be built in reliance upon it. But if a general law does express such an offer, as it may, the grant is made. If the Hawaii statutes did not import a grant, it is hard to see their meaning.

However, in this case it is not necessary to invoke the statutes further than to show that, by the law in force since 1846, at least, such rights as the plaintiff claims, and which, as is shown by the evidence, he and his predecessors in title have been exercising for forty years, have been recognized as private property. Such is the view of the
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leading case, decided in 1858 and acquiesced in, we believe, ever since. *Haalelea v. Montgomery*, 2 Hawaiian R. 62, 66. In the present instance the plaintiff claims under a royal patent, admitted to have been effective as to whatever, by its true construction, it purported to convey. This patent describes the ahupuaa by metes and bounds, and then the granting clause goes on: "There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows," again giving boundaries, and continuing: "The islands of Mokumoa, Mokuonini, and Mokuoco are a part of Moanalua, and are included in the above area." *The description of what is in- [161] tended to be conveyed could not be plainer. But the habendum is "to have and to hold the above granted land," and it is said that, as the fishery of an overlord or konohiki, unlike the rights of tenants, did not pass as an incident of land, but must be distinctly granted, the fishery was not included in the patent. *Haalelea v. Montgomery*, 2 Hawaiian Rep. 62, 71. Again, we must avoid being deceived by a form of words. We assume that a mere grant of the ahupuaa without mention of the fishery would not convey the fishery. But it does not follow that any particular words are necessary to convey it when the intent is clear. When the description of the land granted says that there is incident to it a definite right of fishery, it does not matter whether the statement is technically accurate or not; it is enough that the grant is its own dictionary and explains that it means by "land" in the habendum, land and fishery as well. There is no possibility of mistaking the intent of the patent. It declares that intent plainly on its face. There is no technical rule which overrides the expressed intent, like that of the common law, which requires the mention of heirs in order to convey a fee. We are of opinion that the patent did what it was meant to do, and therefore that the plaintiff is entitled to prevail.

Judgment reversed.

UNITED STATES, *Petitioner,*

v.

SING TUCK or King Do and Thirty-One Others.

(See S. C. Reporter's ed. 161-182.)

Habes corpus in Chinese exclusion cases.

Federal courts will not interfere by habeas

NOTE.—On the jurisdiction of the United States courts on habeas corpus—see *Re Reinitz*, 4 L. R. A. 236, and note. See also notes to *State ex rel. Cochran v. Winters*, 10 L. R. A. 616; *Re Huse*, 25 C. C. A. 4, and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

corpus with the refusal of the right of entry into the United States of Chinese persons alleging citizenship, at least, until after a final decision of the Secretary of Commerce and Labor on the appeal provided for by the act of August 18, 1894 (28 Stat. at L. 390, chap. 301, U. S. Comp. Stat. 1901, p. 1303), and the act of February 14, 1903 (32 Stat. at L. 825, chap. 552), in case of a decision by the immigration officers adverse to the admission of an alien.

[No. 591.]

Argued April 7, 1904. Decided April 25, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which reversed a judgment of the circuit court for the Northern District of New York dismissing a writ of habeas corpus to inquire into a detention of Chinese persons seeking to enter the United States, and claiming citizenship therein. *Reversed.*

See same case below, 128 Fed. 592.

The facts are stated in the opinion.

Assistant Attorney General McReynolds argued the cause and filed a brief for petitioner:

It appears from the record that the present controversy is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law or treaty of the United States. Was not the appellate jurisdiction of this court in respect of the same, therefore, exclusive, and the appeal to the circuit court of appeals improper?

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 281, 45 L. ed. 859, 862, 21 Sup. Ct. Rep. 646; *Union & P. Bank v. Memphis*, 189 U. S. 71, 73, 47 L. ed. 712, 713, 23 Sup. Ct. Rep. 604.

Probable cause must first be shown to obtain the writ of habeas corpus, whether it be granted at common law or under the statute.

Church, Habeas Corpus, § 92; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Ex parte Milligan*, 4 Wall. 2, 110, 18 L. ed. 281, 292; *Ex parte Royall*, 117 U. S. 250, 29 L. ed. 871, 6 Sup. Ct. Rep. 734; *Ex parte Terry*, 128 U. S. 301, 32 L. ed. 407, 9 Sup. Ct. Rep. 77.

At common law no evidence was necessary to support the return to a writ of habeas corpus. It was deemed to import verity until impeached.

2 Hurd, Habeas Corpus, chap. 3, §§ 8-10; Church, Habeas Corpus, §§ 122, 160, 170.

And this rule is not changed by any statute of the United States.

Crowley v. Christensen, 137 U. S. 86, 94,

34 L. ed. 620, 625, 11 Sup. Ct. Rep. 13; *Holden v. Minnesota*, 137 U. S. 483, 491, 34 L. ed. 734, 736, 11 Sup. Ct. Rep. 143.

In any view of the facts brought by the return before the court it was the clear duty of the immigration officers to detain all of the respondents, and, as it was their duty so to do, such detention could not be illegal. It follows, wholly irrespective of the question as to the finality of findings by immigration officers under the act of 1894, that the writ in the present case was properly dismissed, no illegal detention having been shown.

Ex parte Watkins, 3 Pet. 201, 7 L. ed. 652; *Wales v. Whitney*, 114 U. S. 571, 29 L. ed. 279, 5 Sup. Ct. Rep. 1050; *Ex parte Curtis*, 106 U. S. 375, 27 L. ed. 235, 1 Sup. Ct. Rep. 381; *Nishimura Ekiu v. United States*, 142 U. S. 651, 662, 35 L. ed. 1146, 1150, 12 Sup. Ct. Rep. 336; *Carter v. McClaghry*, 183 U. S. 381, 46 L. ed. 245, 22 Sup. Ct. Rep. 181.

Where the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, as to questions of fact, is conclusive upon all others. This doctrine has been frequently applied to the action of administrative officers in the Land Department.

Johnson v. Towsley, 13 Wall. 83, 20 L. ed. 486; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875.

The courts have power to grant relief when the special tribunal acts contrary to law, or, possibly, where a manifest wrong has been done, and only in such cases.

Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 108, 47 L. ed. 90, 96, 23 Sup. Ct. Rep. 33.

If the petition and return in the present case had shown that upon the facts presented to the inspector respondents should have, as a matter of law, been admitted, as in *Gonzales v. Williams*, 192 U. S. 1, ante, 372, 24 Sup. Ct. Rep. 177, then the court might properly have taken jurisdiction. Or it may possibly be that in any case where there is made out by petition and return a case of positive wrong done by the inspector, upon all the facts presented to him or attempted to be presented, a discharge would be proper. But no writ should ever be granted, unless it appears that the officer, upon the showing made to him, should have granted leave to enter.

When Chinese persons present themselves for admission into the United States it is the duty of immigration officers to pass upon their claims. If citizenship is alleged,

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that, like other questions of fact, must be determined by such officers.

Re Moy Quong Shing, 125 Fed. 641; *Lem Moon Sing v. United States*, 158 U. S. 547, 39 L. ed. 1085, 15 Sup. Ct. Rep. 967; *Chin Bak Kan v. United States*, 186 U. S. 193, 200, 46 L. ed. 1121, 1126, 22 Sup. Ct. Rep. 891; *Japanese Immigrant Case*, 189 U. S. 97, 47 L. ed. 724, 23 Sup. Ct. Rep. 611.

Mr. Robert M. Moore argued the cause, and, with **Mr. W. W. Cantwell**, filed a brief for respondents:

The provisions of the Chinese exclusion act do not apply to persons born within the United States of Chinese parents.

United States v. Wong Kim Ark, 169 U. S. 653, 42 L. ed. 892, 18 Sup. Ct. Rep. 456.

The relators were restrained of their liberty by an administrative officer of the government. If they are citizens, then the administrative officer had no power to detain them, much less to refuse them entry. The only remedy for the relators, by which the question of citizenship can be settled, is an application for a writ of habeas corpus, and the district court has jurisdiction thereof.

Re Jew Wong Loy, 91 Fed. 240.

Prior to the act of August 18th, 1894 (28 Stat. at L. 390, chap. 301, U. S. Comp. Stat. 1901, p. 1303), the refusal of the inspector was not binding upon the courts.

Re Jung Ah Lung, 25 Fed. 141, Affirmed in 124 U. S. 621, 31 L. ed. 591, 8 Sup. Ct. Rep. 663.

The act of 1894, above referred to, merely provided that in every case where an alien is excluded from admission the decision of the appropriate immigration officer, if adverse, shall be final unless reversed on appeal to the Secretary of the Treasury. This act has no force when applied to a person seeking admission upon the ground of citizenship.

It is a principle that lies at the foundation of all just government that no man shall be deprived of his life, liberty, or property without due process of law. Every disregard of this principle by courts, legislatures, or citizens tends directly towards distrust, insecurity, disorder, and anarchy.

Burton v. Platter, 4 C. C. A. 95, 10 U. S. App. 657, 53 Fed. 901.

The legislature is not vested with the power arbitrarily to provide that any procedure it may choose to declare shall be regarded as due process of law.

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

The 14th Amendment to the Constitution of the United States is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and can-
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not be so construed as to leave Congress free to make any process "due process of law" by its mere will.

Meyers v. Shields, 61 Fed. 713; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Dorman v. State*, 34 Ala. 216; *Re Ziebold*, 23 Fed. 791.

As applied to judicial proceedings, the term "due process of law" means a course of proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. It is imperative that there be a court of competent jurisdiction, that the proceeding be regular and appropriate to the question involved, and that the trial be a fair one.

Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; *Carr v. Brown*, 20 R. I. 215, 38 L. R. A. 294, 78 Am. St. Rep. 855, 44 C. C. A. 95, 38 Atl. 9; *Burton v. Platter*, 10 U. S. App. 657, 53 Fed. 901; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Dwight v. Williams*, 4 McLean, 581, Fed. Cas. No. 4,218; *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728; *Huber v. Reily*, 53 Pa. 112; *Re Ah Lee*, 6 Sawy. 410, 5 Fed. 899; *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 569.

Due process of law cannot be had without notice of the proceeding. Notice is an essential element of the term "due process of law."

Hennessey v. Volkening, 30 Abb. N. C. 100, 22 N. Y. Supp. 528.

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

Zeigler v. South & North Ala. R. Co. 58 Ala. 594.

Due process of law means that the party shall have his day in court; this means the right to introduce evidence, examine and cross-examine witnesses for and against him, be represented by counsel if he so desires, and to have the questions asked and testimony given in conformity to the rules of evidence as established by our courts.

Brown v. Hummel, 6 Pa. 86, 47 Am. Dec. 431; *Jensen v. Union P. R. Co.* 6 Utah, 253, 4 L. R. A. 724, 21 Pac. 994.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of habeas corpus against a Chinese inspector and inspector of immigration. It appears from his return that the Chinese persons concerned came from China by way of Canada, and were seeking admission into the United States. On examination by an inspector five gave their names, stated that they were born in the United States (*United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456), and answered no further questions. The rest gave their names and then stood mute, not even alleging citizenship. The inspector decided against their right to enter the country, and informed them of their right to appeal to the Secretary of Commerce and Labor. No appeal was taken, and while they were detained at a properly designated detention house for return to China, a petition was filed by a lawyer purporting to act on their behalf, alleging that they all were citizens of the United States, and this writ was obtained. In the circuit court the detention was adjudged to be lawful, and the writ was dismissed without a trial on the merits. This decision was reversed by the circuit court of appeals on the ground that the parties concerned were entitled to a judicial investigation of their status.

By the act of August 18, 1894, 28 Stat. at L. 390, chap. 301 (U. S. Comp. Stat. 1901, p. 1303), "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be [167] final, unless *reversed on appeal to the Secretary of the Treasury." The jurisdiction of the Treasury Department was transferred to the Department of Commerce and Labor by the act of February 14, 1903 (32 Stat. at L. 825, chap. 552). It was held by the circuit court of appeals that the act of 1894 should not be construed to submit the right of a native-born citizen of the United States to return hither to the final determination of executive officers, and the conclusion was assumed to follow that these cases should have been tried on their merits. Before us it was argued that, by the construction of the statute, the fact of citizenship went to the jurisdiction of the immigration officers (see *Gonzales v. Williams*, 192 U. S. 1, 7, ante, 317, 24 Sup. Ct. Rep. 177; *Miller v. Horton*, 152 Mass. 540, 548, 10 L. R. A. 116, 23 Am. St. Rep. 850, 26 N. E. 100), and therefore that the statute did not purport to apply to one who was a citizen in fact. We are of opinion, however, that the words quoted apply to a decision on the question of citizenship, and that, even if it be true

that the statute could not make that decision final, the consequence drawn by the circuit court of appeals does not follow, and is not correct.

We shall not argue the meaning of the words of the act. That must be taken to be established. *Lem Moon Sing v. United States*, 158 U. S. 538, 546, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967. As to whether or not the act could make the decision of an executive officer final upon the fact of citizenship, we leave the question where we find it. *The Japanese Immigrant Case*, 189 U. S. 86, 97, 47 L. ed. 721, 724, 23 Sup. Ct. Rep. 611; *Fok Young Yo v. United States*, 185 U. S. 296, 304, 305, 46 L. ed. 917, 921, 22 Sup. Ct. Rep. 686. See *Chin Bak Kan v. United States*, 186 U. S. 193, 200, 46 L. ed. 1121, 1126, 22 Sup. Ct. Rep. 891. Whatever may be the law on that point, the decisions just cited are enough to show that it is too late to contend that the act of 1894 is void as a whole. But if the act is valid, even if ineffectual on this single point, then it points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the *stat-[168] ute. The first mode of attacking his decision is by taking that appeal. If the appeal fails, it then is time enough to consider whether, upon a petition showing reasonable cause, there ought to be a further trial upon habeas corpus.

We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument, if sound, is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for habeas corpus setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. A familiar illustration is that of a person imprisoned upon criminal process by a state court, under a state law alleged to be unconstitutional. If the law is unconstitutional the prisoner is wrongfully held. Yet, except under exceptional circumstances, the courts of the United States do not interfere by habeas

corpus. The prisoner must, in the first place, take his case to the highest court of the state to which he can go, and after that he generally is left to the remedy by writ of error if he wishes to bring the case here. *Minnesota v. Brundage*, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; *Baker v. Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323. In *Gonzales v. Williams*, 192 U. S. 1, ante, 317, 24 Sup. Ct. Rep. 177, there was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts, but merely a question of law. Here the issue, if there is one, is pure matter of fact,—a claim of citizenship under circumstances and in a form naturally raising a suspicion of fraud.

Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country, and alleging that he is a citizen, it is within the [169] power of Congress to provide, at *least, for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial. Now, when these Chinese, having that opportunity, saw fit to refuse it, we think an additional reason was given for not allowing a habeas corpus at that stage. The detention during the time necessary for investigation was not unlawful, even if all these parties were citizens of the United States, and were not attempting to upset the inspection machinery by a transparent device. *Wong Wing v. United States*, 163 U. S. 228, 235, 41 L. ed. 140, 16 Sup. Ct. Rep. 977. They were offered a way to prove their alleged citizenship and to be set at large, which would be sufficient for most people who had a case, and which would relieve the courts. If they saw fit to refuse that way, they properly were held down strictly to their technical rights.

But it is said that if, under any circumstances, the question of citizenship could be left to the final decision of an executive officer, the Chinese regulations made under the statutes by the Department of Commerce and Labor are such that they do not allow a citizen due process of law, and the same argument is urged in favor of the right to decline to take any part in such proceedings from the outset. The rules objected to require the officer to prevent communication with the parties other than by officials under his control, and to have them examined promptly touching their right to admission. The examination is to be apart from the public, in the presence of the government officials and such witnesses only as the exam-

ining officer shall designate. This last is the provision especially stigmatized. It is said that the parties are allowed to produce only such witnesses as are designated by the officer. But that is a plain perversion of the meaning of the words. If the witnesses referred to are not merely witnesses to the examination, if they are witnesses in the cause, still the provision only excludes such witnesses at the discretion of the officer pending the examination of the party concerned,—a natural precaution in this class *of cases, the reasonableness of which does [170] not need to be explained. It is common in ordinary trials. No right is given to the officer to exercise any control or choice as to the witnesses to be heard, and no such choice was attempted in fact. On the contrary, the parties were told that if they could produce two witnesses who knew that they had the right to enter, their testimony would be taken and carefully considered; and various other attempts were made to induce the suggestion of any evidence or help to establish the parties' case, but they stood mute. The separate examination is another reasonable precaution, and it is required to take place promptly, to avoid the hardship of a long detention. In case of appeal counsel are permitted to examine the evidence, Rule 7, and it is implied that new evidence, briefs, affidavits, and statements may be submitted, all of which can be forwarded with the appeal. Rule 9. The whole scheme is intended to give as fair a chance to prove a right to enter the country as the necessarily summary character of the proceedings will permit.

We are of opinion that the attempt to disregard and override the provisions of the statutes and the rules of the Department, and to swamp the courts by a resort to them in the first instance, must fail. We may add that, even if it is beyond the power of Congress to make the decision of the Department final upon the question of citizenship, we agree with the circuit court of appeals that a petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case. A mere allegation of citizenship is not enough. But, before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether after that a further trial may be had we do not decide.

Judgment reversed.

Mr. Justice **Brewer**, with whom concurred Mr. Justice **Peckham**, dissenting:

I am unable to concur in either the foregoing opinion or *judgment. I have hereto- [171] fore dissented in several cases involving the

exclusion or expulsion of the Chinese, but, although my views on the questions are unchanged, do not care to repeat anything then said. I pass rather to consider the present case and the declarations of the court. That is, as stated in the opinion, one of persons claiming to be citizens of the United States, denied by an inspector of immigration—a mere ministerial officer—the right to enter the country, and who are now informed by this court that their application to the courts for the enforcement of that right must be denied. They are told that their only remedy is by appeal from one ministerial officer to another.

The decision is based upon the act of August 18, 1894 (28 Stat. at L. 390, chap. 301, U. S. Comp. Stat. 1901, p. 1303), which provides:

“In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury.”

But by its very terms that act applies only to an alien, and these parties assert that they are not aliens. If not aliens, certainly that act is inapplicable. So affirms Rule 2, prescribed by the Secretary of Commerce and Labor, concerning the immigration of Chinese persons, which reads: “If the Chinese person has been born in the United States, neither the immigration acts nor the Chinese exclusion acts prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, apply to such person.” So this court has held at the present term. *Gonzales v. Williams*, 192 U. S. 1, ante, 317, 24 Sup. Ct. Rep. 177, decided January 4, 1904. In that case it appeared that Isabella Gonzales, an unmarried woman, coming from Porto Rico to New York, was prevented from landing, and detained by the immigration commissioner as an alien immigrant. A writ of habeas corpus was issued on her behalf by the circuit court of the United States for the southern district of

[172] *New York. Upon a hearing the writ was dismissed and she remanded to the custody of the commissioner. On appeal to this court that decision was reversed, and it was said in the opinion (p. 7, ante, 319, 24 Sup. Ct. Rep. p. 177):

“If she was not an alien immigrant within the intent and meaning of the act of Congress entitled ‘An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor,’ approved March 3, 1891 (26 Stat. at L. 1084, chap.

551, U. S. Comp. Stat. 1901, p. 1294), the commissioner had no power to detain or deport her, and the final order of the circuit court must be reversed.”

There, as here, the applicant had not appealed from the decision of the immigration officer to the Secretary of the Treasury; that fact was pleaded in the return to the writ, and on the argument before us this act of August 18, 1894, was cited by the government, and the argument made that the remedy was by appeal to the Secretary of the Treasury. I quote the language of the Solicitor General as reported (p. 4):

“The act of August 18, 1894 (28 Stat. at L. 390, chap. 301, U. S. Comp. Stat. 1901, p. 1303), makes the decision of the appropriate immigration or customs officer, if adverse to the admission of an alien, final unless reversed on appeal to the Secretary of the Treasury. Even if appellant herein was ultimately entitled to a writ of habeas corpus, she was not in a position justly to obtain the writ until she had prosecuted an unavailing appeal to the Secretary of the Treasury, and thus pursued her remedy in the executive course to the uttermost.”

That case did not hold that the applicant was a citizen of the United States, but only that, being a subject of Porto Rico, an island ceded to the United States, and, as adjudged by a bare majority of this court in conflicting opinions, not within the full scope of constitutional protection, she was not an alien immigrant. Here the petitioners claim that they are citizens by birth, and the decision is that, nevertheless, they cannot be heard in a court to prove the fact which they allege. There the petition disclosed both a question of law and one of fact, for not until the return to the writ was the question of fact eliminated; here, on the [173] face of the petition, only a question of fact is presented, for the law applicable had been fully settled by the decision of this court in *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

But it is said that, inasmuch as Congress has provided for an appeal from the immigration officer to the Secretary of the Treasury, or, rather, since the recent act transferring jurisdiction to the Department of Commerce and Labor, to the Secretary of the latter department, the orderly administration of affairs requires that the remedy by appeal to the Secretary should be followed. It was not so held in the *Gonzales Case*, and I do not appreciate why it should be deemed necessary in the case of one claiming to be a citizen, and not deemed necessary in respect to one who is merely not an alien immigrant. We have called American citizenship an “inestimable heritage” (*Chin Bak Kan v. United States*, 186

U. S. 193, 200, 46 L. ed. 1121, 1125, 22 Sup. Ct. Rep. 891), and I cannot understand why one who claims it should be denied the earliest possible hearing in the courts upon the truth of his claim.

Why should any one who claims the right of citizenship be denied prompt access to the courts? If it be an "inestimable heritage," can Congress deprive one of the right to a judicial determination of its existence, and ought the courts to unnecessarily avoid or postpone an inquiry thereof? If it be said that the conduct of these petitioners before the inspector was not such as to justify a belief in the probability of their claim of citizenship, it is sufficient answer that they assert the claim and ask a right to be heard. I never supposed that courts could deny a party a hearing on the ground that they did not believe it probable that he could establish the claim which he makes.

The postponement of the right to judicial inquiry until after the remedy by appeal to the Secretary has been exhausted is justified by analogy to the rule which restrains this court from interfering with the orderly administration of criminal law in the courts of a state until after a final determination by the *highest court of that state. But there is this essential difference: To the highest court of a state a writ of error runs from this court, and there is, therefore, propriety in waiting until the final decision of the courts of the states, the presumption being always that they will uphold the Constitution of the United States, and enforce any rights granted by it.

In *Ex parte Royall*, 117 U. S. 241, 251, 252, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734, 740, 741, this court said:

"Does the statute imperatively require the circuit court, by writ of habeas corpus, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court? We are of opinion that while the circuit court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the national Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in

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which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. . . . This court holds that where a person is in custody, under process from a state court of original jurisdiction, for an alleged offence against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion, whether it *will discharge him,[175] upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinate to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

But here there is no appeal or writ of error from the decision of the Secretary to this or to any other court, and the remedy which must be pursued then as now is only that of habeas corpus. Indeed, in the opinion the court does not give to these petitioners encouragement to believe that there can be any judicial examination, even after the decision by the Secretary against their claim of American citizenship. If a judicial hearing at any time is not in terms denied, it is, at least, like a famous case of old, passed to "a convenient season." Meantime the American citizen must abide in the house of detention.

Further, there are special reasons why this prompt judicial inquiry by the writ of habeas corpus should be sustained. On July 27, 1903, the Secretary of Commerce and Labor, as authorized by statute, promulgated certain regulations concerning the admission of Chinese persons. Rule 4 named a dozen ports at which alone such persons should be permitted to enter, Malone, N. Y., where these petitioners are detained, being one of the number. Rules 6, 7, 8, 9, 21, and 22 are as follows:

"Rule 6. Immediately upon the arrival of Chinese persons at any port mentioned in Rule 4 it shall be the duty of the officer in charge of the administration of the Chinese

exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined [176] promptly, as by law provided, *touching their right to admission, and to permit those proving such right to land.

"Rule 7. The examination prescribed in Rule 6 should be separate and apart from the public, in the presence of government officials, and such witness or witnesses only as the examining officer shall designate, and, if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal, and his counsel should be permitted, after duly filing notice of appeal, to examine, but not to make copies of, the evidence upon which the excluding decision is based.

"Rule 8. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry must, if he shall elect to take an appeal to the Secretary, give written notice thereof to said officer within two days after such decision is rendered.

"Rule 9. Notice of appeal provided for in Rule 8 shall act as a stay upon the disposal of the Chinese person whose case is thereby affected until a final decision is rendered by the Secretary; and within three days after the filing of such notice, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Commissioner General of Immigration by the officer in charge at the port of arrival, accompanied by his views thereon in writing; but on such appeal no evidence will be considered that has not been made the subject of investigation and report by the said officer in charge."

"Rule 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to, or residence within, the United States, to establish such right affirmatively and satisfactorily to the appropriate government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt [177] *shall be given by administrative officers to the United States government.

"Rule 22. No authenticated copy of a judicial finding that a Chinese person was born in the United States shall be accepted as conclusive in favor of the person presenting it, unless he be completely identified as the person to whom such authenticated copy purports to relate."

By Rule 6 it is the duty of the inspector to prevent any communication between the immigrant and any person other than his own officials. In other words, no communication with counsel or with friends is permitted. By Rule 7 the examination is to be private, in the presence only of government officials and such witnesses as the examining officer shall designate. The most notorious outlaw in the land, when charged by the United States with crime, is, by constitutional enactment (art. 6, Amendments U. S. Constitution), given compulsory process for obtaining witnesses in his favor and the assistance of counsel for his defense; but the Chinaman—although by birth a citizen of the United States—is thus denied counsel and the right of obtaining witnesses. After he has been adjudged inadmissible, then, and then for the first time, is he permitted to have counsel and advised of his right of appeal, and such counsel, after filing notice of appeal, is permitted to examine, but not make copies of, the testimony upon which the excluding order is based. By Rule 8, if he desires to appeal, he must give written notice thereof within two days after the decision. By Rule 9, within three days after the filing of notice a complete record of the case is transmitted to the Commissioner General of Immigration, and on such appeal no evidence will be considered that has not been made the subject of investigation and report by the inspector. Can anything be more harsh and arbitrary? Coming into a port of the United States, as these petitioners did into the port of Malone, placed as they were in a house of detention, shut off from communication with friends and counsel, examined before an inspector with no one to advise or counsel, only such witnesses present as the inspector *may designate, and, [178] upon an adverse decision, compelled to give notice of appeal within two days, within three days the transcript forwarded to the Commissioner General, and nothing to be considered by him except the testimony obtained in this Star Chamber proceeding. This is called due process of law to protect the rights of an American citizen, and sufficient to prevent inquiry in the courts.

But it is said that the applicants did not prove before the immigration officer that they were citizens; that some simply alleged the fact, while others said nothing; that they were told that if they would give the names of two witnesses their testimony would be taken and considered. But what provision of law is there for compelling the attendance of witnesses before such immigration officer or for taking depositions, and of what avail would be an *ex parte* inquiry of such witnesses? Must an American citizen, seeking to return to this, his native

land, be compelled to bring with him two witnesses to prove the place of his birth, or else be denied his right to return, and all opportunity of establishing his citizenship in the courts of his country? No such rule is enforced against an American citizen of Anglo-Saxon descent, and if this be, as claimed, a government of laws, and not of men, I do not think it should be enforced against American citizens of Chinese descent.

Again, by Rule 21, the burden of proof is cast upon the applicant, no other evidence is to be accepted except that which the law prescribes, and in every doubtful case the benefit of the doubt is to be given to the government. And by Rule 22 a judicial finding of citizenship is not to be accepted as conclusive unless the party presenting it is "completely identified." I showed in my dissenting opinion in *Fong Yue Ting v. United States*, 149 U. S. 698, 740, 37 L. ed. 905, 922, 13 Sup. Ct. Rep. 1016, that expulsion was punishment. That proposition was not denied by the majority of the court when applied to a citizen, but only as applied to aliens (p. 709, L. ed. p. 912, Sup. Ct. Rep. p. 1020). If expulsion from the country is punishment for crime when applied to a citizen, can it be that the rule which requires the government to assume [179] the burden of proof, and which clothes the accused with the presumption of innocence can be changed by casting upon the individual the burden of showing that he is one not liable to such punishment? Can it be that the benefit of a doubt which attaches to all other accused persons is taken away from one simply because he is a Chinaman? And can it be that when one produces a judicial finding of citizenship, such finding can be brushed one side unless the identity of the individual in whose behalf the finding was made is established beyond doubt?

I cast no reflections upon the immigration officer in the present case. I am simply challenging a system and provisions which place within the arbitrary power of an individual the denial of the right of an American citizen to free entrance into this country, and put such denial outside the scope of judicial inquiry. It may be true that a ministerial officer, in a secret and private investigation, may strive to ascertain the truth and to do justice, but unless we blind our eyes to the history of the long struggle in the mother country to secure protection to the liberty of the citizen, we must realize that a public investigation before a judicial tribunal, with the assistance of counsel and the privilege of cross-examination, is the best, if not the only, way to secure that result.

In my judgment we are making a curious
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judicial history. In *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1070, decided in 1886, we said:

"The 14th Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

In *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456, decided in 1898, the petitioner, a Chinese person born in the United States, re-[180] turning from China, was refused permission to land, and was restrained of his liberty by the collector, the officer then charged with that duty. Without making any appeal from the decision of such local officer, although the law as to appeal to the Secretary was then the same as now, he sued out a writ of habeas corpus from the district court of the United States, which court, after hearing, discharged him on the ground that he was born within the United States, and therefore a citizen thereof. On appeal to this court that decision was affirmed. No one connected with the case doubted that the immigration and exclusion laws had no application to him if he were a citizen, or questioned his right to appeal in the first instance to the courts for his discharge from the illegal restraint.

In *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891, decided in 1902, it appeared that Chin Bak Kan was brought before a commissioner of the United States charged with wrongfully coming in and remaining within the United States. After a hearing he was adjudged guilty of the charge by the commissioner and ordered removed to China. An appeal was taken to the district court of the United States but the appeal was dismissed, and thereupon the case was brought here. The jurisdiction of the commissioner was challenged, and in disposing of that the court said (p. 200, L. ed. p. 1126, Sup. Ct. Rep. p. 894):

"A United States commissioner is a quasi-judicial officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court, and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commis-

sioner acting as a judge in the sense of the statute."

In the *Japanese Immigrant Case*, 189 U. S. 86, 100, 47 L. ed. 721, 725, 23 Sup. Ct. Rep. 611, 614, decided in 1903, this court, while sustaining the action of the ministerial officers, said:

[181] "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing *the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends,—not necessarily an opportunity upon a regular set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."

This was in the case of one confessedly an alien.

Now the court holds that parties claiming to be citizens can have that claim determined adversely by a mere ministerial officer, and be denied the right of immediate appeal to the courts for a judicial inquiry and determination thereof. I cannot believe that the courts of this Republic are so burdened with controversies about property that they cannot take time to determine the right of personal liberty by one claiming to be a citizen.

Further, even if it should be proved that these petitioners are not citizens of the United States, but simply Chinese laborers seeking entrance into this country, it may not be amiss to note the significance of the act of April 29, 1902 (32 Stat. at L. 176, chap. 641, U. S. Comp. Stat. Supp. 1903, p. 188), re-enacting and continuing the prior laws respecting the exclusion of the Chinese, "so far as the same are not incon-

sistent *with treaty obligations," taken in [182] connection with this provision in article 4 of the treaty with China, proclaimed December 8, 1894 [28 Stat. at L. 1210], "that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens." I am not astonished at the report current in the papers that China has declined to continue this treaty for another term of ten years.

Finally, let me say that the time has been when many young men from China came to our educational institutions to pursue their studies; when her commerce sought our shores, and her people came to build our railroads, and when China looked upon this country as her best friend. If all this be reversed and the most populous nation on earth becomes the great antagonist of this republic, the careful student of history will recall the words of Scripture, "they have sown the wind, and they shall reap the whirlwind," and for cause of such antagonism need look no further than the treatment accorded during the last twenty years by this country to the people of that nation.

I am authorized to say that Mr. Justice Peckham concurs in this dissent.

WILLIAM C. GIBSON, *Appt.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 182-193.)

Navy — pay of captain retired with rank of rear admiral—allowance for sea rations — repeal of statute by implication.

1. A captain in the United States Navy who served during the Civil War is entitled to three fourths of the sea pay of rear admirals of the nine lower numbers of that grade, where he has been retired pursuant to U. S. Rev. Stat. § 1444 (U. S. Comp. Stat. 1901, p. 1020), and the Navy personnel act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, § 11, U. S. Comp. Stat. 1901, p. 1025), with the rank and three fourths the sea pay of the next higher grade.
2. The allowance to naval officers for sea rations, provided for by U. S. Rev. Stat. §§ 1578,

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey*, 4 L. R. A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136, and *United States v. 356 Caddies of Tobacco*, 20 L. ed. U. S. 235.

1585 (U. S. Comp. Stat. 1901, pp. 1083, 1085), was impliedly repealed by the provisions of the Navy personnel act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, § 13, U. S. Comp. Stat. 1901, p. 1072), that officers of the Navy shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army.

[No. 195.]

Argued April 8, 1904. Decided April 25, 1904.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a retired rear admiral in the United States Navy in an action to recover the difference between three fourths the pay of a brigadier general and that of a major general of the Army, accorded by statute to retired rear admirals. *Affirmed.*

See same case below, 38 Ct. Cl. 752.

Statement by Mr. Justice **Day**:

This is an appeal from the court of claims. The claimant is a retired rear admiral. This action was prosecuted to recover the difference between three fourths the pay of a brigadier general and that of a major general of the Army, accorded by statute to retired rear admirals. The court of claims dismissed the petition, holding the claimant entitled to three fourths the pay of a brigadier general. Upon the hearing in that court the following facts were found:

"I. The claimant, William C. Gibson, was duly appointed a captain in the Navy, to rank from February 18, 1900. While serving in that grade, then being an officer of the Navy, with a creditable record, who served during the Civil War, he was retired by the following order:

"Navy Department,
"Washington, June 30, 1900.

"Sir: On July 23, 1900, you will regard yourself transferred to the retired list of officers of the U. S. Navy, in accordance with the provisions of § 1444 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1020), and with the rank and three fourths of the sea pay of the next higher grade, *i. e.*, rear admiral, in accordance with the provisions of § 11 of the naval personnel act, approved March 3, 1899 (U. S. Comp. Stat. 1901, p. 1025).

"Respectfully,

"John D. Long,
"Secretary.

"Captain William C. Gibson, U. S. Navy,
commanding U. S. S. Texas."

"II. Since his retirement he has received
[184]pay at the rate of *four thousand one hundred and twenty-five dollars (\$4,125) a
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year, being three fourths of five thousand five hundred dollars (\$5,500) the pay fixed by § 1261 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 893), as that of a brigadier general in the Army.

"If paid at the rate fixed by said § 1261 for a major general in the Army, he would receive pay at the rate of three fourths of seven thousand five hundred dollars a year, being five thousand six hundred and twenty-five dollars (\$5,625) a year, a difference of over and above what he has been receiving of one thousand five hundred dollars (\$1,500) a year.

"III. From January 22, 1900, to July 3, 1900, inclusive, claimant was, by regular assignment, in command of the U. S. S. Texas, a seagoing vessel in commission. During that period he was, prior to the 18th of February, a commander, in receipt of pay at the rate of four thousand dollars (\$4,000) a year, and from and after that date a captain, receiving pay at the rate of four thousand five hundred dollars (\$4,500) a year. He did not, while so attached to and in command of said vessel, receive any sea ration or commutation therefor, under Revised Statutes, §§ 1578 and 1585 (U. S. Comp. Stat. 1901, pp. 1083, 1085). (Reply of Navy Department not printed.)

"The commutation therefor, at the rate of 30 cents per day, would amount to forty-eight dollars and ninety cents (\$48.90)."

Messrs. George A. King and William B. King argued the cause and filed a brief for appellant:

A construction which assigns to the same word different meanings in different parts of the same statute is at war with well-settled principles of statutory interpretation.

Alexander v. Alexandria, 5 Cranch, 1, 7, 3 L. ed. 19, 20; *Reiche v. Smythe*, 13 Wall. 162, 164, 20 L. ed. 566, 567; *United States v. Central P. R. Co.* 118 U. S. 235, 240, 30 L. ed. 173, 175, 6 Sup. Ct. Rep. 1038; *County-Seat of Linn County*, 15 Kan. 501; *Robbins v. Omnibus R. Co.* 32 Cal. 472; *Pitte v. Shipley*, 46 Cal. 154; *Queen v. Poor Law Comrs.* 6 Ad. & El. 66; *Raymond v. Cleveland*, 42 Ohio St. 529.

It would be contrary to well-settled rules for the construction of provisos to extend the operation of this proviso beyond "the nine lower numbers of" the grade of rear admiral, therein referred to, so as to make it embrace, not merely those nine to whom, by its terms, it is limited, but, in addition, an indefinite number of other rear admirals.

United States v. Dickson, 15 Pet. 141, 165, 10 L. ed. 689, 698; *Minis v. United States*, 15 Pet. 423, 445, 10 L. ed. 791, 799;

Ryan v. Carter, 93 U. S. 78, 83, 23 L. ed. 807, 809.

Not only are rear admirals treated by the statutes and the Navy regulations as constituting a single grade, but other high authorities sustain the same sense of the term as the only admissible one.

Army Regulations, 1901 ed. art. 111; *Schuetze v. United States*, 24 Ct. Cl. 299; 1 Ops. Atty. Gen. 578.

Legislation which singles out veterans of the civil war for special benefits should receive a fairly liberal construction, allowing the officer or soldier the full benefit which Congress designed.

Hosmer v. United States, 3 Ct. Cl. 6; *Allstaedt v. United States*, 3 Ct. Cl. 284; *Kelly v. United States*, 5 Ct. Cl. 476; *Henry v. United States*, 6 Ct. Cl. 162; *Carlidge v. United States*, 24 Ct. Cl. 155; *Sowle v. United States*, 38 Ct. Cl. 525; *United States v. Hosmer*, 9 Wall. 432, 19 L. ed. 662; *United States v. Kelly*, 15 Wall. 35, 21 L. ed. 106; *United States v. Henry*, 17 Wall. 405, 21 L. ed. 673.

If two statutes are not absolutely irreconcilable, one will not be held to repeal the other.

Harford v. United States, 8 Cranch, 109, 3 L. ed. 504; *McCool v. Smith*, 1 Black, 470, 17 L. ed. 221; *Ex parte Yerger*, 8 Wall. 105, 19 L. ed. 339; *Distilled Spirits*, 11 Wall. 365, *sub nom. Harrington v. United States*, 20 L. ed. 170; *Henderson's Tobacco*, 11 Wall. 657, 20 L. ed. 238; *Red Rock v. Henry*, 106 U. S. 601, 27 L. ed. 253, 1 Sup. Ct. Rep. 434; *Frost v. Wenie*, 157 U. S. 46, 58, 39 L. ed. 614, 619, 15 Sup. Ct. Rep. 532.

Generalia specialibus non derogant.

Black, Constr. & Interpretation of Laws, p. 116; Sedgw. Stat. & Const. Law, 2d ed. Pomeroy's notes, p. 97; Potter's Dwar. Stat. p. 273; *United States v. Greathouse*, 166 U. S. 601, 41 L. ed. 1130, 17 Sup. Ct. Rep. 701; *United States v. Healey*, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247; *Rodgers v. United States*, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582.

Assistant Attorney General **Pradt** argued the cause, and, with Mr. John Q. Thompson, filed a brief for appellee:

It would seem improbable that Congress intended to place upon retired pay, at the rate of three-fourths of \$7,500 per year, an officer who, but five months and five days previous to his retirement, was below the rank of captain in the Navy.

Rodgers v. United States, 185 U. S. 91, 46 L. ed. 819, 22 Sup. Ct. Rep. 582.

When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the

extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

Murdock v. Memphis, 20 Wall. 590, 617, 22 L. ed. 429, 437; *Tracy v. Tuffly*, 134 U. S. 206, 223, 33 L. ed. 879, 884, 10 Sup. Ct. Rep. 527; *Fisk v. Henarie*, 142 U. S. 459, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207; *District of Columbia v. Hutton*, 143 U. S. 18, 36 L. ed. 60, 12 Sup. Ct. Rep. 369.

A subsequent statute revising the whole subject-matter of an earlier one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as in reason and common sense, operate to repeal the former.

Bartlet v. King, 12 Mass. 545, 7 Am. Dec. 99; Sutherland, Stat. Constr. § 154, p. 207; *King v. Cornell*, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 312.

Mr. Justice **Day** delivered the opinion of the court:

The first question presented is whether a captain in the Navy, retired as a rear admiral, under § 1444 of the Revised Statutes of the United States and § 11 of the Navy personnel act, shall receive three fourths of the pay of the rear admirals in the nine higher numbers in the list of rear admirals or the like proportion of the pay of the nine lower numbers of the eighteen rear admirals.

Section 1444 of the Revised Statutes provides: "When any officer below the rank of vice admiral is sixty-two years old, he shall, except in the case provided in the next section, be retired by the President from active service."

Section 11 of the navy personnel act reads: "That any officer of the Navy, with a creditable record, who served during *the [187] Civil War, shall, when retired, be retired with the rank and three fourths the sea pay of the next higher grade." 30 Stat. at L. 1007, chap. 413 (U. S. Comp. Stat. 1901, p. 1025).

Section 13 provides: "That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

In the first proviso of § 7 of said act, provision having been made for eighteen rear admirals in the active list of the line of the Navy, it is enacted as follows: "*Pro-*

vided, That each rear admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a brigadier general in the Army." 30 Stat. at L. 1005, chap. 413 (U. S. Comp. Stat. 1901, p. 982).

The claimant, at the time of his retirement, was a captain in the United States Navy, who had served during the Civil War, and was retired, by order of the Secretary of the Navy, pursuant to § 1444 of the Revised Statutes, with the rank and with three quarters of the sea pay of the next higher grade, in accordance with § 11 of the navy personnel act above quoted.

By § 1466 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1029), it is provided:

"The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered:

"The vice admiral shall rank with the lieutenant general.

"Rear admirals with major generals.

"Commodores with brigadier generals.

"Captains with colonels.

"Commanders with lieutenant colonels.

"Lieutenant commanders with majors.

"Lieutenants with captains.

"Masters with first lieutenants.

"Ensigns with second lieutenants."

[188] *Section 1261 (U. S. Comp. Stat. 1901, p. 893) fixes the pay of the officers of the Army:

"The officers of the Army shall be entitled to the pay herein stated after their respective designations:

"The general: thirteen thousand five hundred dollars a year.

"Lieutenant general: eleven thousand dollars a year.

"Major general: seven thousand five hundred dollars a year.

"Brigadier general: five thousand five hundred dollars a year.

"Colonel: three thousand five hundred dollars a year."

The claim of the appellant is, in substance, that the pay of the next higher grade above captain, the three quarters of which the appellant is to receive, is the full pay of a rear admiral,—that of a major general,—and not what is claimed to be the exceptional pay for the nine lower numbers of that grade, who are to receive the pay and allowance of a brigadier general.

It is admitted in the discussion, that the provision fixing the pay of the nine rear admirals to correspond with the pay of a brigadier general arose from the fact that the relative rank of officers of the Army and Navy had been so adjusted by statute as to rank commodores with brigadier generals, 194 U. S.

and the rank of commodore being dropped from the service, the pay of a brigadier general was given to the nine lower numbers of the rear admirals, who would otherwise have had the rank of commodores, with the corresponding pay of brigadier generals.

The argument for the appellant insists that the language is plain and so explicit as to need no construction; but the fact that the rear admirals are divided into two classes for the purposes of pay, and the statute not specifically pointing out which class of pay shall be given those situated as the claimant is, leads us to consider the objects to be attained by the new law, the circumstances under which it was enacted, and to construe the language used in view of the purpose of Congress in enacting the statute.

There is no question that, had the claimant been promoted in the active service from captain to rear admiral, he would have passed into the lower grade of rear admirals, so far, at least, as his pay was concerned, and would have received, so *long[189] as within that number, the pay of a brigadier general, notwithstanding that for all other purposes he was entitled to the rank and privileges of a rear admiral.

The appellant was promoted, and almost immediately retired; when thus retired, having served during the Civil War, he was given the rank of the next higher grade and three fourths of the sea pay of that grade. Congress had already created, for the purposes of pay, a division in the rank or grade of rear admiral, with higher pay for those of higher number and lower pay for others in the rank. It seems to us that it was the object of Congress, when retiring an officer under the circumstances stated, that he should receive the pay of the next higher rank, and, but for the division made in the pay of rear admirals, he would receive the three quarters of the full pay of that rank; but, taking one step upward for the purpose of pay, he passes into, and not over, the next pay grade, which is that of the nine lower numbers.

In regular gradation in the active service, a rear admiral, for the purposes of pay, must first serve through the nine lower numbers of the grade. So with a retiring officer; it is the purpose to give him, as compensation in the regular order of promotion, the pay of the "next higher grade." This conclusion is in harmony with the decision of this court in *Rodgers v. United States* [185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582], in which Mr. Justice Brewer, speaking for the court, said of this statute:

"The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but sim-

ply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear admiral, as it had stood in the past) all the benefits of such position? Would it be unnatural for Congress to bear in mind those who, by length of service, or by personal distinction, had already earned the position, and provide that in, at least, the matter of [190]pay, there should be some recognition *of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the Army should not, by a mere change of statute, be given a benefit in salary which was not at the same time accorded to brigadier generals in the Army? May not this explain its action in so dividing the rear admirals into two classes,—one composed substantially of former rear admirals, equal both in rank and pay with major generals in the Army, and the other of those who in the past were only commodores, to whom was given the rank of rear admirals, but the pay of brigadier generals in the Army?"

We cannot believe that it was the intention of Congress that an officer upon retirement, and whose promotion shortly before his retirement was made for the purpose of giving him an increase of pay as well as rank, was intended to be given the higher grade of pay reserved for those of distinction or long service in the grade to which the retiring officer was promoted, leaving those in the active service who earned the right to promotion to receive the lower grade of pay. In short, we believe it was the intention of Congress to promote a retiring officer for the purposes of pay into the next grade above that in which he served before retirement. In this case such compensation was that provided for rear admirals of the lower grade. If this were not so, a retiring rear admiral would receive, under the circumstances now before us, more pay upon retirement than is given to the rear admirals in active service, in the lower pay grade. It is urged that the promotion and retirement of those who had rendered valuable service in the Civil War was the object of Congress, which purpose is best subserved by construing the statute to give in case of such promotions the full rank and pay of the grade to which the officer is promoted. This reasoning may be adequate to furnish a motive for such legislation, but we can only give effect to purposes expressed or necessarily implied in the terms of the statute.

*But, it is urged, that in §§ 8 and 9 of the [191] navy personnel act, Congress, in providing for retirement of naval officers, has included the grade of commodores, and provides that captains within their terms shall be retired with three fourths the pay of the next higher grade, "including the grade of commodore, which is retained on the retired list for this purpose," thus evincing the purpose of Congress to retain the rank and pay of commodores in express terms when such is the purpose. But this reservation is for officers retired under these sections who are not to rank above commodores, while officers who served in the Civil War and are retired are to have the full rank of admirals, with the pay of the lower grade of the rank.

We agree with the Comptroller of the Treasury and the court of claims in the construction to be given this statute. If the purpose of Congress has been mistaken, the law can be corrected by a new enactment making clear the intention to give the more liberal treatment contended for by the appellant.

The question remains as to the right of this officer to receive commutation for the sea ration provided for by 1578 and 1585 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1083, 1085). These sections are:

"Sec. 1578. All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a sea-going vessel."

"Sec. 1585. Thirty cents shall in all cases be deemed the commutation price of the navy ration."

The provision of § 13 of the navy personnel act is:

"Officers of the line of the Navy . . . shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." 30 Stat. at L. 1007, chap. 413 (U. S. Comp. Stat. 1901, p. 1072).

The claim upon this branch of the case is that §§ 1578 and 1585 are not repealed in express terms by § 13 of the navy personnel act, and, as repeals by implication are not favored, it is argued that, notwithstanding the later law, the allowance for sea rations still remains for naval officers. But *the later [192] act distinctly provides that after June 30, 1899, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same compensation and allowance, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army. This section was intended to cover, and in exact terms provides for, all pay and allowance for naval officers except forage.

Where it is the intention of the statute to make a distinction or exception in allowance, that exception is expressly stated. The subject-matter of the later act provides for allowances to such officers, and it is to be the same as is now provided by law for Army officers of corresponding rank. Had Congress intended that such allowances as theretofore given should be continued, or to reserve the right to commutation as to the sea ration, it would have been very easy to have inserted apt words which would have rendered effectual this purpose. But the terms of the law undertaking to revise former laws upon the subject make no such reservation as is contended for, and we think we are not at liberty to add to the statute by inserting it.

It is true that repeals by implication are not favored, but where the same subject-matter is covered by two acts which cannot be harmonized with a view to giving effect to the provisions of each, to the extent of the repugnancy between them the later act will prevail, particularly in cases where it is apparent that the later act was intended as a substitute for the earlier one. *District of Columbia v. Hutton*, 143 U. S. 18-26, 36 L. ed. 60-62, 12 Sup. Ct. Rep. 369.

It is admitted that a change in the compensation of naval officers was made by the enactment of the new law, and, while § 13 provided that such officers should not be reduced in pay, there is no provision retaining the allowances of the former act. Moreover, § 26 of the navy personnel act provides that all acts and parts of acts, so far as they conflict with its provisions, shall be repealed. For the reasons stated we think the allowance of the previous statute cannot stand *consistently with the express provision upon the same subject of the later act.

We find no error in the judgment of the Court of Claims, and the same is *affirmed*.

Mr. Justice **Brewer** took no part in the consideration or decision of this case.

JOHN LOWE, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 193.)

Navy—pay of captain retired with rank of rear admiral—allowance for sea rations—repeal of statute by implication.

This case is governed by the decision in *Gibson v. United States*, *ante*, 926.

[No. 212.]

Argued April 8, 1904. Decided April 25, 1904.

194 U. S.

A PPEAL from the Court of Claims to review a judgment dismissing the petition of a retired rear admiral in the United States Navy in an action to recover the difference between three fourths the pay of a brigadier general and that of a major general of the Army, accorded by statute to retired rear admirals. *Affirmed*.

See same case below, 38 Ct. Cl. 170.

Mr. A. A. Hoehling, Jr., argued the cause, and, with Mr. Charles L. Frailey, filed a brief for appellant:

Where the meaning of a statute is plain, and there is no ambiguity, it is the duty of the courts to enforce it according to its obvious terms, and not to insert words and phrases so as to incorporate therein a new and distinct provision. This well-known principle of construction is applicable to the sections of the personnel act under consideration.

Lake County v. Rollins, 130 U. S. 662, 673, 32 L. ed. 1060, 1064, 9 Sup. Ct. Rep. 65; *United States v. Tyler*, 105 U. S. 244, 26 L. ed. 985; *Thornley v. United States*, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; *United States v. Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *Farnsworth v. Montana*, 129 U. S. 104, 32 L. ed. 616, 9 Sup. Ct. Rep. 253; *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155.

Assistant Attorney General **Pradt** argued the cause, and, with Mr. John Q. Thompson, filed a brief for appellee.

For their contentions see their brief as reported in *Gibson v. United States*, *ante*, 926.

Mr. Justice **Day** delivered the opinion of the court:

This case involves the same question, upon identical facts, as to the pay of a retired rear admiral, just disposed of in the case of *Gibson v. United States*, 193 U. S. 182, *ante*, 926, 24 Sup. Ct. Rep. 613.

For the reasons therein stated, the judgment of the Court of Claims, dismissing the petition of the appellant, is *affirmed*.

Mr. Justice **Brewer** took no part in the consideration or decision of this case.

**Re* UNITED STATES, *Petitioner*. [194]

(See S. C. Reporter's ed. 194-200.)

Appeal from commissioner's decision in Chinese exclusion cases—appeal to district court intended by provision for appeal to district judge.

The appeal to "the judge of the district court of the district," authorized by the act of

September 13, 1888 (25 Stat. at L. 476, chap. 1015, U. S. Comp. Stat. 1901, p. 1312), § 13, where a Chinese person has been convicted before a United States commissioner of being unlawfully in the United States, is, in effect, an appeal to the district court, and not to the district judge as an individual; and the commissioner's transcript and other papers pertaining to the cause may therefore be filed in that court, and the final order of the judge be entered as the final order of the court.

[No. 16, Original.]

Submitted April 18, 1904. Decided May 2, 1904.

PETITION for a Writ of Mandamus to compel the judge of the District Court of the United States for the Northern District of Ohio to direct the entry on the records of that court of final judgment in cases appealed from convictions of Chinese persons before a United States commissioner of being unlawfully within the United States, and to compel the clerk to enter the same, and to compel such judge and clerk to file all the papers relating to the causes, and to treat them as properly appealed to the District Court, and as having been before that court for determination. *Granted.*

The facts are stated in the opinion.

Solicitor General Hoyt and *Assistant Attorney General McReynolds* submitted the cause for petitioner:

Mandamus is the proper remedy.

Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493; *Ex parte Bradstreet*, 6 Pet. 774, 8 L. ed. 577; *Chicago & A. R. Co. v. Wiswall*, 23 Wall. 507, 23 L. ed. 103; *Re Grossmayer*, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535; *Re Conaway*, 178 U. S. 421, 44 L. ed. 1134, 20 Sup. Ct. Rep. 951.

The appeal from the decision of a United States commissioner provided by the act of 1888, was to the district court, and not merely to the judge.

United States v. Gee Lee, 1 C. C. A. 516, 7 U. S. App. 183, 50 Fed. 271; *Tsoiyii v. United States*, 129 Fed. 585.

This court has entertained without question appeals from district courts of the United States in Chinese cases appealed to those courts from United States commissioners, which, of course, could only have been upon the theory that the statute provided for appeals to the district court.

United States v. Gue Lim, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415; *Chin Bak Kan v. United States*, 186 U. S. 199, 201, 46 L. ed. 1125, 1126, 22 Sup. Ct. Rep. 891; *Ah How v. United States*, 193 U. S. 65, ante, 619, 24 Sup. Ct. Rep. 357; *Tom*

Hong v. United States, 193 U. S. 517, ante, 772, 24 Sup. Ct. Rep. 517.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is a petition for a writ of mandamus, commanding the judge of the district court of the United States for the northern district of Ohio to direct the entry on the records of that court of final judgment in the cases of *United States v. Jock Coe*, *Bong Meng*, and *Woo Joe*, and that the clerk enter the same; and that the cases be treated as properly appealed from the United States commissioner before whom they had been heard in the first instance, and as having been before the district court for determination. The complaint against Coe was made before a United States commissioner for the northern district of Ohio, charging that Coe, a Chinese person, was within the United States at Cleveland, Ohio, contrary to law, and a warrant was duly issued and executed, whereupon the commissioner found Coe guilty, and ordered him to be deported. *Coe appealed "to the dis-[195] trict court of the United States in and for the northern district of Ohio, and the judge of said court," and the commissioner transmitted a copy of the proceedings before him and the accompanying papers "into the district court of the United States," as his certificate stated. The transcript was filed by the clerk of the district court, and was marked as filed among the papers pertaining to the case. Subsequently a hearing was had and § 13 of the act of Congress of September 13, 1888 (U. S. Comp. Stat. 1901, p. 1312), was held to be unconstitutional, and Coe was discharged, to which exception was taken. Motion for new trial was made and overruled, and a bill of exceptions was duly settled and signed by the district judge. The United States applied to the clerk to file the bill of exceptions and various papers as part of the record of the district court, and to prepare a certified transcript thereof; but the clerk declined to do this under instruction of the judge, and furthermore stated that so many of the papers as were marked filed "had been so marked by mistake." The United States thereupon requested the judge, in writing, to order the clerk to file in the district court all the papers in the proceedings, and to make the necessary entries in regard thereto, and to prepare a certified transcript thereof, in order that a complete record of the same might be preserved, to be used on an appeal taken to this court. The request was refused on the ground that the proceedings on appeal from the commissioner had been had before the judge as judge, and not before the district court.

Leave having been granted to file the petition, and a rule having been entered thereon, return thereto has been duly made. The return of the judge states that in the proceedings against Coe, which were described in the bill of exceptions, a copy of which was attached to the petition for mandamus as an exhibit, he had denied as judge the order applied for, although he had allowed an appeal of the cause to the Supreme Court of the United States; that he had adopted this course because he was of opinion that § 13 gave jurisdiction on appeal to respondent as judge, but did not give [196]*jurisdiction to the district court to hear such appeal; and that said appeal was heard by respondent as judge, and not in the district court; that the clerk should not be ordered to make the proceedings matter of record in the district court, because there was no provision of law requiring the clerk to record proceedings other than those occurring in the court.

It seems that the judge allowed a writ of error, but only to his action as judge, and even if it could be held to run to the district court, it would be equally unavailing, in the absence of final judgment in that court and of the filing of the bill of exceptions. As we understand this record, if the appeal from the commissioner under § 13 was an appeal to the district court, then it follows that the commissioner's transcript and other papers pertaining to the case should be filed and the judgment be entered in that court, and an appeal will bring the cause before us. In other words, the district court will not have lost jurisdiction because of the view taken by the district judge, and the final order may be entered as the final judgment of the court.

Section 13 of the act of September 13, 1888 (25 Stat. at L. 476, chap. 1015, U. S. Comp. Stat. 1901, p. 1312), provides: "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

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Many cases may be found in which the words "court" and "judge" were held to have been used interchangeably, and in **Foote v. Silsby*, 1 Blatchf. 542, Fed. Cas. [197]. No. 4,917, Mr. Justice Nelson was of opinion that the circuit judge sitting at chambers was the circuit court in the usual and proper sense of the term and within the meaning of the 17th section of the patent act of July 4, 1836 (5 Stat. at L. 117, chap. 357).

In *Porter v. United States*, 2 Paine, 313, Fed. Cas. No. 11,290, Judge Betts said: "It is not an unusual use of language, in the statutes, to put the judge for the court, and to make provisions for him to execute which can only be executed in court." It was held that a statute authorizing a party "to prefer a bill of complaint to any district judge of the United States," referred to the district court, and not to the judge as an individual.

The construction put upon § 13 in practice has been quite general that the appeal to the district judge is in effect an appeal to the district court.

In 1892 the circuit court of appeals for the ninth circuit so held, in *United States v. Gee Lee*, 1 C. C. A. 516, 7 U. S. App. 183, 50 Fed. 271, and that the circuit court of appeals had jurisdiction over the judgment of the district court under § 6 of the judiciary act of March 3, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550]. The circuit court of appeals was of opinion that the words "the judge of the district court for the district" could and should be held equivalent to the words "the district court for the district," and that, while they were not, strictly speaking, convertible terms, they were so in a popular sense; "and it is safe to assume that Congress, in the use of the former phrase in this section, intended to give the party an appeal to the district court of the district."

In *United States v. Pin Kwan*, 40 C. C. A. 618, 100 Fed. 609, decided February 28, 1900, the circuit court of appeals for the second circuit sustained a writ of error to review the decision of the district court (94 Fed. 824) in which an order of deportation by a United States commissioner had been reversed by the district court. Of course, the circuit court of appeals took jurisdiction on the theory that the statute provided for appeals from the commissioner to the district court. And see *United States v. Ham Toy*, 56 C. C. A. 685, 120 Fed. 1022.

*A different view was expressed by the circuit court of the first circuit in the case of *Chow Loy*, 110 Fed. 952, in September, 1901, a proceeding in habeas corpus, and in the same case on appeal in the succeeding November (50 C. C. A. 279, 112 Fed. 354);

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and the original ruling was reiterated by the circuit court of appeals for the ninth circuit in *Tsoi Yui v. United States*, April 4, 1904, not yet reported, in which the case of Chow Loy was considered.

In *United States v. Gue Lim*, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415, decided February 26, 1900, this court entertained jurisdiction of several distinct appeals from the district court for the district of Washington. In the case of Mrs. Gue Lim a warrant had been issued, and her discharge ordered by the district court; but in the other cases the proceedings were had before a United States commissioner, and from his judgment of deportation the cases had been taken to the district court, which reversed his decision. The judgments of the district court were affirmed by this court.

By the 1st section of the act of April 29, 1902 (32 Stat. at L. 176, chap. 641, U. S. Comp. Stat. Supp. 1903, p. 188), § 13 of the act of 1888 was, together with some other sections, re-enacted, and we think it not unreasonable to conclude that Congress accepted the view we had indicated, and by its action removed any doubt on the question.

Shortly after the approval of that act, in *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891, we took jurisdiction of an appeal from the judgment of the district court for deportation on an appeal from the United States commissioner to the district court of the United States for the northern district of New York and we observed: "Something is said in respect of want of jurisdiction in the commissioner because § 6 of the act of 1892 [27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319] provides that Chinese laborers without certificates may be 'taken before a United States judge;' but we concur in the views of the circuit court of appeals for the ninth circuit in *Fong Mey Yuk v. United States*, 51 C. C. A. 528, 113 Fed. 898, that the act is satisfied by proceeding before 'a justice, judge, or commissioner.' These are the [199] words used in § 12 of the *act of 1882 [22 Stat. at L. 58, chap. 126, U. S. Comp. Stat. 1901, p. 1305], § 12 of the act of 1884 [23 Stat. at L. 115, chap. 220], § 13 of the act of 1888, and § 3 of the act of 1892; while the 1st section of the act of March 3, 1901 [31 Stat. at L. 1093, chap. 845, U. S. Comp. Stat. 1901, p. 1327], explicitly authorizes the district attorney to designate the commissioner before whom the Chinese person may be brought. The words 'United States judge,' 'judge,' and 'court,' in § 6 seem to us to refer to the tribunal authorized to deal with the subject, whether composed of a justice, a judge, or a commissioner. A

United States commissioner is a quasi-judicial officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court, and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute." . . . "Section 13, of the act of September 13, 1888, provides that any Chinese person, or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath, 'by any justice, judge, or commissioner of any United States court,' and when convicted, on a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. 'But any such Chinese person convicted before a commissioner of the United States court, may, within ten days from such conviction, appeal to the judge of the district court for the district.' It seems to have been assumed, during the years following the date of the act, and is conceded by the United States, that although most of its provisions were dependent upon the ratification of the treaty of March 12, 1888, and failed with the failure of ratification, that this section is, in and of itself, independent legislation, and in force as such. Accordingly in this case an appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the district court of the United States for the northern district of New York, and, upon hearing, the district court affirmed that judgment. From the judgment of the *district court, this appeal [200] was taken under § 5 of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 [28 Stat. at L. 1210] was drawn in question."

In the cases of *Ah How v. United States*, 193 U. S. 65, ante, 619, 24 Sup. Ct. Rep. 357, and *Tom Hong v. United States*, 193 U. S. 517, ante, 772, 24 Sup. Ct. Rep. 517, decided at this term, we disposed of sundry appeals from a district court to which the cases had been brought on appeal from a United States commissioner. Our jurisdiction was greatly challenged by the government, and attention was called to the conflicting decisions of the circuit courts of appeals for the ninth circuit in *United States v. Gee Lee*, and for the first circuit in *Chow Loy v. United States*, on the question whether the appeal was to the district judge or to the district court, but we maintained jurisdiction and affirmed the judgments of the district court in some of the

cases, and reversed the judgments and discharged the appellants in others. In these cases the district court would not have had jurisdiction if the statute confined appeals from the commissioner to appeals to the judge individually.

While it must be admitted that the proper construction of § 13 is not free from difficulty, we are not willing to change the construction we have heretofore repeatedly recognized as correct, and which we think has been adopted by Congressional legislation. That construction enables uniformity in the administration of the laws on this important subject to be attained by securing uniformity in judicial decision, and operates as a safeguard against injustice.

We assume that the other two cases are in substance the same as that of Coe.

The result is that we hold that the relief sought should be granted, but as we do not doubt it will be accorded on the expression of our conclusion, the order will be *petitioner entitled to mandamus as prayed*.

[201]*CITY & SUBURBAN RAILWAY OF
WASHINGTON, *Plff. in Err.*,
v.

HEDWIG E. SVEDBORG.

(See S. C. Reporter's ed. 201-204.)

Carriers of passengers—negligence—instructions.

1. The court need not direct the jury to find for a street railway company, in an action to recover damages for the injuries sustained by a passenger in alighting from one of its cars, where there was evidence on behalf of the plaintiff of a substantial character, bearing upon the general issue as to the carrier's negligence.
2. The modification of an instruction which seeks to confine the question of the negligence of a street railway company toward one of its passengers who was injured in alighting from one of its cars, to the acts of the motorman, so as to include the acts of the motorman or conductor or both, cannot be deemed to have misled the jury to the prejudice of the company, even though there was no evidence whatever showing negligence on the part of the conductor.
3. The trial court is not bound to grant an instruction which assumes that there is no evidence of negligence on the part of the conductor of a street car towards a passenger attempting to alight therefrom, and that the negligence, if any, was wholly that of the motorman, where the whole case as to the alleged negligence of the company was properly submitted to the jury, leaving them to determine whether, under all the evidence, the injury was caused by the negligence of its employees or any of them.

[No. 214.]

Argued April 13, 1904. Decided May 2, 1904.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of that District, entered on a verdict in favor of plaintiff in an action against a street railway company to recover damages for injuries received by a passenger in alighting from a car. *Affirmed*.

See same case below, 20 App. D. C. 543.

The facts are stated in the opinion.

Messrs. R. B. Behrend and C. C. Cole argued the cause, and, with *Mr. J. J. Darlington*, filed a brief for plaintiff in error:

Where the only evidence tending to show negligence comes from a witness who testifies positively both ways as to the same identical fact, it is mere matter of speculation as to whether the witness is correct in any of her testimony, and it is rendered perfectly worthless for any purpose, and ought not to be submitted to the jury.

Peaslee v. Glass, 61 Ill. 94.

When the evidence for the plaintiff and defendant is all considered together it is wholly insufficient to support a verdict for the plaintiff. It does not support the conclusion that she was thrown from the car by a starting or jerking of it, and the court should so have instructed the jury.

Pleasants v. Fant, 22 Wall. 116, 22 L. ed. 780; *Marion County v. Clark*, 94 U. S. 278, 24 L. ed. 59; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Baltimore & O. R. Co. v. State*, 71 Md. 590, 18 Atl. 969; *Duval v. Baltimore & O. R. Co.* 73 Md. 516, 21 Atl. 496; *Philadelphia, W. & B. R. Co. v. Burkhardt*, 83 Md. 516, 34 Atl. 1010; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

Where there is some evidence on behalf of the plaintiff which might sustain a verdict if it was uncontradicted, yet where the rebuttal is overwhelming, so that it may be said that, taking all the evidence together, the verdict would be unsupported by the evidence, it is the duty of the court to direct a verdict.

Metropolitan R. Co. v. Moore, 121 U. S. 569, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; *Powers v. New York C. & H. R. R. Co.* 60 Hun, 19, 14 N. Y. Supp. 408, *Affirmed* in 128 N. Y. 659, 29 N. E. 148.

The court below erred in holding that the doctrine of *res ipsa loquitur* applies to this case, or can in any way affect the question of whether the case should be taken from the jury.

Stokes v. Saltonstall, 13 Pet. 181, 10 L. ed. 115; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160; *New Jersey R. &*

Transp. Co. v. Pollard, 22 Wall. 341, 22 L. ed. 877; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 557, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; *Weaver v. Baltimore & O. R. Co.* 3 App. D. C. 436; *Harbison v. Metropolitan R. Co.* 9 App. D. C. 67; *Whalen v. Consolidated Traction Co.* 61 N. J. L. 609, 41 L. R. A. 836, 68 Am. St. Rep. 723, 40 Atl. 645; *Fcital v. Middlesex R. Co.* 109 Mass. 405, 12 Am. Rep. 720; *Chicago City R. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238; *North Carolina Street R. Co. v. Cotton*, 140 Ill. 494, 29 N. E. 899; *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 183, 15 L. R. A. 416, 23 Atl. 989; *Fleming v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 130, 22 L. R. A. 351, 38 Am. St. Rep. 835, 27 Atl. 858; *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067; *Paynter v. Bridgeton & M. Traction Co.* 67 N. J. L. 619, 52 Atl. 367.

Messrs. A. A. Lipscomb and Philip Walker argued the cause, and, with *Mr. Charles P. Janney*, filed a brief for defendant in error.

Res ipsa loquitur.

Whittaker's Smith, Neg. 522; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474, 37 Atl. 132; *Dougherty v. Missouri R. Co.* 81 Mo. 325, 51 Am. Rep. 239; *Murphy v. St. Louis, I. M. & S. R. Co.* 43 Mo. App. 343; *Murphy v. Concy Island & B. R. Co.* 36 Hun, 199; *Webster v. Elmira, C. & N. R. Co.* 85 Hun, 170, 32 N. Y. Supp. 590; *Martin v. Second Ave. R. Co.* 3 App. Div. 448, 38 N. Y. Supp. 220; *Palmer v. Warren Street R. Co.* 206 Pa. 574, 63 L. R. A. 507, 56 Atl. 49; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435-443, 35 L. ed. 458-463, 11 Sup. Ct. Rep. 859; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870; *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61.

The relation of the witnesses of defendant to the subject-matter in controversy was of itself sufficient to take from the court the right to dispose of the case upon their evidence, and to require that the jury should pass upon the weight to be given to them.

Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140.

The question of negligence is one of law for the court only when the facts are such that all reasonable men must draw the same conclusion; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish.

Gardner v. Michigan C. R. Co. 150 U. S.

349-361, 37 L. ed. 1107-1111, 14 Sup. Ct. Rep. 140.

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the question is for the jury. It is only where the facts are such that reasonable men must draw the same conclusions from them, that the question of negligence is ever considered as one of law for the court.

Texas & P. R. Co. v. Gentry, 163 U. S. 353-368, 41 L. ed. 186-193, 16 Sup. Ct. Rep. 1104.

The cause before the jury was made up by the pleadings, and the defendant in error was entitled to the full scope of the issue as thereby made. The declarations of the defendant in error may well have been considered by the jury, but it would have been improper for the court to have limited the issue as those declarations might affect it.

Daub. v. Northern P. R. Co. 18 Fed. 625; *Cooper v. Central R. Co.* 44 Iowa, 134.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error is a corporation organized under acts of Congress and engaged in the business of carrying passengers for hire in street cars operated on public highways in the District of Columbia.

The defendant in error was received as a passenger on one of such cars, and, in alighting from the one in which she was riding, was thrown to the ground and seriously injured.

The present action was brought against the railway company to recover damages on account of such injuries, the theory of the plaintiff's case being that the car in which she was a passenger was stopped for her to alight from it, and, while she was stepping off it, was suddenly and recklessly started, whereby, without negligence on her part, she was violently thrown to the ground.

The railway company pleaded not guilty as alleged, and the plaintiff joined issue on that plea.

The case was then tried before the court and a jury, the plaintiff introducing evidence tending to sustain her theory as to the cause of the injuries received by her, while the defendant introduced evidence tending to sustain its theory, which was that the plaintiff negligently attempted to alight from the car before it had actually stopped.

*At the conclusion of the plaintiff's evidence [202] the defendant asked the court to instruct the jury to find in its favor, upon the ground that the evidence was insufficient to justify a verdict for the plaintiff. That motion was denied, and the defendant ex-

cepted. The defendant then introduced evidence, at the close of which the motion to direct a verdict in its favor was renewed. The motion was also denied, and the defendant excepted.

It appears from the record that the court then granted two instructions at the request of the plaintiff and six instructions asked by the defendant. But none of the instructions so given on either side, were embodied in the bill of exceptions. What they were this court has no means of knowing.

There was a verdict and judgment in favor of the plaintiff for \$6,500, and that judgment was affirmed in the court of appeals for the District.

The railway company assigns for error the refusal of the trial court to direct the jury to find a verdict in its favor. The refusal was proper; for there was evidence of a substantial character bearing upon the general issue as to the negligence of the defendant, and therefore the question was one peculiarly for the jury. Even if the court thought that the preponderance of evidence was for the defendant, it was not bound, simply for that reason, to have taken the case from the jury, whatever influence that fact might have in disposing of a motion for a new trial.

It is also assigned for error that the trial court refused to give the following instructions to the jury:

[203] "In order to entitle the plaintiff to a verdict, the burden is upon her to prove, by a preponderance of the evidence, to the satisfaction of the jury, that the car stopped for her to alight, and that, while she was in the act of alighting, the car, through the negligence of the motorman, started, and thereby threw her to the pavement, and injured her; and unless, upon the whole evidence, the jury shall so find, the verdict should be for the defendant."

The court refused to grant that instruction without inserting after the word "motorman" the words "or conductor or both." These words having been inserted, the instruction was granted. The defendant excepted to the refusal of the court to give the instruction as asked.

It is contended that it was error prejudicial to the railway company to have added these words to the instruction asked, because, by so doing, the jury were, in effect, told that there was sufficient evidence upon which to base an inquiry whether the conductor was guilty of negligence; whereas, the company insists, there was not the slightest proof showing negligence on the part of the conductor.

We need not review the evidence as to the conductor; for if, as the defendant insists, there was no evidence whatever show-

ing negligence upon the part of the conductor, then the modification made by the court could not have so misled the jury as to prejudice the defense.

It is assigned for error that the trial court refused to grant the following instruction asked by the defendant: "The jury are instructed that under the evidence in this case they cannot find any negligence on the part of the conductor of the car, and unless they shall find from the evidence that the motorman was guilty of negligence which caused the accident to plaintiff, they should find for the defendant; and in considering that question they cannot infer the existence of any fact not shown to their satisfaction by the evidence."

Testing the action of the trial court alone by the evidence set out in the bill of exceptions, we cannot hold that the instruction *in question was improperly denied; for that [204] instruction took it for granted that there was not a scintilla of proof—none whatever—of negligence on the part of the conductor, and that the negligence, if there was any, was wholly or exclusively that of the motorman. The court below was not bound to submit the case to the jury in that way. It was not bound to make a particular part of the evidence the subject of a special instruction. Under the circumstances it properly submitted to the jury the whole case as to the alleged negligence of the company, leaving them to determine whether, under all the evidence, the injury was caused by the negligence of its employees or any of them. The plaintiff was entitled to a verdict if the injury was caused by the negligence of any employee. *Pomeroy v. Boston & M. R. Co.* 172 Mass. 92, 51 N. E. 523.

In the argument at the bar much was said by counsel as to the principles of law announced by the court of appeals, particularly in respect of the application of the maxim, *Res ipsa loquitur*. Our attention has been called to many authorities upon that branch of the case. But we deem it unnecessary to extend this opinion by a review of those authorities; for, even if the court of appeals erred in its application of that maxim,—and we express no opinion upon that point,—the judgment should not be reversed, since, as we have seen, the record before us does not show that the trial court committed any error to the substantial prejudice of the defendant.

The judgment of the Court of Appeals affirming the judgment of the Supreme Court of the District must, therefore, be affirmed.

It is so ordered.

Mr. Justice White and Mr. Justice McKenna dissented.

[205]*HENRY C. PETTIT, United States Marshal for the District of Indiana, *Appt.*,
v.
THOMAS WALSHE.

(See S. C. Reporter's ed. 205-220.)

Direct appeal from circuit court—case involving construction of treaty—foreign extradition—preliminary examination must be held in state where arrest is made.

1. The construction of the extradition treaties, on which the determination of the case depended in part, at least, was none the less so drawn in question by habeas corpus proceedings in a Federal circuit court as to permit a direct review of the judgment in the Supreme Court, because it also became necessary or appropriate for the court below to construe the acts of Congress passed to carry into effect the provisions of such treaties.
2. The preliminary examination of a person sought to be extradited under the treaties of August 9, 1842 (8 Stat. at L. 572, 576), and July 12, 1889 (26 Stat. at L. 1508, 1510), between the United States and Great Britain, on a conviction of murder, must be had in the state where he was found and arrested, in view of the provision of the 10th article of the earlier treaty, that the alleged fugitive criminal shall be arrested and delivered up only upon such evidence of criminality as, according to the laws of the place where he is found, would justify his apprehension and commitment for trial if the crime had there been committed, and of the proviso in the sundry civil appropriation act of August 18, 1894 (28 Stat. at L. 416, chap. 301, U. S. Comp. Stat. 1901, p. 717), by which it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction, for a hearing, commitment, or taking bail for trial,—notwithstanding those parts of the act of August 12, 1848, chap. 167 (9 Stat. at L. 302) and of U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), which provide for bringing the accused in extradition proceedings before the justice, judge, or commissioner who issued the warrant of arrest.

[No. 563.]

Argued April 6, 1904. Decided May 2, 1904.

ON APPEAL from the Circuit Court of the United States for the District of Indiana to review a judgment discharging, on habeas corpus, a person arrested in that state under an extradition warrant, for the purpose of taking him into another state,

NOTE.—On direct review in the Federal Supreme Court of judgments of circuit or district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On foreign extradition—see notes to *Kentucky v. Dennison*, 16 L. ed. U. S. 717, and *State v. Jackson*, 1 L. R. A. 370.

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before the officer who issued the warrant of arrest, without any preliminary examination in the former state as to the criminality of the charge against him. *Affirmed.*

See same case below, 125 Fed. 572.

The facts are stated in the opinion.

Mr. Charles Fox argued the cause and filed a brief for appellant:

Upon this appeal from a decision upon the application for a writ of habeas corpus this court has the power to review the decision below upon the facts, as well as the law.

Re Neagle, 135 U. S. 42, 34 L. ed. 63, 10 Sup. Ct. Rep. 658; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522.

An order of a district or circuit court of the United States upon an application for a writ of habeas corpus can be reviewed only by an appeal, and not by a writ of error.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406; *Re Morrissey*, 137 U. S. 157, 158, 34 L. ed. 644, 645, 11 Sup. Ct. Rep. 57; *Re Neagle*, 135 U. S. 42, 34 L. ed. 63, 10 Sup. Ct. Rep. 658.

The appeal lies directly to this court, as the construction of a treaty is drawn in question.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406.

If a foreign government should be required to obtain a warrant in every state in which the fugitive is supposed to be, it would entail upon the government such difficulties and annoyances as were never contemplated by the law or treaty.

Grin v. Shine, 187 U. S. 194, 47 L. ed. 137, 23 Sup. Ct. Rep. 98.

Warrants in extradition proceedings may run throughout the United States.

Re Henrich, 5 Blatchf. 415, Fed. Cas. No. 6,369; *Re Fergus*, 30 Fed. 607; *Ex parte Van Hoven*, 4 Dill. 415, Fed. Cas. No. 16,859; *Moore*, Extradition, § 304.

The Federal law regulates proceedings for extradition, and state laws have no application thereto, except as necessary to define the crime and determine whether the evidence introduced in support of extradition would be sufficient to justify the commitment for trial, if the offense had been committed within the state in which the fugitive is found.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406; *Wright v. Henkel*, 190 U. S. 40, 47 L. ed. 948, 23 Sup. Ct. Rep. 781.

If there is any conflict or inconsistency between article 10 of the treaty of 1842, and article 7 of the treaty of 1889, the latter will control; being, in effect, a later law, it supersedes the earlier treaty.

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Head Money Cases, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Chinese Exclusion Case*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623.

Treaties for extradition are to be liberally construed, for the purpose of carrying their object into effect.

Grin v. Shine, 187 U. S. 191, 47 L. ed. 136, 23 Sup. Ct. Rep. 98; *Tucker v. Alexandroff*, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195.

An alien convict has no right of asylum or habitation anywhere in the United States under our immigration laws, and can acquire no local residence.

Grin v. Shine, 187 U. S. 191, 47 L. ed. 136, 23 Sup. Ct. Rep. 98.

Mr. Ferdinand Winter argued the cause, and, with *Mr. Addison C. Harris*, filed a brief for appellee:

On every writ of error and appeal the first and fundamental question is that of jurisdiction, and the court, of its own motion will refuse to proceed where want of jurisdiction appears on the face of the record.

Continental Nat. Bank v. Buford, 191 U. S. 119, ante, 119, 24 Sup. Ct. Rep. 54.

The jurisdiction in this case depends upon whether the construction of a treaty is involved.

Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; *Craemer v. Washington*, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. Rep. 1.

This case depends for its decision upon the construction of the statutes relating to fugitives from the justice of a foreign country, and regulating the appointment and defining the powers of United States commissioners. It does not involve the construction of any treaty. There was no exception to the ruling and judgment of the court below, but, on the contrary, the British government, at whose instance the appellee was under the arrest from which he was discharged by such judgment, acquiesced in the judgment by procuring appellee to be again arrested and tried upon the same charge, before a United States commissioner for the district of Indiana, in accordance with the judgment of the court below in this case. This was a waiver of error in said judgment, and of the right to appeal therefrom.

Liebuck v. Stahle, 66 Iowa, 749, 24 N. W. 562; *Gordon v. Ellison*, 9 Iowa, 317, 94 Am. Dec. 353; *Carr v. Casey*, 20 Ill. 637; *Holland v. Commercial Bank*, 22 Neb. 585, 36 N. W. 112; *Wilson v. Roberts*, 38 Neb. 194 U. S.

206, 56 N. W. 787; *Brooks v. Hunt*, 17 Johns. 484; *Ehrman v. Astoria R. Co.* 26 Or. 377, 38 Pac. 306; *McAfee v. Kirk*, 78 Ga. 356.

The answer to the assignment of errors shows that, immediately upon the appellee being discharged from arrest under the warrant of Commissioner Shields, the British government, upon whose complaint that warrant had been issued, immediately procured him to be rearrested upon the same charge, upon a warrant issued by Judge Baker, and brought before Commissioner Moores, of the district of Indiana, pursuant to the command of the warrant, by whose judgment, still in full force, appellee was acquitted and discharged upon the merits, after a full hearing. This judgment, while in force, is final, and disposed of the subject-matter. The court cannot afford any substantial relief in the present case, which presents simply a moot question.

Tennessee v. Condon, 189 U. S. 70, 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 579; *Mills v. Green*, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *California v. San Pablo & T. R. Co.* 149 U. S. 314, 37 L. ed. 748, 13 Sup. Ct. Rep. 876; *Dakota County v. Glidden*, 113 U. S. 225, 28 L. ed. 981, 5 Sup. Ct. Rep. 428; *Dinsmore v. Southern Exp. Co.* 183 U. S. 120, 46 L. ed. 111, 22 Sup. Ct. Rep. 45; *Codlin v. Kohlhausen*, 181 U. S. 151, 45 L. ed. 793, 21 Sup. Ct. Rep. 584; *Kimball v. Kimball*, 174 U. S. 159, 43 L. ed. 933, 19 Sup. Ct. Rep. 639; *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 34 L. ed. 572, 11 Sup. Ct. Rep. 4; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; *San Mateo County v. Southern P. R. Co.* 116 U. S. 138, 29 L. ed. 589, 6 Sup. Ct. Rep. 317; *Coryell v. Holecombe*, 9 N. J. Eq. 650; *Re Treadwell*, 111 Cal. 189, 43 Pac. 584.

The extradition of a fugitive from justice is a criminal proceeding. The evidence of criminality must be heard and considered.

Rice v. Ames, 180 U. S. 374, 375, 45 L. ed. 581, 21 Sup. Ct. Rep. 406.

The defendant has a right to be examined as a witness in his own behalf, if he is a competent witness by the laws of the state in which he is found.

Re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645.

The commissioner failed to observe the mode of procedure designated by the law of the state of Minnesota, by refusing to permit the prisoner to examine witnesses in his own behalf; and it was held that his commitment was illegal.

Re Kelley, 25 Fed. 268.

The competency of evidence is to be determined by the law of the state in which the hearing is had.

Re Charleston, 34 Fed. 531.

The proceedings for arrest, hearing, and commitment for trial, or discharge, of persons charged with crimes or offenses against the United States are required to be had agreeably to the usual mode of process against offenders in the state where such person is found, and after commitment in a district, other than that in which the offense was committed, the district judge issues a warrant for his removal to the district where the trial is to be had.

Re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645.

If there were conflict between the treaty and the statutes, the latter, being later in enactment, would control.

Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 17 Sup. Ct. Rep. 522; *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Chinese Exclusion Case*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623.

If the acts alleged to have been committed are not criminal by the statutes of the United States, resort must be had to the laws of the state.

Wright v. Henkel, 190 U. S. 40, 47 L. ed. 948, 23 Sup. Ct. Rep. 781; *Re Farez*, 7 Blatchf. 345, Fed. Cas. No. 4,645.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a case of extradition. It presents the question whether a commissioner specially appointed by a court of the United States under and in execution of statutes enacted to give effect to treaty stipulations for the apprehension and delivery of offenders, can issue a warrant for the arrest of an alleged criminal, which may be executed by a marshal of the United States, within his district, in a state other than the one in which the commissioner has his office.

[211] It also presents the question whether a person arrested under such a warrant can be lawfully taken beyond the state in which he was found, and delivered in another state before the officer who issued the warrant of arrest, without any preliminary examination in the former state as to the criminality of the charge against him.

By the 10th article of the treaty between the United States and Great Britain, concluded August 9th, 1842, it was provided that upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, they shall "deliver up to justice all persons who, being charged with

the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other." But by the same article it was provided that "this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive." 8 Stat. at L. 572, 576.

A supplementary treaty between the same countries, concluded July 12th, 1889, provided for the extradition for certain crimes not specified in the 10th article of the treaty of 1842 *and "punishable by the laws of both [212] countries;" and, also, declared that the provisions of the above article "shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed. In case of a fugitive criminal alleged to have been convicted of the crime of which his surrender is asked, a copy of the record of the conviction, and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers." 26 Stat. at L. 1508, 1510.

By an act of Congress, approved August 12th, 1848, chap. 167, and entitled "An Act for Giving Effect to Certain Treaty Stipulations between This and Foreign Governments for the Apprehension and Delivering Up of Certain Offenders," it is provided (§ 1): "That in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States and any foreign government, it shall and

may be lawful for any of the justices of the Supreme Court or judges of the several district courts of the United States—and the judges of the several state courts, and the commissioners *authorized so to do* by any of the courts of the United States, are hereby severally vested with power, jurisdiction, and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention—to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the

[213] Secretary of State, *that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention; and it shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made.” “§ 6. That it shall be lawful for the courts of the United States, or any of them, to *authorize any person or persons to act as a commissioner or commissioners*, under the provisions of this act; and the doings of such person or persons so authorized, in pursuance of any of the provisions aforesaid, shall be good and available to all intents and purposes whatever.” 9 Stat. at L. 302.

And by § 5270 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3591)—omitting therefrom the proviso added thereto by the act of June 6th, 1900, chap. 793, 31 Stat. at L. 656 (U. S. Comp. Stat. 1901, p. 3591), which applies only to crimes committed in a foreign country or territory “occupied by or under the control of the United States”—it is provided: “Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, *authorized so to do by any of the courts of the United States*, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdic-

tion of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the *proper authorities of such [214] foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.” See also § 5273 (U. S. Comp. Stat. 1901, p. 3596).

In the sundry civil appropriation act of August 18th, 1894, will be found the following clause: “*Provided*. That it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof.” 28 Stat. at L. 416, chap. 301 (U. S. Comp. Stat. 1901, p. 717).

Under these treaty and statutory provisions, complaint on oath was made before John A. Shields—a commissioner appointed by the district court of the United States for the southern district of New York *to execute the above act of August 12th, 1848, and the several acts amendatory thereof*—that one James Lynchehaun was convicted, in a court of Great Britain, of the crime of having feloniously and unlawfully wounded one Agnes McDonnell, with intent thereby, feloniously and with malice aforethought, to kill and murder said McDonnell; that the accused was sentenced to be kept in penal servitude for his natural life; that in execution of such sentence he was committed to a convict prison in Queens county, Ireland, had escaped therefrom, and was at large; and that he was a fugitive from the justice of the Kingdom of Great Britain and

Ireland, and within the territory of the United States. It is admitted that the present appellee is the person referred to in the warrant as James Lynchehaun.

[215] *Upon that complaint, Commissioner Shields, in his capacity as a commissioner appointed by a court of the United States, to execute the laws relating to the extradition of fugitives from the justice of foreign countries, issued, on the 6th day of June, 1903, in the name of the President, a warrant addressed "to any marshal of the United States, to the deputies of any such marshal, or any or either of them," commanding that the accused be forthwith taken and brought before him, *at his office, in the city of New York*, in order that the evidence as to his criminality be heard and considered, and if deemed sufficient to sustain the charge, that the same might be certified, together with a copy of all the proceedings, to the Secretary of State, in order that a warrant might be issued for the surrender of the accused, pursuant to the above treaty.

This warrant having been placed for execution in the hands of the appellant, as marshal of the United States for the district of Indiana, he arrested the accused in that state. Thereupon the latter filed his application for a writ of habeas corpus in the circuit court of the United States for that district, alleging that his detention was in violation of the Constitution, treaties, and laws of the United States. The writ was issued, and the marshal justified his action under the warrant, issued by Commissioner Shields. Referring to the warrant and averring its due service upon the accused, the marshal's return stated that the warrant was "regular, legal, valid, and sufficient in law in all respects to legally justify and warrant the arrest and detention of petitioner, and, under the laws of the United States, it was and is the duty of this defendant to arrest and detain said petitioner, *and deliver him as commanded by said writ for hearing before Commissioner Shields, in New York city*; that said writ runs for service in the state of Indiana, although issued by a commissioner of the United States for the southern district of New York, by reason of its being a writ in extradition; that defendant is informed and believes, and therefore states the fact to be, that petitioner is the identical person commanded to be arrested by said warrant as

[216] James *Lynchehaun; . . . and that it is by virtue and authority solely of said warrant that defendant holds, and detains petitioner; that defendant proposes, if not otherwise ordered by this honorable court, to obey, as United States marshal for the district of Indiana, the command of said

warrant as set out therein, believing it to be his duty as said officer so to do."

The accused excepted to the marshal's return for insufficiency in law, and the case was heard upon that exception. The court held the return to be insufficient; and the marshal having indicated his purpose not to amend it, the accused was discharged upon the ground that the commissioner in New York was without power to issue a warrant under which the marshal for the district of Indiana could legally arrest the accused and deliver him before the court of that commissioner in New York without a previous examination before some proper officer in the state where he was found. *Re Walshe*, 125 Fed. 572.

The appellee contends that this case only involves a construction of certain acts of Congress, and that, therefore, this court is without jurisdiction to review the judgment on direct appeal from the circuit court. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 407, *ante*, 496, 499, 24 Sup. Ct. Rep. 376. We do not concur in this view. The treaties of 1842 and 1889 are at the basis of this litigation, and no effective decision can be made of the controlling questions arising upon the appeal without an examination of those treaties, and a determination of the meaning and scope of some of their provisions. A case may be brought directly from a circuit court to this court if the construction of a treaty is therein drawn in question. 26 Stat. at L. 826, chap. 517, § 5 (U. S. Comp. Stat. 1901, p. 549). The petition for the writ of habeas corpus, and the warrant under which the accused was arrested, both refer to the treaty of 1842, and the court below properly, we think, proceeded on the ground that the determination of the questions involved in the case depended in part, at least, on the meaning of certain provisions of that treaty. The construction of the treaties was none the less drawn in question because it became necessary *or appropriate for the court be-[217] low also to construe the acts of Congress passed to carry their provisions into effect.

We now go to the merits of the case. It has been seen that the treaty of 1842 expressly provides, among other things, that a person charged with the crime of murder, committed within the jurisdiction of either country, and found within the territories of the other, shall be delivered up by the latter country; and that the provision shall apply in the case of one convicted of such a crime, but whose sentence has not been executed. But both countries stipulated in the treaty of 1842 that the alleged criminal shall be arrested and delivered up *only* upon such evidence of criminality, as, according to the laws of the place where the fugitive person

so charged is *found*, would justify his apprehension and commitment for trial if the crime or offense had been there committed. As applied to the present case, that stipulation means that the accused, Walshe, could not be extradited under the treaties in question, except upon such evidence of criminality as, under the laws of the state of Indiana,—the place in which he was found,—would justify his apprehension and commitment for trial if the crime alleged had been there committed. The words in the 10th article of the treaty of 1842, “as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed,” and the words “punishable by the laws of both countries,” in the treaty of 1889, standing alone, might be construed as referring to this country as a unit, as it exists under the Constitution of the United States. But as there are no common-law crimes of the United States, and as the crime of murder, as such, is not known to the national government, except in places over which it may exercise exclusive jurisdiction, the better construction of the treaty is, that the required evidence as to the criminality of the charge against the accused must be such as would authorize his apprehension and commitment for trial in that state of the Union in which he is arrested.

[218] *It was substantially so held in *Wright v. Henkel*, 190 U. S. 40, 58, 61, 47 L. ed. 948, 954, 955, 23 Sup. Ct. Rep. 781, 785, 786, which was a case of extradition under the same treaties as those here involved. In that case the alleged fugitive criminal from the justice of Great Britain was found in New York. The court said: “As the state of New York was the place where the accused was found, and, in legal effect, the asylum to which he had fled, is the language of the treaty, ‘made criminal by the laws of both countries,’ to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the states? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the states, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common-law crimes of the United States, and, indeed, in most of the states the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.” Again: “When by the law of Great Britain, and by the law of the state in which the fugitive is found, the fraudulent

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acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offense under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offense charged to be within the treaty because the law violated was a statute of one of the states, and not an act of Congress.”

The above provision in the treaty of 1842 has not been modified or superseded by any of the acts passed by Congress to carry its provisions into effect. In our opinion, the evidence of the criminality of the charge must be heard and considered by some judge or magistrate authorized by the acts of Congress to act in extradition matters, and sitting in the state where the accused was found and arrested. Under any other interpretation of the statute Commissioner Shields, proceeding *under the treaty, could [219] by his warrant cause a person charged with one of the extraditable crimes, and found in one of the Pacific states, to be brought before him at his office in the city of New York, in order that he might hear and consider the evidence of the criminality of the accused. But as such a harsh construction is not demanded by the words of the treaties or of the statutes, we shall not assume that any such result was contemplated by Congress. While the view just stated has some support in those parts of the act of 1848, and § 5270 of the Revised Statutes which provide for the accused being brought before the justice, judge, or commissioner who issued the warrant of arrest, it is not consistent with the above proviso in the sundry civil act of August 18th, 1894, the language of which is broad enough to embrace the case of the arrest by a marshal, within the district for which he was appointed, of a person charged with an extraditable crime committed in the territories of Great Britain, and found in this country. By that proviso it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest circuit court commissioner or the nearest judicial officer, having jurisdiction, for a hearing, commitment, or taking bail for trial in cases of extradition. The commissioner or judicial officer here referred to is necessarily one acting as such within the state in which the accused was arrested and found. So that, assuming that it was competent for the marshal for the district of Indiana to execute Commissioner Shields’ warrant within his district, as we think it was, his duty was to take the accused before

the nearest magistrate in that district, who was authorized by the treaties and by the above acts of Congress to hear and consider the evidence of criminality. If such magistrate found that the evidence sustained the charge, then, under § 5270 of the Revised Statutes, it would be his duty to issue his warrant for the commitment of the accused to the proper jail, there to remain until he was surrendered under the direction of the national government, in accordance with the treaty. Instead of pursuing that course, [220] the marshal *arrested Walshe, and in his return to the writ of habeas corpus distinctly avowed his purpose, unless restrained by the court, to take the prisoner at once from the state in which he was found, and deliver him in New York, before Commissioner Shields, without a hearing first had in the state of Indiana before some authorized officer or magistrate there sitting, as to the evidence of the criminality of the accused. The circuit court adjudged that the marshal had no authority to hold the accused in custody for any such purpose; and, the marshal declining to amend his return, and not avowing his intention to take him before a judicial officer or magistrate in Indiana for purposes of hearing the evidence of criminality, the prisoner was properly discharged from the custody of that officer.

For the reasons above stated the judgment is affirmed.

CLIPPER MINING COMPANY, *Plff. in Err.*,
v.

ELI MINING & LAND COMPANY, A. D.
Searl, F. C. Schroeder, A. F. Britton, and
H. J. Gray.

(See S. C. Reporter's ed. 220-235.)

Error to state court—questions of fact not reviewable—placer mining location—effect of failure to secure patent—lode claims within exterior boundaries of placer locations—trespass cannot initiate title—adverse suit.

1. The conclusions of the highest court of a

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998, and *Re Buchanan*, 39 L. ed. U. S. 884.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

On lodes or veins within placer claims—see note to *Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 50 L. R. A. 289.

state upon questions of fact cannot, in an action at law, at least, be reviewed by the Supreme Court of the United States, on writ of error to that court.

2. The validity of a placer mining location is not affected by the lapse of many years since its original location, without the issue of a patent therefor.
3. An entry upon a prior valid placer mining location for the purpose of prospecting for unknown lodes, when made against the will of the placer locators, must be deemed a trespass, which can initiate no title to the lode claims thus located within the exterior boundaries of the placer claim, in view of the right of exclusive possession and enjoyment of the surface given to placer locators by U. S. Rev. Stat. §§ 2322, 2329 (U. S. Comp. Stat. 1901, pp. 1425, 1432), and of the provision of § 2333 (U. S. Comp. Stat. 1901, p. 1433), that a patent for a placer claim, while not including known veins or lodes not specifically applied and paid for, conveys any veins or lodes not known to exist when the patent was issued.
4. The owner of a prior placer mining location may maintain an adverse suit against an application for a patent for a subsequent lode location within the exterior boundaries of the placer claim, made by persons entering thereon against the will of the placer locators for the purpose of prospecting for unknown lodes or veins.

[No. 76.]

Argued November 13, 1903. Decided May 2, 1904.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which affirmed a judgment of the District Court of Lake County in that state in favor of plaintiffs in an action in support of an adverse claim of the owners of a placer mining location against an application for a patent for a lode claim within the exterior boundaries of the placer location. *Affirmed.*

See same case below, 29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286.

Statement by Mr. Justice **Brewer**:

On December 12, 1877, A. D. Searl and seven associates made a location of placer mining ground near the new mining camp of Leadville. The claim embraced at that time 157.02 acres of land. The original locators shortly conveyed all their interest to A. D. Searl, who applied for a patent on July 5, 1878. The application was met at the Land Office with a multitude of adverse claims. Settlements were made with some of the contestants, and on November 10, 1882, an amended application for patent was filed, including only 101 $\frac{21}{100}$ acres. This application was rejected by the Commissioner of the General Land Office on March 6, 1886, and his decision was affirmed by the Sec-

retary of the Interior on November 13, 1890. On November 25, 1890, four lode claims, known as the Clipper, Castle, Congress, and Capital, were located by parties other than the owners of the placer claim within the exterior boundaries of that claim. These four lode claims became, by mesne conveyances, the property of the Clipper Mining Company. It applied for a patent, and on November 23, 1893, the defendants in error, as the owners of the Searl placer location, filed an adverse claim and commenced this action in the district court of Lake county, in support of that claim. Judgment was rendered in favor of the plaintiffs, which was affirmed by the supreme court of the state (29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286), and thereafter this writ of error was sued out.

Mr. W. H. Bryant argued the cause, and, with *Messrs. C. S. Thomas and H. H. Lee*, filed a brief for plaintiff in error:

Can a citizen of the United States enter the limits of a valid placer location held by possessory title only, and discover and locate a lode found to be actually existing therein and not claimed or located by the locator of the placer? This question has been answered in the affirmative by every court that has passed upon it, except the supreme court of Colorado in the case at bar. The supreme court of Colorado in an earlier case answered in the affirmative, and in the case at bar was divided in the opinion. All text writers have likewise answered in the affirmative. *Mr. Morrison*, who has issued a new edition of his valuable work upon Mining Rights since the opinion in this case was published, is very emphatic in his dissent from its conclusions.

Morrison, Mining Rights, 11th ed. p. 207.

The general relation between lode and placer claimants has been very well discussed by nearly all text writers on mining law.

1 *Lindley*, Mines, 2d ed. § 413; 1 *Snyder*, Mines & Mining, § 318; *Morrison*, Mining Rights, 11th ed. p. 225.

A homestead is, perhaps, as sacred a title as any known to the law, and a person going on the public domain and attempting to locate a homestead and acquire title thereto will be given every protection that the law can afford; and yet it has always been the rule that, wherever a homestead was located upon land which turned out to contain valuable deposits of mineral any time before patent had been issued to the homestead claimant, anyone discovering such valuable deposits of mineral could locate the same and acquire thereby a better title than that possessed by the homesteader.

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Re Kaweah Co-operative Colony, 12 Land Dec. 326; 1 *Lindley*, Mines, §§ 202 *et seq.*

Again, land embraced within an inhabited city or town and occupied as residences should receive whatever protection the law throws around it; yet this court has held that, wherever land is included within the limits of an incorporated town which is found to be mineral in its character at any time before patent finally issues, it may be located as mineral land.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389.

And even though the land is actually occupied for trade and business, and improvements have been made thereon, the discoverer of a vein of mineral has the right to locate the same, secure a patent thereto, and is not compelled to pay anything for the improvements thereon.

Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Talbott v. King*, 6 Mont. 76, 9 Pac. 434; *Butte City Smoke-House Lode Cases*, 6 Mont. 397, 12 Pac. 858; *Chambers v. Jones*, 17 Mont. 156, 42 Pac. 758; *Re Tombstone Town Site Cases* (Ariz.) 15 Pac. 26; *Re Rankin*, 7 Land Dec. 411; 1 *Lindley*, Mines, § 166.

A railroad grant having been construed by this court to convey mineral rights, it has always been held that, so long as a patent has not been actually issued, the lands are open for exploration for minerals, and all mineral discovered is subject to location. This rule has been enforced even where the grant itself was held to convey the title, and although the railroad company was exercising ownership over the land and had attempted to sell it to other parties.

Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

Many conflicts between lode and placer claims have been before this court. In all of them it has been conceded that a lode claim could be located within a placer claim before the latter had applied for a patent. This was the one point upon which all parties seemed to agree.

Iron Silver Min. Co. v. Sullivan, 5 McCrary, 274, 16 Fed. 829; *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. ed. 466, 8 Sup. Ct. Rep. 598; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 34 L. ed. 155, 10 Sup. Ct. Rep. 765; *Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co.* 143 U. S. 394, 36 L. ed. 201, 12 Sup. Ct. Rep. 543; *Sullivan v. Iron Silver Min.*

Co. 143 U. S. 431, 36 L. ed. 214, 12 Sup. Ct. Rep. 555.

The conclusions of the text writers and of this court are supported by the decisions of the department of the interior and of other courts.

Aurora Lode v. Bulger Hill & Nugget Guleh Placer, 23 Land Dec. 95, 348; *Raunheim v. Dahl*, 6 Mont. 167, 9 Pac. 892, Affirmed in 132 U. S. 260, 33 L. ed. 324, 10 Sup. Ct. Rep. 74; *McCarthy v. Speed*, 11 S. D. 362, 50 L. R. A. 184, 77 N. W. 590; *Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245, 56 Pac. 176.

It is not an unusual thing to have the right to enter upon mining land in the possession of third parties for the purpose of securing title under other provisions of the mining law. Lode claims come nearer to exemption than any other class of mining property, because the statute expressly gives exclusive possession. But even in this case this court has expressly decided that the lines of a junior location may be run across it, and stakes placed upon its surface to secure underground rights.

Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

And again, a patented lode claim may be entered by a tunnel claimant to secure and work a blind lode.

Campbell v. Ellet, 167 U. S. 116, 42 L. ed. 101, 17 Sup. Ct. Rep. 765.

When a placer claimant applies for a patent, and says nothing about lodes, the owner of a known lode need not file an adverse claim, and his rights are fully protected.

Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co. 143 U. S. 394, 36 L. ed. 201, 12 Sup. Ct. Rep. 543.

And when a lode claimant applies for a patent, and is met with a placer adverse, and the placer claim wins in the courts, it only becomes entitled to the placer ground as such, and the judgment does not prohibit the lode claimants from securing title to their lodes.

Aurora Lode v. Bulger Hill & Nugget Guleh Placer, 23 Land Dec. 95.

That the adverse claim must be really adverse in character has been settled in numerous cases. Thus, it has been decided that, where a tunnel has been located, and a lode claimant afterwards applies for a patent for ground along the line of the tunnel, the tunnel owner need not file an adverse claim to protect his rights.

Enterprise Min. Co. v. Rieo-Aspen Consol. Min. Co. 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762.

The supreme court of Colorado has de-

cided that the owner of an easement need not file an adverse claim to protect it; the court stating in so many words that such a claim was not the subject of an adverse suit, as it was fully protected by the provisions of the Federal laws.

Rockwell v. Graham, 9 Colo. 36, 10 Pac. 284.

If any right which is fully protected by the law is not the subject of an adverse claim, it follows that a placer claim is not entitled to adverse a lode claim, for any rights which a placer claim may have are fully protected by the laws.

The supreme court of Montana has held that a person owning a highway over a mining claim need not file an adverse when the mining claim owner applies for a patent.

Murray v. Butte, 7 Mont. 61, 14 Pac. 656.

And the same court has held that a mine owner need not adverse an application for a town site.

Silver Bow Min. & Mill. Co. v. Clark, 5 Mont. 378, 5 Pac. 570.

A townsite applicant cannot adverse a lode claim.

Ryan v. Granite Hill Min. & Development Co. 29 Land Dec. 522. See also 2 Lindley, Mines, §§ 717 *et seq.*

This court, in the various placer mining cases that have been before it, has emphatically announced the same rule.

Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 34 L. ed. 155, 10 Sup. Ct. Rep. 765.

And again, it has held, contrary to some earlier rulings of the Land Department, that one cotenant need not adverse an application for a patent made by his cotenants, the court saying that the statute contemplated conflicting mining locations, and not contests as to the ownership of one location.

Turner v. Sawyer, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192.

The same point was decided some years earlier by the supreme court of Colorado.

Doherty v. Morris, 11 Colo. 12, 16 Pac. 911.

Mr. Lindley takes the position that a lode claimant cannot adverse a placer claimant, and, *vice versa*, that a placer claimant cannot adverse a lode claimant.

2 Lindley, Mines, § 721.

The decisions of the Land Department are as conclusive and to the same effect. It is held that an agricultural claimant cannot file an adverse against a mineral claimant.

Powell v. Ferguson, 23 Land Dec. 173.

So, the owner of a mill site is not entitled to file an adverse claim against a mineral applicant.

Snyder v. Waller, 25 Land Dec. 7; *Elda Min. & Mill. Co. v. Mayflower Gold Min. Co.* 26 Land Dec. 573; *Cape May Min. & Leasing Co. v. Wallace*, 27 Land Dec. 676. See also *North Star Lode*, 28 Land Dec. 41.

The matter determined in Searl's application for a patent was the character of the land. It has been decided by the Land Department, and the decision affirmed by this court, that the Land Department must finally determine the character of public land, and that, even though in an adverse suit where the jurisdiction was undoubted this question was involved, yet afterwards the Land Department had the right to say whether or not the land could be sold under the classification made in the adverse suit.

Alice Placer Mine, 4 Land Dec. 314; *Perego v. Dodge*, 163 U. S. 160, 41 L. ed. 113, 16 Sup. Ct. Rep. 971.

Any adverse suit which only had for its object an adjudication respecting the character of the land could not be maintained, as this question had to be determined solely by the Land Department.

Powell v. Ferguson, 23 Land Dec. 173; *Snyder v. Waller*, 25 Land Dec. 7; *Aurora Lode v. Bulger Hill & Nugget Gulch Placer*, 23 Land Dec. 95; 2 Lindley, Mines, § 765.

This court has also decided in any number of cases that the decisions of the Department on questions of fact are conclusive, and cannot be reviewed, annulled, or set aside in any other tribunal.

Catholic Bishop v. Gibbon, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779; *Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018.

The old distinction between possessory and legal titles, so far as mining claims are concerned, is fast disappearing.

Tibbitts v. Ah Tong, 4 Mont. 536, 2 Pac. 759; *Noyes v. Black*, 4 Mont. 527, 2 Pac. 769; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Leland v. McDonald*, 2 Idaho, 283, 13 Pac. 347; *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110; *Noyes v. Mantle*, 127 U. S. 348, 32 L. ed. 168, 8 Sup. Ct. Rep. 1132; *Kendall v. San Juan Silver Min. Co.* 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779; *Manuel v. Wolff*, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651.

It has frequently been decided by the Department that, after there has been a determination of the character of the land, an application to enter it under a different classification will be denied.

Coleman v. McKenzie, 28 Land Dec. 348.

The point made by the supreme court
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that the parties are different does not apply. An application for a patent is a proceeding in rem.

Wight v. Du Bois, 21 Fed. 693.

Messrs. **John A. Ewing** and **A. B. Browne** argued the cause, and, with Messrs. *Charles Cavender* and *Alex. Britton*, filed a brief for defendants in error:

The finality attending the determination of facts by the United States Land Department in controversies affecting disposal of agricultural land can have no application in respect of controversies between mineral claimants sent by express provision of statute into the courts for such exclusive and controlling determination.

Shoshone Min. Co. v. Rutter, 177 U. S. 505, 511, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; *Bennett v. Harkrader*, 158 U. S. 441, 39 L. ed. 1046, 15 Sup. Ct. Rep. 863; *Jennison v. Kirk*, 98 U. S. 453, 457, 25 L. ed. 240.

Priority of location, lawfully initiated and maintained, gives priority of right, and protects the holder thereof from the intrusion of another.

Belk v. Meagher, 104 U. S. 279, 283, 284, 26 L. ed. 735, 737; *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110.

The location made by the grantors of the defendants in error was a location of mineral land.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 649, 26 L. ed. 875; *Sweet v. Webber*, 7 Colo. 443, 4 Pac. 752.

The law of possessory rights, giving the locator of a mining claim the exclusive right thereto, and rendering it no longer public domain, applies to placer claims.

Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 611; *Quigley v. Gillett*, 101 Cal. 462, 35 Pac. 1040; *Stratton v. Gold Sovereign M. & T. Co.* 1 Mills Leg. Adv. 350; *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673.

Only the unoccupied and unappropriated mineral lands of the general government are subject to exploration and location.

Armstrong v. Lower, 6 Colo. 393; *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443.

Going upon the possession of one having a valid location of a mining claim is a trespass, and no new right can be initiated thereon.

McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; *Girard v. Carson*, 22 Colo. 345, 44 Pac. 508.

Provisions relating to mining claims apply equally to both lode and placer claims.

Sweet v. Webber, 7 Colo. 443, 4 Pac. 752.

A lode discovery on adjacent land raises

no presumption of the existence of a vein or lode within the placer claim.

Dahl v. Raunheim, 132 U. S. 260, 261, 33 L. ed. 324, 10 Sup. Ct. Rep. 74.

A placer claimant may adverse an application for a lode patent.

Bennett v. Harkrader, 158 U. S. 441, 39 L. ed. 1046, 15 Sup. Ct. Rep. 863.

Upon an adverse-claim suit not merely questions of law under the statutes of the United States, but questions of fact and questions arising under local rules and customs and state statutes, are open for consideration.

Shoshone Min. Co. v. Rutter, 177 U. S. 505, 511, 44 L. ed. 864, 867, 20 Sup. Ct. Rep. 726.

Under the mining law the question sent to the courts to be there litigated upon the adverse-claim suit is the question of the right of possession. The judgment rendered on that question controls the United States Land Department, for, after the decision, they are governed by it.

Richmond Min. Co. v. Rose, 114 U. S. 576, 585, 29 L. ed. 273, 276, 5 Sup. Ct. Rep. 1055.

[222] *Mr. Justice **Brewer** delivered the opinion of the court:

The location of the placer mining claim and both the original and amended applications for patent thereof were long prior to the locations of the lode claims, and the contention of the plaintiffs is that they, by virtue of their location, became entitled to the exclusive possession of the surface ground; that the entry of the lode discoverers was tortious and could not create an adverse right, even though, by means of their entry and explorations they discovered the lode claims. The defendant, on the other hand, contends that the original location of the placer claim was wrongful, for the reason that the ground included within it was not placer mining ground; that the intent of the locators was not placer mining, but the acquisition of title to a large tract of ground contiguous to the new mining camp of Leadville, and likely to become a part of the townsite. In fact, it was thereafter included within the limits of the town, and on its streets and alleys have been laid out and many houses built and occupied by individuals claiming adversely to the placer location.

It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the conclusions of the highest court of a state upon questions of fact. *Republican River Bridge Co. v. Kansas P. R. Co.* 92 U. S. 315, 23 L. ed. 515; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Israel v. Arthur*, 152 U. S. 948

S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; *Noble v. Mitchell*, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673-677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922; *Turner v. New York*, 168 U. S. 90-95, 42 L. ed. 392-394, 18 Sup. Ct. Rep. 38; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the supreme court.

As against this, it is contended that the Land Department *held that the ground [223] within the Searl location was not placer mining ground, nor subject to entry as a placer claim; that such holding by the Department must be accepted as conclusive in the courts, and therefore that the tract should be adjudged public land and open to exploration for lode claims and to location by any discoverer of such claims. It is true that the Commissioner of the General Land Office, in rejecting the amended application for the placer patent, said that he was not satisfied that the land was placer ground, or that the requisite expenditure had been made, and, further, that the locators had not acted in good faith, but were attempting to acquire title to the land on account of its value for townsite purposes and for the lodes supposed to be contained therein. This decision was affirmed by the Secretary of the Interior; but notwithstanding this expression of opinion by these officials, all that was done was to reject the application for a patent. As said thereafter by the Secretary of the Interior upon an application of the Clipper Mining Company for a patent for the lode claims here in dispute:

"The judgment of the Department in the *Searl Placer Case* [11 Land Dec. 441] went only to the extent of rejecting the application for patent. The Department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it." [*Re Clipper Min. Co.*] 22 Land Dec. 528.

So far as the record shows—and the record does not purport to contain all the evidence—the placer location is still recognized in the Department as a valid location. Such also was the finding of the court; and being so there is nothing to prevent a subsequent application for a patent

and further testimony to show the claimant's right to one. Undoubtedly when the Department rejected the application for a patent it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have.

[224] *The fact that many years have elapsed since the original location of the placer claim, and that no patent has yet been issued therefor, does not affect its validity, for it is a well-known fact, as stated by the court of appeals in *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4, 16, that "some of the richest mineral lands in the United States, which have been owned, occupied, and developed by individuals and corporations for many years, have never been patented."

The views entertained by the supreme court of the law applicable to the facts of this case are disclosed by the following quotation from its opinion. After referring to one of its previous decisions, known as the *Mt. Rosa Case* [26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245, 56 Pac. 176], it said:

"If, in the case at bar, the lode claims were known to exist at the time of the entry of defendant's grantors upon the Searl placer, under the decision in the *Mt. Rosa Case* the entry was not unlawful; but if, on the contrary, the veins were then unknown, by the same decision the right of possession of this ground belonged to the owners of the placer location. Their right of possession included these unknown veins, and the entry for prospecting was a trespass, and no title could thereby be initiated.

"Our conclusion, therefore, is that one may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. If the trial court intended to rule that in no circumstances may one, before application for a patent of a placer claim, go upon the ground within its exterior boundaries for the purpose of locating a lode, it went too far; yet, as general language in an opinion must be taken in connection with the facts in the particular case, the ruling here should be limited to the facts disclosed by the record, and no prejudicial error was committed. For, under the authorities, a prospector may not enter upon a prior placer location for the purpose

of prospecting for, or locating, unknown *lodes or veins; and to uphold the judgment [225] we must presume that the evidence before the trial court showed that the veins or lodes upon which the defendant's grantors based their locations were unknown when they entered upon the Searl placer for the purpose of prospecting."

The law under which these locations were all made is to be found in chap. 6 of Title 32, Rev. Stat. Section 2319 (U. S. Comp. Stat. 1901, p. 1424) of that chapter reads:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase."

Section 2320 (U. S. Comp. Stat. 1901, p. 1424) provides for the location of mining claims upon veins or lodes.

By § 2322 (U. S. Comp. Stat. 1901, p. 1425) it is provided that—

"The locators of all mining locations . . . on any mineral vein, lode, or ledge, situated on the public domain, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

And by § 2329 (U. S. Comp. Stat. 1901, p. 1432):

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

Section 2333 (U. S. Comp. Stat. 1901, p. 1433) is as follows:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for *such vein or lode claim, [226] and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty three hundred and twenty, is known to exist within the boundaries of

a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

It will be seen that § 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one, without his consent, or, at least, his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mine, and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In *Belk v. Meagher*, 104 U. S. 279, 283, 26 L. ed. 735, 737, it was said by Chief Justice Waite that "a mining claim perfected under the law is property in the highest sense of that term;" and in a later case (*Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 1112) he adds:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a [227] location, there is *another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second."

In *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 171 U. S. 650, 655, 43 L. ed. 320, 322, 19 Sup. Ct. Rep. 61, 63, the present Chief Justice declared that "where there is a valid location of a mining claim, the area becomes segregated from the public domain, and the property of the locator." Nor is this "exclusive right of possession and enjoyment" limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." In other words, the entire body of

ground, together with all veins and lodes whose apexes are within that body of ground becomes subject to an exclusive right of possession and enjoyment by the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location, or, in the words of Chief Justice Waite, just quoted, while there is "a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States." There is no provision for, no suggestion of, a prior termination thereof.

By § 2329, placer claims are subject to entry and patent "under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." The purpose of this section is apparently to place the location of placer claims on an equality both in procedure and rights with lode claims. If there were no other legislation in respect to placer claims the case before us would present little doubt; but following this are certain provisions, those having special bearing on the case before us being found in § 2333. Parties obtaining a patent for a lode claim must pay \$5 an acre for the surface ground, while for a placer claim the government only charges \$2.50 an acre. By § 2333 it is provided that one who is in possession of a placer claim and also of a lode claim *in-[228] eluded within the boundaries of the placer claim shall, on making application for a patent, disclose the fact of the lode claim within the boundaries of the placer, and upon the issue of the patent payment shall be made accordingly; that if the application for the placer claim does not include an application for a vein or lode claim known to exist within the boundaries of the placer, it shall be construed as a conclusive declaration that the placer claimant has no right of possession of that vein or lode; and further, that where the existence of a vein or lode within the boundaries of a placer claim is not known, the patent for the placer claim shall convey all valuable mineral and other deposits within its boundaries.

A mineral lode or vein may have its apex within the area of a tract whose surface is valuable for placer mining, and this last section is the provision which Congress has made for such a case. That a lode or vein, descending as it often does to great depths, may contain more mineral than can be obtained from the loose deposits which are secured by placer mining within the same limits of surface area, naturally gives to the surface area a higher value in the one case than the other, and that Congress appreciated this difference is shown by the different prices charged for the surface under the two

conditions. Often the existence of a lode or vein is not disclosed by the placer deposits. Hence ground may be known to be valuable and be located for placer mining, and yet no one be aware that underneath the surface there is a lode or vein of greater value. A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. A lode or vein may be known to exist at the time of the placer location or not known until long after the patent therefor has been issued. There being no necessary connection between the placer and the vein, Congress by the section has provided that in an application for a placer patent the applicant shall include any vein or lode of which he has possession, and that if he does not make such [229] inclusion the omission is to be taken *as a conclusive declaration that he has no right of possession of such vein or lode. If, however, no vein or lode within the placer claim is known to exist at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered.

While by the statute the right of exclusive possession and enjoyment is given to a locator, whether his location be of a lode claim or a placer claim, yet the effect of a patent is different. The patent of a lode claim confirms the original location, with the right of exclusive possession, and conveys title to the tract covered by the location, together with all veins, lodes, and ledges which have their apexes therein, whereas the patent to the placer claim, while confirming the original location and conveying title to the placer ground, does not necessarily convey the title to all veins, lodes, and ledges within its area. It makes no difference whether a vein or lode within the boundaries of a lode claim is known or unknown, for the locator is entitled to the exclusive possession and enjoyment of all the veins and lodes, and the patent confirms his title to them. But a patent of a placer claim will not convey the title to a known vein or lode within its area unless that vein or lode is specifically applied and paid for.

It is contended that because a vein or lode may have its apex within the limits of a placer claim a stranger has a right to go upon the claim, and, by sinking shafts or otherwise, explore for any such lode or vein, and on finding one obtain a title thereto. That, with the consent of the owner of the placer claim, he may enter and make such exploration, and if successful, obtain title to the vein or lode, cannot be questioned. But can he do so against the will of the placer locator? If one may do it, others may, and so the whole surface of the placer

be occupied by strangers seeking to discover veins beneath the surface. Of what value then would the placer be to the locator? Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface he cannot continue his workings. And if the surface is open to the entry of whoever *seeks to explore for [230] veins, his possession can be entirely destroyed. In this connection it may be well to notice the last sentence in § 2322. That section, from which we have just quoted, is the one which gives a locator the right to pursue a vein on its dip outside the vertical side lines of his location. The sentence, which is a limitation on such right, reads: "And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It would seem strange that one owning a vein, and having a right in pursuing it to enter beneath the surface of another's location, should be expressly forbidden to enter upon that surface, if, at the same time, one owning no vein, and having no rights beneath the surface, is at liberty to enter upon that surface, and prospect for veins as yet undiscovered.

We agree with the supreme court of Colorado as to the law when it says that "one may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or, by his conduct, is estopped to complain of it." Perhaps if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work, and certainly if he acquiesces in their action, he cannot, after they have discovered a vein or lode, assert right to it, for, generally, a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer ought not thereafter to appropriate that which they have discovered by such search.

The difficulty with the case presented by the plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespasses, and as a general rule no one can initiate a right by means of a trespass. *Ather-ton v. Fowler*, 96 U. S. 513, 24 L. ed. 732; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. ed. 626; *Haws v. *Victoria Cop* [231] *per Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282. See also *Cosmos Es-*

ploration Co. v. Gray Eagle Co. 61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4, in which the court said (L. R. A. p. 242, C. C. A. p. 93, Fed. p. 17) :

"No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon. *Cowell v. Lammers*, 10 Sawy. 246, 21 Fed. 200, 202; *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 674, 680; *Hosmer v. Wallace*, 97 U. S. 575, 579, 24 L. ed. 1130, 1132; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. ed. 626; *Mower v. Fletcher*, 116 U. S. 380, 385, 386, 29 L. ed. 593, 595, 6 Sup. Ct. Rep. 409; *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 317, 40 L. ed. 436, 440, 16 Sup. Ct. Rep. 282; *Nickals v. Winn*, 17 Nev. 188, 193, 30 Pac. 435; *McBrown v. Morris*, 59 Cal. 64, 72; *Goodwin v. McCabe*, 75 Cal. 584, 588, 17 Pac. 705; *Rourke v. McNally*, 98 Cal. 291, 35 Pac. 62."

If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts or otherwise, is undoubtedly a trespass, and such a trespass cannot be relied upon to sustain a claim of a right to veins and lodes. It will not do to say that the right thus claimed is only a right to something which belongs to the United States, and which will never belong to the placer locator, unless specifically applied and paid for by him, and therefore that he has no cause of complaint; for if the claim of the lode locator be sustained it carries, under §§ 2320 and 2333, at least 25 feet of the surface on each side of the middle of the vein. Further, if there be no prospecting, no vein or lode discovered until after patent, then the title to all veins and lodes within the area of the placer passes to the placer patentee, and any subsequent discovery would enure to his benefit.

Again, it is contended that the claims which the defendant sought to patent were lode claims; that the only title set up in the complaint in the adverse suit was a placer title, and that a placer claimant has no standing to maintain an adverse suit against lode applications. In support of this is cited 2 Lindley on Mines, § 721, in which the author says:

"Where an application for a patent to a [232] lode within *the limits of a placer is made by a lode claimant, if the placer claimant asserts any right to the lode, he is necessarily called upon to adverse. Where his claim, however, is placer, pure and simple, under which claim he cannot lawfully assert a right to the lode, he has nothing upon which to base an adverse claim, unless the lode is entirely without the placer, and

the controversy is confined to a conflicting surface, or the lode claimant seeks to acquire more surface than the law permits."

We do not think the author's language is to be taken as broadly as counsel contend. Under the statutes a lode claim carries with it the right to a certain number of acres, and where one is in peaceable possession of a valid placer claim, if a stranger forcibly enters upon that claim, discovers and locates a lode claim within its boundaries, and then applies for a patent, surely the placer claimant has a right to be heard in defense of his title to the ground of which he has been thus forcibly dispossessed. If the application for a patent of the lode claim is not adverse it will pass to patent, and it may well be doubted whether the placer claimant could, after the issue of a patent under such circumstances, maintain an equitable suit to have the patentee declared the holder of the legal title to the ground for his benefit. If the placer claimant can be thus deprived of his possession and title to a part of his ground, he may be in like manner dispossessed of all by virtue of many forcible trespasses and lode discoveries.

The amount of land embraced in this placer location was about 100 acres, while the land claimed under the several lode locations was a little over 35 acres. Can it be that the placer claimant had no right to be heard in court respecting the claim of the lode claimants to so large a portion of the placer ground?

We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment necessarily *gives to them [233] the lodes in controversy. In 2 Lindley on Mines, § 765, the author thus states the law:

"Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, to ascertain the character of the land, and determine whether or no the conditions of the law have been complied with in good faith."

In 4 Land Dec. 316, Mr. Justice Lamar, then Secretary of the Interior, said in respect to this question:

"Does the judgment of a court as to which of two litigants has the better title to a piece of land bind the commissioner to say, without judgment, or contrary to his judgment, that the successful litigant has complete title and is entitled to patent under the law? The usual result following

a favorable judgment in a court under § 2326 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1430) is, I doubt not, the issue of patent in due time; but in such case the final passing of title is not on the judgment of the court, independent of that of the Commissioner, but is on the judgment of the latter pursuant to that of the former, and on certain evidence supplemental to that furnished by the judgment roll.

"The judgment of the court is, in the language of the law, 'to determine the question of the right of possession.' It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established.

"The party thus placed in possession may 'file a certified copy of the judgment roll with the register and receiver.' But this is not all. He may file 'the certificate of the surveyor general that the requisite amount of labor has been performed or improvements made thereon.' Why file this, or anything further, if the judgment roll settles all questions as to title and right to patent? Clearly, because the law vests in the Commissioner the authority and makes it his duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied [234] with before the issue of *patent. His judgment should, therefore, be satisfied before he is called upon to take final action in any case. In this case, the judgment of the court ended the contest between the parties, and determined the right of possession. The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. *Branagan v. Dulaney*, 2 Land Dec. 744. The sufficiency of that proof is a matter for the determination of the Land Department."

This opinion was cited as an authority by this court in *Perego v. Dodge*, 163 U. S. 160, 168, 41 L. ed. 113, 118, 16 Sup. Ct. Rep. 971. See also *Aurora Lode v. Bulger Hill and Nugget Gulch Placer*, 23 Land Dec. 95, 103. The Land Office may yet decide against the validity of the lode locations, and deny all claims of the locators thereto. So, also, it may decide against the placer location, and set it aside; and in that event all rights resting upon such location will fall with it.

Finally, we observe that the existence of placer rights and lode rights within the same area seems to have been contemplated by Congress, and yet full provision for the harmonious enforcement of both rights is not to be found in the statutes. We do not wonder at the comment made by Lindley (1 Lindley, 2d ed. § 167) that "the townsite laws, as they now exist, consist simply of a

chronological arrangement of past legislation, an aggregation of fragments, a sort of 'crazy quilt,' in the sense that they lack harmonious blending. This may be said truthfully of the general body of the mining laws." Many regulations of the Land Department and decisions of courts find their warrant in an effort to so adjust various statutory provisions as to carry out what was believed to be the intent of Congress and at the same time secure justice to miners and those engaged in exploring for mines. If we assume that Congress, recognizing the co-existence of lode and placer rights within the same area, meant that a lode or vein might be secured by a party other than the owner of the placer location within which it is discovered,—providing his discovery was made without forcible trespass and dispossession,—it may be *that [235] a court of equity is competent to provide by its decree that the discoverer of the lode, within the placer limits, shall be secured in the temporary possession of so much of the ground as will enable him to successfully work his lode, protecting, at the same time, the rights of the placer locator. But such equitable adjustment of coexisting rights cannot be secured in a simple adverse action, and it would be, therefore, beyond the limits of proper inquiry in this case to determine the rights which may exist, if, in the end, the placer location be sustained and a discovery of the lodes without forcible trespass and dispossession established.

But for the present, for the reasons above given, we think *the judgment of the Supreme Court of Colorado was right, and it is affirmed.*

The CHIEF JUSTICE and Mr. Justice White dissent.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA and William Mayger, Appts.,

v.

MONTANA MINING COMPANY, Limited.

(See S. C. Reporter's ed. 235-239.)

Mining claims—apexing veins—right to tunnel to reach vein on its dip through adjoining patented claim.

The right of the owner to pursue a vein apexing within the surface boundaries of his lode mining claim on its dip downward outside the vertical side lines of such claim, which is given by U. S. Rev. Stat. § 2322 (U. S.

NOTE.—On the right to follow a vein or lode on its dip beyond the surface lines of the location—see note to Parrot Silver & Copper Co. v. Heinze, 53 L. R. A. 491.

Comp. Stat. 1901, p. 1425), cannot be deemed to include the right to run a horizontal tunnel from his claim into an adjoining patented lode claim, for the purpose of reaching the vein in its descent through such adjoining claim, in view of the provisions of § 2319 (U. S. Comp. Stat. 1901, p. 1424), that all valuable mineral deposits in lands belonging to the United States are open to exploration and purchase, and the lands in which they are found to occupation and purchase, and of § 2325 (U. S. Comp. Stat. 1901, p. 1429), that a patent for any land claimed and located for valuable deposits may be obtained when properly claimed and located.

[No. 250.]

Submitted April 21, 1904. Decided May 2, 1904.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Montana, enjoining the further prosecution by the owner of a lode mining claim of a horizontal tunnel from his claim into an adjoining patented lode claim, for the purpose of reaching a vein in its dip through the adjoining claim. *Affirmed.*

See same case below, 51 C. C. A. 530, 113 Fed. 900.

Statement by Mr. Justice Brewer:

This was a suit brought by the appellee (hereinafter called the Montana company) against the appellants (hereinafter called the St. Louis company) in the circuit court of the United States for the district of Montana, for an injunction restraining the further prosecution of a tunnel. The facts were [236] *agreed upon, and are substantially that the Montana company was the owner and in possession of the Nine Hour lode mining claim under a patent from the United States, on a location made under the mining acts of 1872 and acts amendatory thereof; that the St. Louis company was the owner of the St. Louis lode mining claim, holding the same under a similar title. In the St. Louis claim is a vein other than the discovery vein, having its apex within the surface limits of the St. Louis claim, but on its dip passing out of the side line of the St. Louis claim into the Nine Hour claim. The tunnel was 260 feet underground, running from the St. Louis into the Nine Hour claim and for the purpose of reaching the vein on its descent through the latter. It was run horizontally through country rock, and between the east line of the St. Louis claim and the vein above referred to will not intersect any other vein or lode. The St. Louis company did not propose to extend the tunnel beyond the point at which it would intersect the vein above referred to, and simply proposed

to use this cross-cut tunnel in working and mining said vein. The circuit court, upon the facts agreed to, enjoined the further prosecution of the tunnel. That injunction was sustained by the circuit court of appeals for the ninth circuit (51 C. C. A. 530, 113 Fed. 900) from whose decision the St. Louis company has brought the case to this court.

Messrs. E. W. Toole and Thomas C. Bach submitted the cause for appellants.

Mr. W. E. Cullen submitted the cause for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The situation and the question can be easily presented to the mind by considering the significant lines as lines of a right-angled triangle; the vein descending on its dip being the hypotenuse, the tunnel the base line, and the boundary between the two claims the side line of the triangle. The St. Louis *company, being the owner of the vein, [237] may pursue and appropriate that vein on its course downward, although it extends outside the vertical side lines of its claim and beneath the surface of the Nine Hour lode claim. Such is the plain language of § 2322, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1425) which grants to locators "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

In other words, it has a right to the hypotenuse of the triangle. May it also occupy and use the base line? Is it, in pursuing and appropriating this vein, confined to work in or upon the vein, or is it at liberty to enter upon and appropriate other portions of the Nine Hour ground in order that it may more conveniently reach and work the vein which it owns? Its contention is that the mining patent conveys title to only the surface of the ground and the veins which go with the claim, and that the balance of the underground territory is open to anyone seeking to explore for mineral, or at least may be taken possession of by one other than the owner of the claim for the purpose of conveniently working a vein which belongs to him. The question may be stated in another form: Does the patent for a lode claim take the subsurface as well as the surface, and is there any other right to disturb the subsurface than that given to the owner of a vein apexing without its

surface, but descending on its dip into the subsurface, to pursue and develop that vein?

[238] We are of opinion that the patent conveys the subsurface as well as the surface, and that, so far as this case discloses, the only limitation on the exclusive title thus conveyed is the right given to pursue a vein which on its dip enters the subsurface. By § 2319, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1424) "all valuable mineral deposits in lands belonging to the United States" are "open to exploration and purchase, and the lands in which they are found to occupation and purchase." By § 2325 (U. S. Comp. Stat. 1901, p. 1429) "a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person . . . having claimed and located a piece of land for such purposes . . . shall thereupon be entitled to a patent for the land." In a subsequent part of the same section it is provided that the applicant shall pay \$5 per acre. Appellants rely upon the clause heretofore quoted from § 2322 as a limitation upon the full extent of the grant indicated by these provisions. But this limitation operates only indirectly and by virtue of the grant to another locator to pursue a vein apexing within his surface boundaries on its dip downward through some side line into the ground embraced within the patent. It withdraws from the grant made by the patent only such veins as others own and have a right to pursue. As said by Lindley (1 Lindley, Mines, 2d ed. § 71):

"In other words, under the old law he located the lode. Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex of the vein."

And in vol. 2 (§ 780):

"Prima facie, such a patent confers the right to everything found within vertical planes drawn through the surface boundaries; but these boundaries may be invaded by an outside lode locator holding the apex of a vein under a regular valid location, in the pursuit of his vein on its downward course underneath the patented surface."

See also *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499, 508, 45 L. ed. 1200, 1206, 21 Sup. Ct. Rep. 885. The decisions of the courts in the mining regions are referred to in the opinion of the court of appeals in this case, from which we quote:

[239] "This view is in accord with the trend of all the decisions to which our attention has been directed. In *Parrot Silver & Copper Co. v. Heinze*, 25 Mont. 139, 53 L. R. A. 491, 194 U. S.

87 Am. St. Rep. 386, 64 Pac. 326, the supreme court of Montana held in substance that the owner of a mining claim is prima facie the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said: 'Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction when it departs beyond the vertical planes of the side lines is an expansion of the rights which would be conferred by a common-law grant.' Of similar import is *State ex rel. Anaconda Copper Min. Co. v. District Court*, 25 Mont. 504, 65 Pac. 1020. In *Doc v. Waterloo Min. Co.* 54 Fed. 935, Judge Ross said: 'Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law.' In *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540, Judge Hawley said: 'Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim.'

The judgment of the Court of Appeals is affirmed.

*THE IROQUOIS.

[240]

(See S. C. Reporter's ed. 240-248.)

Shipping—duty of master to call at intermediate port for surgical attendance for a disabled seaman—appeal—conclusiveness of concurrent findings of two lower courts.

1. The master of a sailing vessel bound for San Francisco is not chargeable with fault in failing to put back 480 miles from the place of accident to Port Stanley, in the East Falkland islands, to secure surgical attendance for a seaman who was disabled by the accident while the vessel was rounding Cape Horn, although, with the winds then prevailing, it would have been possible to reach that port in three or four days, where the return from the port to the place of the

NOTE.—On the duty of a master to furnish medical aid to his servants—see note to *Ohio & M. R. Co. v. Early*, 28 L. R. A. 548.

accident, in view of the head winds, might have taken as many weeks.

2. The obligation of the master of a sailing vessel bound for San Francisco, toward a seaman disabled by an accident while the ship was rounding Cape Horn, does not require him to stop at the Evangelist islands, at the western end of the Straits of Magellan, which could have been reached by sailing one or two days out of the vessel's course, where the only building there was a lighthouse from which a small steamer was accustomed to put out to passing vessels in case a signal for relief was hoisted, and nothing could be done there except, possibly, to place the injured man upon a steamer bound north to Valparaiso or east to Sandy Point, near the middle of the straits.
3. The failure of the master of a sailing vessel bound for San Francisco to put into San Carlos or Ancud to secure surgical attendance for a seaman who was disabled in an accident while the vessel was rounding Cape Horn is not negligence, since these are not harbors at which vessels from the Atlantic and Pacific ports are in the habit of stopping, and while the master was apprised by his charts of their existence, it might well be that he was ignorant of their population and surgical facilities.
4. The concurring decisions of the two lower courts that the master of a sailing vessel bound for San Francisco was bound to put into an intermediate port for surgical attendance for a seaman who, while in the discharge of his duties, had fractured two ribs and his right leg in a fall from the main yard to the deck, while the vessel was rounding Cape Horn, will not be disturbed by the Federal Supreme Court, where the ship was about 1,500 miles from Valparaiso when the accident happened, and, with favorable winds, could have reached that port in fourteen days, without causing a delay to the voyage of more than five or six days.

[No. 200.]

Submitted March 18, 1904. Decided May 2, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the Northern District of California in favor of the libellant, in a libel against a vessel to recover damages for the failure of the master to secure surgical attendance for a seaman who was injured while in the performance of his duties. *Affirmed.*

See same case below, 55 C. C. A. 497, 118 Fed. 1003.

Statement by Mr. Justice **Brown**:

This was a libel filed in the district court for the northern district of California by Matthew Bridges against the ship *Iroquois*, to recover damages for a failure of the master to provide suitable surgical treatment and care for the libellant, who had suf-

fered injury by a fall from the main yard to the deck of the vessel.

The facts of the case were substantially as follows: The *Iroquois* left New York on December 27, 1899, bound for the port of San Francisco, with a full cargo of general merchandise. On February 23, 1900, while the vessel was rounding Cape Horn during heavy weather, and while libellant was aloft, in the performance of his duty, he accidentally fell from the main yard to the deck of the vessel, thereby fracturing two ribs and his right leg in two places. The master, with the aid of the carpenter, set the leg in splints, kept the libellant in his berth, gave him such food and delicacies as the supplies of the ship permitted, and on March 30, after five weeks, removed the splints, and found the leg apparently in good condition. Before arriving at San Francisco, and early in April, he was able to leave his berth, go upon deck and walk about with the aid of a crutch. But after[241] arriving at that port on May 7, 1900, he was sent to the hospital, where it was found that, while his ribs had healed perfectly, the bones of his leg had not united, and he was subsequently, and in October, compelled to suffer amputation, and, of course, became a cripple for the remainder of his life. The master was charged with a breach of duty in failing to put into an intermediate port and procure the proper surgical attendance.

Upon this state of facts the district court entered a decree in favor of the libellant for \$3,000 (113 Fed. 964), which was subsequently affirmed by the court of appeals, 55 C. C. A. 497, 118 Fed. 1003.

Mr. Milton Andros submitted the cause for petitioners:

That, whenever a seaman falls sick or is injured in the service of the ship, he is entitled to be taken care of, and, so far as may be, cured at the expense of the ship owner, was declared by the ancient laws of the sea; and this rule may be traced with remarkable uniformity through the marine laws and ordinances of all maritime states, ancient as well as modern. It is incident to, and forms a part of, his contract, as a material ingredient in the compensation for his services as a seaman.

The Osceola, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 Sup. Ct. Rep. 483.

The obligation of the master to the seaman in this respect is an obligation wholly independent of their relation as fellow servants in navigating the ship. It is the ordinary maritime obligation to provide for a seaman's cure of hurts while in the service of the ship.

The Scotland, 42 Fed. 925.

It does not, however, appear from the ancient laws of the sea that, for the purpose of procuring aid for a sick or disabled seaman, the master was required to deviate from the course of the voyage; but that the seaman was to be sent on shore for such treatment only when it was convenient to do so, or the ship was in port.

Laws of Oleron, arts. 6, 7; Laws of Wisby, art. 19.

While the seaman is to be cured, so far as may be, at the expense of the ship, of sickness or injury sustained in its service, he is not to receive any compensation or allowance for the effects of the injury. But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical, or other, nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by, the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners.

Reed v. Canfield, 1 Sumn. 202, Fed. Cas. No. 11,641.

This must, however, be taken with the qualification that the effects of the injury have not been materially aggravated by the culpable negligence of the master; as it seems to be settled law that if, through such negligence, the consequences of the injury are rendered more serious in respect to prolonged suffering and ultimate recovery, or if such recovery be materially retarded or rendered impossible, the ship owner would then be liable in consequential damages to the seaman.

The City of Alexandria, 17 Fed. 395.

The master's duty is dependent upon the circumstances surrounding him at the time of the accident, and he must determine his action in the light of these circumstances, and in the exercise of a reasonable discretion.

Peterson v. The Chandos, 4 Fed. 645; *Danvir v. Morse*, 139 Mass. 323, 1 N. E. 123; *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 292.

Mr. A. H. Ricketts submitted the cause for respondent. Messrs. Walter G. Holmes and D. T. Sullivan were with him on the brief:

The excuse of a master that his deviation from his course to land an injured seaman would have occasioned expense presents not the least extenuation.

Brown v. Overton, 1 Sprague, 462, Fed. Cas. No. 2,024.

Under the circumstances, and by virtue of the obligations of the contract between libellant and the vessel, it was the duty of the master to land libellant at an intermediate port.

Brown v. Overton, 1 Sprague, 462, Fed. Cas. No. 2,024; *Peterson v. The Chandos*, 4 Fed. 645; *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 292.

The master stood *in loco parentis* to libellant.

Robertson v. Baldwin, 165 U. S. 287, 41 L. ed. 719, 17 Sup. Ct. Rep. 326.

A deviation to obtain surgical aid for an injured seaman does not avoid an insurance policy.

Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654; *Perkins v. Augusta Ins. & Bkg. Co.* 10 Gray, 312, 71 Am. Dec. 654; *Peterson v. The Chandos*, 4 Fed. 646.

In *Tomlinson v. Hewett*, 2 Sawy. 278, Fed. Cas. No. 14,087, damages were decreed because of the failure of a master to make proper arrangements for the treatment and care of a seaman ill of the smallpox.

A seaman injured, without his fault, in the service of a vessel, is entitled to be maintained and cured at the expense of the vessel.

The Osceola, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 Sup. Ct. Rep. 483.

For a breach of the obligation on the part of the master or owner of a vessel of the duty to provide medical and surgical care for a seaman so injured, the owner is liable *in personam*, and the vessel *in rem*, in damages.

Ibid.

Mr. Justice **Brown** delivered the opinion of the court:

The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime *nations. It appears in the [242] earliest codes of Continental Europe and was expressly recognized by this court in the recent case of *The Osceola*, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483. Upon large passenger steamers a physician or surgeon is always employed, whose duty it is to minister to the passengers and crew in cases of sickness or accident. Of course, this would be impracticable upon an ordinary freighting vessel, where the master is presumed to have some knowledge of the treatment of diseases, and in ordinary cases stands in the place of a physician or surgeon (*The Wensleydale*, 41 Fed. 602); but for the further protection of seamen, vessels of the class of the Iroquois are compelled by law to be provided with a chest of medicines and with such anti-scorbutics, clothing, and slop-chests as the climate, particular trade, and the length of the voyage may require. U. S. Rev. Stat. §§

4569, 4572, 4573 (U. S. Comp. Stat. 1901, pp. 3100, 3101).

What is the measure of the master's obligation in cases where the seaman is severely injured while the ship is at sea has been made the subject of discussion in several cases; but each depends so largely upon its own peculiar facts that the rule laid down in one may afford little or no aid in determining another, depending upon a different state of facts. The early cases of *Harden v. Gordon*, 2 Mason, 541, Fed. Cas. No. 6,047, and *Reed v. Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641, contain an exhaustive discussion of the general subject by Mr. Justice Story. But, as in both cases the disability occurred at or near a port, they are of no special value in this case.

We have carefully examined the cases of *Brown v. Overton*, 1 Sprague, 462, Fed. Cas. No. 2,024; *The Chandos*, 6 Sawy. 544, 4 Fed. 647; *The Scotland*, 42 Fed. 925; *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 292; *The Troop*, 118 Fed. 769, and *Danvir v. Morse*, 139 Mass. 323, 1 N. E. 123, and are of opinion that none of them fit the exigencies of the present case. We cannot say that in every instance where a serious accident occurs the master is bound to disregard every other consideration and put into the nearest port, though if the accident happen within a reasonable distance of such port, his duty to do so would be manifest.

[243]*Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind and the probability of its continuing in the same direction, and the fact whether a surgeon is likely to be found with competent skill to take charge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen.

To judge of the propriety of the master's conduct in a particular case we are bound,

so far as possible, to put ourselves in his place, and inquire whether, in view of all the circumstances, he was bound to put into an intermediate port. The charge in the libel is that he should either have put back to Port Stanley in the East Falkland islands, or deviated from his course and made the port of Valparaiso, "or any one of several other ports in the southern part of South America." The very indefiniteness of this charge shows that neither libellant nor counsel had in mind any particular port, and it was not until the testimony of a former officer of the Chilean navy was taken at San Francisco, that they were able to fix upon the port of San Carlos or the Evangelist islands as proper places at which to make call. In view of this inability to select a proper port until the officer whose business it had been to cruise up and down the Chilean coast had informed them, it may certainly be contended *with great show[244] of reason that the master was not bound to know of the existence of these ports, except as he was informed by the chart, or of the possibility of obtaining surgical treatment at them. While masters plying upon vessels between New York and Pacific ports would be presumed to know of such familiar harbors as those of Port Stanley and Valparaiso, it by no means follows that they are chargeable with knowledge of every port upon the southwest coast of South America, or of their surgical facilities. The accident occurred upon one of the loneliest and most tempestuous seas in the world. For over 1,000 miles from Cape Horn to Valparaiso there seem to have been but one or two places at which it would be feasible to make a call. The evidence shows that the ship at the time was about 480 miles from Port Stanley, and with the winds then prevailing it would have been possible to reach that port in three or four days; but that to return to the place of the accident, in view of the head winds, might have taken as many weeks. During this time the owners of the ship would sustain a heavy loss in the wages and provisions of the crew, and the demurrage of the ship, and while the cargo is not shown to have been perishable, there would be a risk of the loss of a market by the consequent delay in reaching San Francisco. The master is not chargeable with fault in failing to put back to Port Stanley.

It was also suggested that the ship could have made the Evangelist islands, at the western end of the Straits of Magellan, by sailing one or two days out of her course; but it was shown that the only building there was a lighthouse, from which a small steamer was accustomed to put out to passing vessels in case a signal for relief

was hoisted, and that nothing could be done there, except possibly to place the seaman upon a steamer bound north to Valparaiso or east to Sandy Point, near the middle of the straits. The probability of obtaining aid by this course, and the certainty of the limb being injured by the delay, would have made it highly inadvisable to adopt it. As there is no harbor in the islands, the vari-

[245]ous transfers *from the ship to a boat and from the boat to shore, and the return to another ship in the rough water that might be expected at that point, would have been extremely dangerous to a person in libellant's crippled condition. The transfer of passengers from a ship to a boat, even in a moderate sea, is attended with considerable difficulty, and, to a person with a broken leg, with great danger, in view of the unequal rising and falling of a large ship and a small boat. Had the master adopted this course and injury had resulted to the libellant, he could hardly have escaped the imputation of negligence.

The libellant contended in his brief that, assuming that the master was not in fault for failing to stop at the Evangelist islands, he should have put in at the port of San Carlos or Aneud, which lie near together, where it seems there is a good harbor, a city of 15,000 or 20,000 inhabitants, and ample surgical facilities. We are not impressed with the force of this argument. These are not harbors at which vessels from the Atlantic and Pacific ports are in the habit of stopping. While the master was apprised by his charts of their existence, it might well be that he was ignorant of the population and of the accommodations for disabled seamen. There was no American consul there, and quite possibly no one familiar with the English language. To convict the captain of negligence for not calling there it must be shown that he knew, or should have known, that the libellant could obtain proper treatment. In short, the suggestion of these ports appears to have been purely an afterthought, inspired by the testimony of the Chilean officer.

With respect to Valparaiso, the case is different. This port appears to be about 1,500 miles from the place of the accident, and, with favorable winds, could have been reached in fourteen days. It is true that the direct course from Cape Horn to San Francisco passes Valparaiso at a distance of about 600 miles; but the testimony all shows that if the Iroquois had borne away and hugged the South American coast she

[246]might have put into *Valparaiso, left the libellant there, and resumed her course without more than five or six days' detention. Valparaiso is a large city, with ample hos-

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pital facilities, and with an American consul general resident there.

We have no criticism to make of the treatment of libellant immediately following the injury, except that we think he should have been taken into the cabin, where he could have been more comfortably provided for. His leg was put in splints as well as the master and carpenter knew how to do it; he was kept to his berth in the forecabin, and was fed with such delicacies as the ship's supplies afforded. No fever set in, and when the splints were taken off, about five weeks after the accident, and after the vessel had passed Valparaiso, the leg was found to be in good condition, except for certain sores which had broken out upon it, caused by the long confinement in splints. It is true the libellant said the bones were not united, but he does not seem to have complained of this to the master; yet with a careful examination, such as the master was bound to make, we think he should have detected it. It may be, however, that the bones failed to unite by reason of the libellant being allowed to go upon deck and walk about on crutches. But however this may be, it was admitted that when the splints were taken off the vessel was about as near San Francisco as Valparaiso, and that nothing would have been gained by turning about at that time.

The real question in the case is whether the master, knowing his ignorance of surgery, the serious nature of the libellant's injury, the poor accommodations for him in the forecabin, the liability of inflammation setting in, and of the bones not uniting, the fact that he was to be carried through the tropics, where, to an invalid confined in the forecabin, the heat would be almost intolerable, he should not, even at the sacrifice of a week, have put into Valparaiso and left the libellant there in charge of the American consul. Upon the other hand: Libellant made no complaint of his treatment; did not ask to be taken into an intermediate port, and, so far as appears, the master *did [247] not know that the wound was not healing properly. The fact that the ribs had already united probably induced him to believe that the leg had also healed, although a careful examination could not have failed to reveal the truth. We lay no stress upon the fact that the libellant did not ask to be taken into an intermediate port. He was a boy, largely ignorant of his rights and duties. The master was his legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not. If, on arriving at Valparaiso, the bones were found not to have knitted together, there was at least a chance of se-

curing their union by proper treatment. If, upon the other hand, they had united, there was a certainty of securing ultimate recovery by careful nursing, and by the use of facilities which the hospital undoubtedly would have, and which the ship undoubtedly had not. To put it in a light most favorable to the master, he speculated upon the chance that the union of the bones had taken place, without seeking to inform himself of the fact. The courts below held that the master did not discharge, as he should have done, the claim of humanity which the serious nature of the injury and the helpless condition of the libellant imposed upon him.

Upon the whole, while the case is by no means free from doubt, we are not disposed to disturb the decree of the court below in holding it to have been the duty of the master to put into an intermediate port. We regard the case as peculiarly one for the application of the general rule so often announced by this court, both in equity and admiralty cases, that this court will not reverse the concurring decisions of two subordinate courts upon questions of fact, unless there be a clear preponderance of evidence against their conclusions. *The S. B. Wheeler*, 20 Wall. 385, 22 L. ed. 385; *The Lady Pike*, 21 Wall. 1, 8, 22 L. ed. 499, 502; *The Richmond*, 103 U. S. 540, 26 L. ed. 313; *Towson v. Moore*, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; *Smith v. Burnett*, 173 U. S. 430, 436, 43 L. ed. 756, 759, 19 Sup. Ct. Rep. 442.

As the decision of the District Court was [248] unanimously affirmed *by the Circuit Court of Appeals, we do not think there is any such preponderance of evidence as would justify us in disturbing their conclusions. *The decree is therefore affirmed.*

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, Deceased, et al., Plffs. in Err.,

v.

HORSESHOE MINING & MILLING COMPANY et al.

(See S. C. Reporter's ed. 248-257.)

Mining claims—annual work—notice to delinquent co-owner—how addressed when owner is deceased—sufficiency of publication.

1. The notice by publication provided for by U. S. Rev. Stat. § 2324 (U. S. Comp. Stat. 1901, p. 1426), where a co-owner of a mining claim has failed to contribute his share towards the annual labor made necessary by that section, is not insufficient to work a forfeiture because it was addressed to a de-

ceased co-owner by name, and "his heirs, administrators, and to all whom it may concern," without specifically naming the heirs.

2. The lack of an administrator of a deceased co-owner of a mining claim at the time of the publication of the notice provided for by U. S. Rev. Stat. § 2324 (U. S. Comp. Stat. 1901, p. 1426), where a co-owner of a mining claim has failed to contribute his share toward the annual labor made necessary by that section, does not render a notice addressed to the deceased owner by name, "his heirs, administrators, and to all whom it may concern," insufficient to work a forfeiture, where, under the local law, an administrator has but a lien on real estate for administrative purposes, the title vesting in the heirs.
3. Expenditures of several years for holding a mining claim may be grouped in a single notice by publication, given pursuant to U. S. Rev. Stat. § 2324 (U. S. Comp. Stat. 1901, p. 1426), for the purpose of working a forfeiture, where a co-owner of a mining claim has failed to contribute his share toward the annual labor made necessary by that section.
4. Publication every day except Sunday in the proper newspaper, beginning Monday, January 7, and concluding Tuesday, April 2, satisfies the provision of U. S. Rev. Stat. § 2324 (U. S. Comp. Stat. 1901, p. 1426), for giving notice by publication "for at least once a week for ninety days" to a co-owner of a mining claim who has failed to contribute his share toward the annual labor made necessary by that section.

[No. 220.]

Submitted April 18, 1904. Decided May 2, 1904.

IN ERROR to the Supreme Court of the State of South Dakota to review a judgment which affirmed a judgment of the Circuit Court of Lawrence County in that State, dismissing, upon the merits, a complaint in an action to enforce an alleged trust in an undivided interest in a lode mining claim. *Affirmed.*

See same case below, 15 S. D. 124, 87 N. W. 586.

Statement by Mr. Justice **Peckham**:

The plaintiffs in error, being the administrator, together with the heirs at law of Rufus Wilsey, deceased, commenced this suit in the state court of South Dakota against the defendants, and upon the trial the complaint was dismissed upon the merits; that judgment was affirmed by the supreme court of the state, and the plaintiffs have brought the case here. The action was commenced to obtain a decree that defendants held in trust for the plaintiffs in error an undivided one-half interest in and to the land embraced in what is called in the complaint the Golden Sand lode mining claim, and plaintiffs asked for a decree that the

defendants should convey to the plaintiff in error, *Elder, administrator, an undivided one-half interest therein, and for such other and further relief as might be just and equitable.

The answer contained a denial of the various allegations of the complaint and set up a defense of laches on the part of the plaintiffs in error in asserting their claim. The case went to trial before the court, and the following facts were found:

In January, 1878, Rufus Wilsey and Charles H. Havens located a mining claim near Bald mountain, in the Whitewood mining district, Lawrence county, South Dakota, by discovering mineral-bearing rock in place, sinking a shaft, posting discovery notices, and planting boundary stakes; and on May 13 of the same year they filed for record their location certificate, which was then recorded. On June 12, 1878, Wilsey died, and soon thereafter the plaintiffs, his heirs at law, were informed of his death. They knew that he had left property, and from a time shortly after his death corresponded with different attorneys and others residing in the Black hills, trying to get something out of the estate; but, until the arrangement was made with the attorneys under which this action is brought, made no progress towards a settlement. From the time of the death of Wilsey, in 1878, up to December, 1893, the heirs of Wilsey* did nothing towards contributing or offering to contribute towards paying for the annual labor made necessary by the Federal statute (Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426) in order to keep possession of the mine. On June 19, 1878, one Evans was appointed special administrator of the estate of Wilsey, and his letters were subsequently revoked, and one Stevens was appointed and filed his bond as administrator on August 13, 1881. Subsequently, on an allegation of the death of Stevens, some time in 1888, the present administrator was appointed on the 12th of August, 1893.

In 1889, or soon thereafter, processes for the successful treatment of all mining ores, including such ore as was found in the ground in controversy, were introduced in Lawrence county, and as a consequence the value of the mining property *therein was materially enhanced, and this property became of much greater value in August, 1892, and December, 1893, than at any time since its location.

On December 5, 1893, the plaintiffs in error, by their attorneys, served on the defendant company an offer in writing to pay \$700 for annual development and assessment work, and if that was not the correct amount of the expense for protecting their half interest in the Golden Sand lode, then

they offered to pay the full amount due for the protection of the half interest of the plaintiffs in error, and they asked for a receipt, and demanded a deed for such half interest. The offer and the request were refused, and this action was begun on December 6, 1893.

From the time of the location of the mine up to 1888, inclusive, Havens, the co-owner with Wilsey, did at least \$100 worth of labor each year in order to hold the claim, and filed on January 2, 1889, an affidavit to that effect, including the time from 1880 to and including the year 1887, and another affidavit to the same effect for the year 1888. Under the statute he published a notice directed to "Rufus Wilsey, his heirs, administrators, and to all whom it may concern," informing them that he had expended \$800 in labor upon the mine for the years ending December 31, 1880, 1881, 1882, 1883, 1884, 1885, 1886, and 1887, and stating that if, within ninety days after this notice by publication, they failed to contribute their proportion, \$400, being \$50 for each of said years, their interest in said claim would become the property of the subscriber under § 2324 of the Revised Statutes of the United States. Havens also published for the year 1888 a notice similar to the one already given in regard to the work done prior to that year. The two notices were published in the proper newspaper and were set out in full and published in each daily issue of the paper (every day in the week except Sunday), beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889, and no more. Havens also continued, during the years 1889, 1890, 1891, and 1892, to do at least \$100 worth of work in the mine for the purpose of holding the same. On *August 10, 1892, Havens made a deed of the [251] whole lode and mining claim to one Thomas H. White, and on August 25, 1892, White caused to be filed for record an affidavit of Havens, which recited that he was one of the locators of the Golden Sand lode, and that Wilsey, his co-owner, and whom he advertised out for not contributing his proportion of labor, had not paid his proportion nor any of the expenditures for holding the claim.

Questions were made as to the sufficiency of the notices and as to the regularity of the publication of the same under the above statute of the United States. The case was tried once before and resulted in a judgment for plaintiffs, which was reversed by the supreme court of the state (9 S. D. 636, 70 N. W. 1060), and upon the new trial the judgment was for the defendants. 15 S. D. 124, 87 N. W. 586.

Mr. Eben W. Martin submitted the cause for plaintiffs in error. **Mr. Norman T. Mason** was with him on the brief:

A forfeiture cannot be established, except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law.

Hammer v. Garfield Min. & Mill. Co. 130 U. S. 291, 32 L. ed. 964, 9 Sup. Ct. Rep. 549; *Johnson v. Young*, 18 Colo. 625, 34 Pac. 173; *Quigley v. Gillett*, 101 Cal. 462, 35 Pac. 1040.

In an *ex parte* proceeding, as a sale of land for taxes, under a special authority, great strictness is required. An individual cannot be divested of his property against his consent until every substantial requisite of the law has been complied with.

Early v. Doe, 16 How. 615, 618, 14 L. ed. 1081, 1082; *Ronkendorff v. Taylor*, 4 Pet. 49, 7 L. ed. 882.

Statutes providing for giving notice by publication are in derogation of common law, and must be strictly construed.

16 Am. & Eng. Enc. Law, p. 817.

Forfeitures are not favored in the law. Courts always incline against them.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 35, 23 L. ed. 199; *Marshall v. Vicksburg*, 15 Wall. 146, 21 L. ed. 121.

This court in construing this very statute says that it should be strictly construed.

Turner v. Sawyer, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192.

The supreme court of Montana has recently held the same, treating the question entirely as one of forfeiture.

Brundy v. Mayfield, 15 Mont. 201, 38 Pac. 1067.

A notice addressed to William J. Wood, or his administrator, was held to be nugatory because Wood was dead, and the title which was vested in his heirs could not be affected by a notice addressed to a dead man or his administrator.

Billings v. Aspen Min. & Smelting Co. 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338.

One of the most important requisites of a service by publication is that it shall correctly state the parties to the suit and the name of the defendant.

Detroit v. Detroit City R. Co. 54 Fed. 9; *Colton v. Rupert*, 60 Mich. 318, 27 N. W. 520; *Entrekin v. Chambers*, 11 Kan. 368; *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211; *Bleidorn v. Pilot Mountain Coal & Min. Co.* 89 Tenn. 166, 15 S. W. 737; *Troyer v. Wood*, 96 Mo. 478, 9 Am. St. Rep. 367, 10 S. W. 43; *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44; *New Orleans v. De St. Rome*, 28 La. Ann. 17.

The notice of forfeiture was insufficiently published.

Early v. Doe, 16 How. 617, 14 L. ed. 1079; *Wilson v. Northwestern Mut. L. Ins. Co.* 12 C. C. A. 505, 27 U. S. App. 526, 65 Fed. 38; *Finlayson v. Peterson*, 5 N. D. 587, 33 L. R. A. 532, 57 Am. St. Rep. 584, 67 N. W. 954; *Bacon v. Kennedy*, 56 Mich. 329, 22 N. W. 824; *Pratt v. Tinkcom*, 21 Minn. 142; *Boyd v. McFarlin*, 58 Ga. 208; *Ogden v. Walker*, 59 Ind. 460; *Security Co. v. Arbuckle*, 123 Ind. 518, 24 N. E. 329; *Smith v. Rowles*, 85 Ind. 265; *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 398.

Mr. Chambers Kellar submitted the cause for defendants in error. **Messrs. Moody, Kellar, & Moody** were on the brief:

The objections urged to the notice of forfeiture are not tenable.

Elder v. Horseshoe Min. & Mill. Co. 9 S. D. 637, 62 Am. St. Rep. 895, 70 N. W. 1060; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780.

The supreme court of South Dakota has decided that under the laws of that state the title to real estate upon the death of an owner devolves upon the heirs and vests in them immediately. An administrator has merely a lien upon such property for certain limited purposes.

Elder v. Horseshoe Min. & Mill. Co. 9 S. D. 636, 62 Am. St. Rep. 895, 70 N. W. 1060.

Upon well-recognized principles the decision of the South Dakota supreme court upon that question is conclusive upon this court.

The notice of forfeiture was sufficiently published.

Elder v. Horseshoe Min. & Mill. Co. 15 S. D. 124, 87 N. W. 586; *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. ed. 882; *State v. Yellow Jacket Silver Min. Co.* 5 Nev. 415; *Bachelor v. Bachelor*, 1 Mass. 256; *Sheldon v. Wright*, 5 N. Y. 497; *Alcott v. Robinson*, 21 N. Y. 150, 78 Am. Dec. 126; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Wood v. Morehouse*, 45 N. Y. 368; *Chamberlain v. Dempsey*, 13 Abb. Pr. 421; *Steinle v. Bell*, 12 Abb. Pr. N. S. 171; *Wood v. Knapp*, 100 N. Y. 109, 2 N. E. 632; *Savings & Loan Soc. v. Thompson*, 32 Cal. 347; *Knowlton v. Knowlton*, 155 Ill. 158, 39 N. E. 595; *Madden v. Cooper*, 47 Ill. 359; *Pearson v. Bradley*, 48 Ill. 250; *Andrews v. People*, 84 Ill. 28; *Garrett v. Moss*, 20 Ill. 549; *Raunn v. Leach*, 53 Minn. 84, 54 N. W. 1058; *Cox v. North Wisconsin Lumber Co.* 82 Wis. 141, 51 N. W. 1130; *Wilson v. Scott*, 29 Ohio St. 636; *Martin v. Hawkins*, 62 Ark. 421, 35 S. W. 1104; *McDonald v. Cooper*, 32 Fed. 745.

[253] *Mr. Justice **Peckham**, after making the above statement of facts, delivered the opinion of the court:

The Federal questions which arise in this case are based upon the statute of the United States already referred to in the foregoing statement of facts, being § 2324 of the Revised Statutes, the material portion of which is set forth in the margin.†

The plaintiffs in error contend that the notices published by or in behalf of the defendants in error were not a compliance with the statute, because of the manner in which they were addressed. They also insist that, even assuming the sufficiency of the notices, they were not published in accordance with the *requirements of the statute for a sufficient length of time, and that, therefore, the title of the plaintiffs in error was not divested. We are not impressed with the validity of either of the two objections.

As to the first. The notice was addressed as follows: "To Rufus Wilsey, his heirs, administrators, and to all whom it may concern." The objection made is that at the time when this notice was published, Rufus Wilsey was dead, and there was no administrator then existing, and the names of the heirs were not given, and the notice, "to whom it may concern," was futile.

The statute, it will be observed, does not require that the published notice in regard to a deceased co-owner shall be directed to anyone by name. Upon the failure of a co-owner to contribute his proportion of the expenditure required under the section, the co-owner who has performed the labor or made the improvements may, as provided for by the section at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim,

and if, at the expiration of ninety days after such notice in writing, or by publication, the delinquent refuses to contribute his proportion or fails to do so, his interest in the claim thereby becomes the property of his co-owners who have made the required expenditures. We perceive no possible harm arising from the fact that the notice itself, containing all the facts necessary to be included therein, was addressed to "Rufus Wilsey, his heirs, administrators, and to whom it may concern." The fact that Rufus Wilsey was dead was not material so far as to thereby render the notice to his heirs illegal or insufficient. It certainly did them no harm to include the name of Rufus Wilsey, and the notice was quite as likely to become known to them as if it had been addressed "to the heirs of Rufus Wilsey, deceased, his administrators, and to all whom it may concern." It is entirely unlike the publication of a summons for the purpose of commencing an action against a particular individual or individuals. There the identification must be complete and the person particularly described *and named, so [255] that when the publication has been finished it can be known that the particular individual has been served with process by publication with the same effect as if it had been personally served on the same individual without publication. This statute provides a summary method for the purpose of insuring the proper contribution of co-owners among themselves in the working of the mine, and it provides a means by which a delinquent co-owner may be compelled to contribute his share, under the penalty of losing his right and title in the property because of such failure. It was not necessary, in our judgment, that the notice should specifically name the heirs of the deceased owner. The act does not require it. If the no-

†Rev. Stat. § 2324; U. S. Comp. Stat. 1901, p. 1426.

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made each year. On all claims located prior to the tenth of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure, and before such loca-

tion. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of one year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two.

tice be such that the former owner is particularly named and identified thereby, and his heirs are notified by the publication, it is a sufficient notice to them for the purpose of making it necessary for them to comply with the terms of the statute within the time designated therein by the payment of their share of the expenses of working the mine, or else to lose their right, title, and interest therein. The co-owner who did the work might not know who the heirs were, and it might be impossible for him to learn their names or whereabouts, and the statute never contemplated that the man who did the work should be prevented from obtaining the benefit of the statute by his inability to learn who the heirs were and where they lived. A general address to the heirs of the person named, and the proper publication of the notice, is sufficient. It did not become insufficient because, in addition to being addressed to them, it was also addressed to their intestate by name. An address to a deceased person did them no harm, so long as it was also addressed to them.

The supreme court of South Dakota has held in this case that at the time this notice was published the title to a one-half interest in this claim was in the heirs, subject to a possible lien of the administrator for administrative purposes, and had been since the death of Wilsey. 9 S. D. 636, 642, 70 N. W. 1060. The same court has held that an ad-
 [256]ministrator has but a lien on real*estate for administrative purposes, and that the title vests in the heirs. (Cases cited in opinion of the state court.) The only debt, so far as the record shows, existing against the estate of Wilsey, was one for \$50, in favor of Stevens, who was appointed administrator in 1881, and died in 1888, and from then until 1893 there was no administrator, the present one being appointed evidently for the purpose of this suit. The actual title to the fee is in the government (*Black v. Elkhorn Min. Co.* 163 U. S. 445, 449, 41 L. ed. 221, 223, 16 Sup. Ct. Rep. 1101), but the interest of the miner may be conveyed and inherited. (*Ibid.*). We are of opinion that the publication of the notice was sufficient, although there was no administrator at the time of publication. It is unnecessary under this statute to publish a notice to lienors. We agree with the supreme court of the state that the evident purpose and object of the law of 1872 (§ 2324) were to encourage the exploration and development of the mineral lands of the United States, and the sale of the same, and that, all the provisions of the law having been framed with that object in view, if the required work is not performed, after the expiration of the year, and notice

of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year. When a notice has been rightfully published under the statute it becomes effective in cutting off the claims of all parties, and the title is thus kept clear and free from uncertainty and doubt.

There was no irregularity in grouping in one notice claims for more than one year's expenditures. We can perceive no reason why a consolidation of the claims of several years should not be made and included in one and the same notice.

(2.) The objection to the sufficiency of the publication of the notice we regard as equally unfounded. The statute provides for a publication "for at least once a week for ninety days." The publication was in fact made every day, except Sunday, in the proper newspaper, beginning Monday, January 7, 1889, *and concluding Tuesday, April [257] 2, 1889. And the statute provides that if, after the expiration of ninety days after such notice in writing or publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The publication, we think, was sufficient. The ninety-day period begins with the first publication; in this case, Monday, January 7. The publication on that day was sufficient for the week then beginning. The publication on January 15 was sufficient for that week, and, as stated by the supreme court of South Dakota: "Each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7 to April 1, both inclusive. If no publication was required after the first until the following Monday, none was required after April 1 until the following Monday, April 8, and on that day the period of ninety days had been completed. Including the first day of publication, ninety days ended on Saturday, April 6. Excluding the first day, ninety days ended on Sunday, April 7. On that day the required notice had continued during ninety days, and another publication on Monday, April 8, was wholly unnecessary."

We are satisfied that this construction is the correct one, and the publication was, therefore, made for a sufficient length of time to comply with the statute.

The judgment of the Supreme Court of South Dakota is affirmed.

[258]*ROBERT L. WEST and Others, *Plffs. in Err.*,
v.

STATE OF LOUISIANA.

(See S. C. Reporter's ed. 258-267.)

Error to state court—non-Federal questions not reviewable—constitutional law—due process of law—admission of deposition of absent witness.

1. Errors of the state court in construing a state constitution, statutes, and the common law on the subject of reading depositions of witnesses do not present any Federal question which can be reviewed by the Supreme Court of the United States on a writ of error to the state court.
2. Due process of law is not denied by the introduction in evidence in a criminal trial, upon proof of nonresidence, permanent absence, and inability to procure the attendance of a witness, of the deposition of such witness, taken upon the preliminary examination before a committing magistrate when defendants were present and their counsel was afforded opportunity to cross-examine.

[No. 230.]

Argued and submitted April 5, 1904. Decided May 2, 1904.

[N ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a conviction of larceny in the Criminal District Court of the Parish of Orleans in that State. *Affirmed.*

See same case below, 109 La. 622, 33 So. 618.

Statement by Mr. Justice Peckham:

The plaintiffs in error were proceeded against by information, and were convicted of larceny in the criminal district court of the parish of Orleans, Louisiana, on April 4, 1902, and sentenced to three years' imprisonment, which conviction and sentence were thereafter affirmed by the supreme court of Louisiana. 109 La. 622, 33 So. 618. They have brought the case here by writ of error.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998, and Re Buchanan, 39 L. ed. U. S. 884.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L. R. A. 571.

As to what constitutes due process of law—see Kuntz v. Sumption, 2 L. R. A. 655, and note; Re Gannon, 5 L. R. A. 359, and note; Ulman v. Baltimore, 11 L. R. A. 224, and note, and Gilman v. Tucker, 13 L. R. A. 304, and note. And see notes to People v. O'Brien, 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436, and Wilson v. North Carolina, 42 L. ed. U. S. 865.

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On the trial the district attorney offered to read the testimony of one Thebaud, after having proved that he was permanently absent from the state and was a nonresident thereof, and that his attendance could not be procured. It appeared that the plaintiffs in error had been arrested and charged with the crime for which they were then on trial, and had been brought before the judge of the city criminal court, sitting as a *com-[259] mitting magistrate, and upon the hearing before him, in the presence of the plaintiffs in error and their counsel, the witness Thebaud had been produced and examined orally, and cross-examined by the counsel for plaintiffs in error. The offer of the district attorney, after he had made this proof, to read the testimony thus taken upon the preliminary examination, was objected to by counsel for plaintiffs in error on various grounds, the material one now urged being that it was not shown that the witness whose deposition was proposed to be read was dead, insane, or sick, nor that he was absent by the procurement of the plaintiffs in error or their counsel, and it was insisted that the reading of that testimony would be in violation of the act of 1805, being now § 976 of the Revised Statutes of Louisiana, and of article 9 of the Bill of Rights and Constitution of that state, and also would violate the 6th and 14th Amendments of the Constitution of the United States.

The act of 1805 reads as follows:

"All crimes, offenses, and misdemeanors shall be taken, intended, and construed according to, and in conformity with, the common law of England; and the forms of indictment (devested, however, of unnecessary prolixity), the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of crimes, offenses, and misdemeanors, changing what ought to be changed, shall be according to the common law, unless otherwise provided." Acts 1805, p. 440, § 33.

Article 9 of the Constitution of 1898 of the state of Louisiana provides as follows:

"In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury: *Provided*, that cases in which the penalty is not necessarily imprisonment at hard labor or death shall be tried by the court without a jury, or by a jury less than twelve in number, as provided elsewhere in the Constitution: *Provided further*, that all trials shall take place in the parish in which the offense was committed, unless the venue be changed. The accused in every instance shall *have the[260] right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of coun-

sel, to have compulsory process for obtaining witnesses in his favor."

The evidence contained in the deposition was material. The objections to the reading thereof were overruled, and the counsel for plaintiffs in error duly excepted. The deposition was then read in evidence.

Mr. Lionel Adams argued the cause, and, with *Messrs. Henry L. Lazarus* and *Richard B. Otero*, filed a brief for plaintiffs in error:

Repeated adjudications of the Supreme Court of the United States construing the 14th Amendment and interpreting its effect all recognize that the expression "due process of law" is to be understood now as it was understood by our ancestors in their interpretation of Magna Charta, and, in consequence of that construction, embraces those substantial and fundamental rights essential to the protection of the lives, liberties, and property of American citizens.

Davidson v. New Orleans, 96 U. S. 99, 24 L. ed. 618; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Lowe v. Kansas*, 163 U. S. 85, 41 L. ed. 79, 16 Sup. Ct. Rep. 1031; *Civil Rights Cases*, 109 U. S. 11, 27 L. ed. 839, 3 Sup. Ct. Rep. 18; *United States v. Cruikshank*, 92 U. S. 554, 23 L. ed. 592; *Guthrie*, 14th Amend.; *Brown v. Walker*, 161 U. S. 600, 40 L. ed. 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; 2 Story, Const. § 1791.

If the substantial and fundamental right of the accused in criminal proceedings to be confronted with the witnesses against him was part and parcel of the law of England, protected by the great charter of the liberties of Englishmen, it must be carried into that provision of the 14th Amendment which protects the citizen against the deprivation of his life, his liberty, or his property, without due process of law.

Story, Const. § 1789.

It is the boast of the English law, and justly so, that it protects its citizens and safeguards their rights whenever prosecuted for the commission of crime.

Hale, P. C. p. 33; 3 Bacon, Abr. p. 512; Magna Charta, chap. 29; Co. Inst. 48, 49.

After Magna Charta and up to the time of the adoption of the statutes 1 & 2 P. & M. chap. 13, and 2 & 3 P. & M. chap. 10, no testimony could be legally received at a trial upon indictment except from living witnesses speaking in the presence of the accused of facts within their knowledge.

1 Chitty, Crim. L. p. 80; *King v. Eriswell*, 3 T. R. 711; 2 Hawk, P. C. chap. 46, § 12, p. 606; Foster, C. L. 337.

After the statutes of Philip and Mary were enacted, by judicial construction dep-

sitions and proof of statements made under oath at a formal trial in the presence and hearing of the accused were permitted to be given in evidence wherever it was satisfactorily established that the deponent was dead, or unable to travel, or was kept away by the means or contrivance of the prisoner.

1 Hale, P. C. p. 305; 2 Hale, P. C. pp. 52, 284; *Re Morly*, Kelyng, 55; 1 Hawk, P. C. chap. 46, §§ 6, 7, 12, pp. 605, 606; 1 Chitty, Crim. Law, pp. 80, 81; Peake, Ev. pp. 63, 64.

That was the condition of the law at the time of the adoption of the Constitution of the United States.

The substantial and fundamental right of confrontation is subject to but four exceptions: First, where the witness is dead; second, where the witness is so ill that it is unlikely that he will ever be able to appear in court; third, where the witness has become insane; fourth, where, through the procurement or connivance of the accused, the witness has been prevented from attending. In each of these instances the absent witness must previously have testified under oath in the presence of the accused, and a predicate for the introduction of the secondary evidence must be established to the satisfaction of the court.

1 Phillipps, Ev. 6th Am. ed. Cowen & Hill's notes, p. 337; 1 Archbold, Crim. Pr. & Pl. Waterman's notes, p. 480, *148; Powell, Ev. pp. 256-267; 1 Roscoe, Crim. Ev. p. 104; 3 Russell, Crimes, p. 464; Broom, Common Law, pp. 1001, 1002; Taylor, Ev. §§ 474, 478; Stephen's Digest of Ev. pp. 76, 77; Cooley, Const. Lim. p. 387; Wharton, Crim. Ev. § 229; Wharton, Crim. Pl. & Pr. § 546; 1 Bishop, Crim. Proc. § 1195; Rapalje, Crim. Proc. § 278; Underhill, Crim. Ev. § 262, p. 320; McKelvey, Ev. p. 234; 6 How. St. Tr. pp. 776, 777; *Re Harrison*, 4 Wm. & M. 1692; *Queen v. Scaife*, 17 Q. B. 238; *Reg. v. Guttridges*, 9 Car. & P. 473; *Rex v. Savage*, 5 Car. & P. 143; *Reg. v. Hagan*, 8 Car. & P. 167; *Rex v. Austen*, 7 Cox C. C. p. 55.

Neither the commentators on the law of evidence, nor the courts called upon to expound it, have shown any inclination to lend a willing ear to the plea of convenience.

King v. Eriswell, 3 T. R. 711; *Boyd v. United States*, 116 U. S. 616, 635, 29 L. ed. 746; 752, 6 Sup. Ct. Rep. 524.

This court recognizes the limitations to which we have adverted, and which are in consonance with the principles of the common law. No other exception to the recognition and enforcement of the right of confrontation is made, and, where any has been suggested, it has been promptly and effectually repudiated.

Mattox v. United States, 156 U. S. 240, 39 L. ed. 410, 15 Sup. Ct. Rep. 337; *Kirby v. United States*, 174 U. S. 60, 43 L. ed. 895, 19 Sup. Ct. Rep. 574; *Murray v. Louisiana*, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Motes v. United States*, 178 U. S. 459, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993.

So far as the American courts are concerned, in but three of the states in which was adopted an unqualified constitutional provision giving to the accused in all criminal prosecutions the right to be confronted with the witnesses against him are there to be found decisions which hold that the absence of a witness from the jurisdiction will authorize the introduction of evidence previously taken upon the same issue. These are Alabama, Arkansas, and Louisiana. In Louisiana the rule is that absence from the state must be permanent; in Alabama and Arkansas it will suffice if the witness be beyond the jurisdiction of the court.

State v. Banks, 106 La. 480, 31 So. 53; *Jacobi v. State*, 133 Ala. 1, 32 So. 158; *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

Decisions in other state courts do not justify this doctrine, except when authorized by constitutional provisions or statutory enactments passed pursuant thereto.

State v. Jones, 7 Nev. 408; *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580; *Allen v. State*, 16 Tex. App. 237; *Menges v. State*, 21 Tex. App. 413, 2 S. W. 812; *Butler v. State*, 97 Ind. 378; *Brown v. Com.* 73 Pa. 321, 13 Am. Rep. 740; *Com. v. Cleary*, 148 Pa. 26, 23 Atl. 1110; *People v. Restell*, 3 Hill, 289; *Wilbur v. Selden*, 6 Cow. 162; *Beebe v. People*, 5 Hill, 33; *Crary v. Sprague*, 12 Wend. 43, 27 Am. Dec. 110; *People v. Williams*, 35 Hun, 516; *People v. Penhollow*, 42 Hun, 103; *People v. Fish*, 125 N. Y. 151, 26 N. E. 319; *Summons v. State*, 5 Ohio St. 325; *State v. Frederic*, 69 Me. 400; *Williams v. State*, 19 Ga. 402; *Finn v. Com.* 5 Rand. (Va.) 708; *Brogy v. Com.* 10 Gratt. 732; *State v. Valentine*, 29 N. C. (7 Ired. L.) 226; *State v. Grady*, 83 N. C. 645; *Dominges v. State*, 7 Smedes & M. 475, 45 Am. Dec. 316; *Owens v. State*, 63 Miss. 450; *Dukes v. State*, 80 Miss. 353, 31 So. 745; *Warren v. Nichols*, 6 Met. 264; *Com. v. McKenna*, 158 Mass. 207, 33 N. E. 389; *Williams v. State*, 61 Wis. 281, 21 N. W. 61; *State v. Staples*, 47 N. H. 115, 90 Am. Dec. 568; *State v. Lee*, 13 Mont. 248, 33 Pac. 691; *State v. Houser*, 26 Mo. 439; *State v. Collins*, 32 Iowa, 40; *People v. Murray*, 52 Mich. 290, 17 N. W. 842; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *Hoyt v. People*, 140 Ill. 588, 16 L. R. A. 194 U. S.

239, 30 N. E. 316; *People v. Gardner*, 98 Cal. 127, 32 Pac. 882; *Brown v. Com.* 73 Pa. 325, 13 Am. Rep. 740; *Kean v. Com.* 10 Bush, 190, 19 Am. Rep. 66; *Collins v. Com.* 12 Bush, 271.

It is illogical to assume that, when the framers of the Constitution of 1812 studiously selected the very expressions employed by the makers of the Federal Constitution, they intended that in the two instruments identical words should import different meanings. That construction which holds good in respect of the original must, of necessity, apply to the copy.

Brown v. Walker, 161 U. S. 600, 40 L. ed. 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

In Louisiana the rules of evidence in criminal trials, as well as the forms of indictment, method of trial, etc., must be according to the common law of England as it existed in 1805, unless otherwise provided.

State v. McNeil, 33 La. Ann. 1333.

The statutes of Philip and Mary were received as common law in Louisiana.

State v. Wheat (La.) 35 So. 959; *State v. Williams*, 34 La. Ann. 1198; *State v. McNeil*, 33 La. Ann. 1333.

At common law the strong and uniform current of authority is against the right to introduce the testimony of a witness who is out of the jurisdiction of the trial court and beyond service of its process.

1 Hawk. P. C. chap. 46, §§ 6, 7, p. 605; 2 Starkie, Ev. 283; 1 Roscoe, Crim. Ev. 107; 1 Taylor, Ev. § 474; Stephen's Digest of Ev. 76, 77; Wharton, Crim. Ev. § 229; 1 Bishop, Crim. Proc. § 1195; Underhill, Crim. Ev. § 262, p. 320; Rapalje, Crim. Proc. § 278; Abbott, Trial Brief Crim. Cas. § 664; *Motes v. United States*, 178 U. S. 459, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993.

When the bill of rights was incorporated into the Federal and state Constitutions, in the language of Mr. Justice Brown in *Robertson v. Baldwin*, 165 U. S. 281, 41 L. ed. 717, 17 Sup. Ct. Rep. 326, it was intended "to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continue to be recognized as if they had been formally expressed."

Under the Constitution of the state of Louisiana, and the rule of the common law, which by constitutional and by statutory mandate is written into the judicial system of that state, the procedure of the courts in this case worked a denial of the fundamental rights guaranteed to the citi-

zen in its organic law, protected from abuse and infraction by the 14th Amendment to the Constitution of the United States.

Maxwell v. Dow, 176 U. S. 581, 605, 44 L. ed. 597, 606, 20 Sup. Ct. Rep. 448, 494.

Messrs. Walter Guion and F. C. Zacharie submitted the cause for defendant in error:

Testimony of absent witnesses, taken before committing magistrates, is admitted on final trial in criminal cases in California, Michigan, Texas, Alabama, Arkansas, Tennessee, and New York, in nearly all of which states, if not in all, statutory provisions similar to those of Louisiana, exist; and such procedure has been uniformly sustained in those states as constitutional.

People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; *People v. Kennedy*, 105 Mich. 434, 63 N. W. 405; *Puryear v. Reese*, 6 Coldw. 21; *Childers v. State*, 30 Tex. App. 160, 28 Am. St. Rep. 899, 16 S. W. 903; *Harris v. State*, 73 Ala. 495; *Dolan v. State*, 40 Ark. 454; *People v. Murphy*, 1 N. Y. Crim. Rep. 102; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *People v. Munroe* (Cal.) 33 Pac. 778; *Shackelford v. State*, 33 Ark. 539; *Lowery v. State*, 98 Ala. 45, 13 So. 499; *Chafee v. Sprague*, 15 R. I. 135, 23 Atl. 110. See also, 3 Greenl. Ev. 12th ed. § 11, p. 14; Cooley, Const. Lim. 1st ed. p. 318.

"Due process of law" means law in its regular course of administration through courts of justice.

2 Kent, Com. 13.

When life and liberty are in question, there must, in every instance, be judicial proceedings; and that requires an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before punishment can be inflicted. But the states will prescribe their own modes of proceeding and trial.

Cooley, Const. Lim. p. 224.

The requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. The process of the state is regulated by the law of the state.

Kolloch v. Superior Court, 56 Cal. 237.

The phrase "due process of law," or its equivalent "law of the land," does not mean a law enacted for the purpose of working the wrong, but the general law in its regular course of administration through the courts of justice; a law which hears before it condemns; proceeds upon inquiry, and renders judgment only after trial.

Clark v. Mitchell, 64 Mo. 565.

The right of the states to vary by statute the common law, although affecting the substantial rights of citizens in several im-

portant particulars, has been sustained by this honorable court as not being in violation of the 14th Amendment.

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 688, 41 L. ed. 1166, 17 Sup. Ct. Rep. 718; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

A change in the rules of evidence in criminal cases, by state statutes, is not a violation of the 14th Amendment.

Brannon, Fourteenth Amend. pp. 292, 311; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Hurtado v. California*, 110 U. S. 537, 28 L. ed. 239, 4 Sup. Ct. Rep. 111, 292; *Maxwell v. Dow*, 176 U. S. 605, 44 L. ed. 606, 20 Sup. Ct. Rep. 448, 494; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620.

Mr. Justice **Peckham**, after making the above statement of facts, delivered the opinion of the court:

The only question for this court to determine is whether the admission of the deposition of Thebaud as evidence upon the trial of this case deprived the plaintiffs in error of due process of law, and therefore was a violation of the 14th Amendment upon the part of the state through its judicial department.

For many years the supreme court of Louisiana has held that upon such facts as were proved in this case it was proper to admit a deposition as evidence upon the trial of the accused; that in such circumstances he had been confronted with the witnesses within the meaning of the Constitution and laws of the state. Many cases were cited by the supreme court in the opinion in this case as authority for the proposition it laid down and, after having cited them, the court, in its opinion, continued:

"A reference to these various decisions will show that this court has repeatedly permitted the introduction in evidence of testimony of witnesses which had been taken down in writing on a preliminary examination, when the presence of the witnesses *themselves at the trial could not be ob-[261] tained. In the case before us the witnesses whose written testimony was so received were permanently absent from the state, the accused were present at the examination and cross-examined the witnesses. The jurisprudence of the state on the subject fully warranted the action of the district court in permitting the testimony to be introduced."

Counsel for the plaintiffs in error in their brief used in this court concede that the law of Louisiana, as stated in the above extract from the opinion of the court in this case, "is absolutely indisputable;" but they nevertheless urge that the decisions are founded in error and are in violation of the Constitution and mandatory statute (act of 1805; Rev. Stat. § 976, *supra*), requiring that, in the prosecution of crimes, among other things, the rules of evidence shall be in accordance with the English common law as it stood in 1805.

We are now asked to review the decisions of the state court as to what is the law of that state regarding this question of evidence, because, as asserted, the state has, ever since 1805, made the common law, as it existed at that time, the rule as to evidence on criminal trials, and it is contended that the common law did not permit this evidence under circumstances existing in this case, and the state court, in permitting the deposition to be read, not only violated the state law, but the 14th Amendment, by refusing to the plaintiffs in error due process of law.

Whether the state court erred in its construction of the state Constitution and statutes and the common law on the subject of reading depositions of witnesses is not a Federal question. We are bound by the construction which the state court gives to its own Constitution and statutes and to the law which may obtain in the state, under circumstances such as those existing herein. Among many of the cases to that effect, see *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

[262] As to the Federal Constitution, it will be observed that there is no specific provision therein which makes it necessary in a *state court that the defendant should be confronted with the witnesses against him in criminal trials. The 6th Amendment does not apply to proceedings in state courts. *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Brown v. New Jersey*, 175 U. S. 172-174, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Maxwell v. Dow*, 176 U. S. 581, 586, 44 L. ed. 597, 599, 20 Sup. Ct. Rep. 448, 494. The only question, therefore, is, as we have stated, whether the reading of the deposition under the circumstances amounted to a violation by the state of the 14th Amendment, by depriving the plaintiffs in error of their liberty without due process of law.

At common law, the right existed to read a deposition upon the trial of the defendant, if such deposition had been taken when the defendant was present and when the defendant's counsel had had an opportunity to cross-examine, upon proof being made to the satisfaction of the court that the witness

was, at the time of the trial, dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant. This much is conceded by counsel for plaintiffs in error, but they deny that the common law extended the right to so read a deposition upon proof merely of nonresidence, permanent absence, and inability to procure the evidence of the witness upon the trial.

There is some contrariety among the authorities and text writers whether, under the common law, a deposition is admissible in such case. Assuming, however, that the state court erroneously held what the common law was on the subject, we must, in order to reverse this judgment, go further, and hold that a trial thus conducted and a deposition thus admitted did not furnish due process of law to the accused; in other words, that the refusal to exclude this deposition (an error regarding the admissibility of evidence) took away from plaintiffs in error a right of such an important and fundamental character as to deprive them of their liberty without due process of law.

The state of Louisiana had the right to alter the common law at any time, although it had theretofore adopted it with certain limitations. If, through its courts, it erred in deciding *what the common law was, yet, [263] if no fundamental and absolutely all-important right were thereby denied to an accused, he still had due process of law, and could not complain to this court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of the Federal Constitution.

As was said in *Brown v. New Jersey*, 175 U. S. 175, 44 L. ed. 120, 20 Sup. Ct. Rep. 78:

"The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a state to abolish the grand jury entirely and proceed by information."

The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

Coming to a decision of the question before us, we are of opinion that no Federal right of the plaintiffs in error was violated by admitting this deposition in evidence. Its admission was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. It is neither so unreasonable nor improper as to substantially affect the rights of an accused party, or to fundamentally impair those general rights which are secured to him by the 14th Amendment. The accused has, as held by the state court in such case, been once confronted with the witness, and has had opportunity to cross-examine him, and it seems reasonable that when the state cannot procure the attendance of the witness at the trial, and he is a nonresident

[264]*and is permanently beyond the jurisdiction of the state, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity.

We say this with reference to the question whether the admission of the deposition fails to give the accused "due process of law," as provided for in the 14th Amendment. As the 6th Amendment does not apply to state courts, the question as to what is required under its provisions in order to preserve the right to be confronted with the witness is eliminated from any inquiry by this court in this case.

We have held (*Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292) that the words "due process of law," in the 14th Amendment, do not require an indictment by a grand jury in the prosecution by a state for murder. We have also held (*Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494) that the trial of a person in a state court, accused as a criminal, by a jury of only eight persons instead of twelve, and his subsequent conviction and imprisonment, did not deprive him of his liberty without due process of law. See also *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77, as to a struck jury. In these cases it was held that the several rights mentioned in them were not those fundamental ones which were protected by the Federal Constitution, when presented for review under state prosecutions.

The cases contain a somewhat full statement upon the subject of what constitutes or fulfils the requirements of "due process of law," so far as it relates to questions of this nature, and it is only necessary for us at this time to refer to those cases, without renewing the discussion here. Within the

principle there decided the plaintiffs in error were accorded due process of law.

It is true that the proceedings in the cases were under particular state statutes, while it is contended here that there are no state statutes authorizing the rule as laid down by the supreme court of Louisiana. But that court has held that the proceeding was justified, and the deposition admissible, under the law of that state. Whether the decision of the state court is made *under[265] the authority of a statute or on its own construction of what the law of the state is, cannot, in such case as this, be a material inquiry, because the sole question for this court is whether the Federal Constitution has been violated by the decision of the state court. We think it has not.

The cases cited from this court are not in any degree inconsistent with the views herein expressed, while some rather tend to support them.

In *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244, which was a prosecution for bigamy in the territory of Utah, under § 5352, Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3633), it was held that when there was some proof that an absent witness was kept away by procurement of the defendant, the burden of proof was on him to show (having full opportunity therefor) that he was not instrumental in concealing or keeping the witness away. If the defendant failed, he was in no condition to assert his constitutional right to be confronted with the witness.

In *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337, the indictment was for murder, and it was found in the United States district court of Kansas. It was held that the testimony of a former witness of the government, once taken by a stenographer on a former trial, and fully examined and cross-examined, was admissible on a second trial, on proof of the death of the witness.

In *Murray v. Louisiana*, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990, the state court, on the trial of plaintiff in error for murder, permitted to be read the evidence of a witness taken in the presence of the accused at the preliminary hearing, read to and signed by the witness, the prosecuting officer alleging that the witness was beyond the jurisdiction of the court, and his attendance could not be procured. This court refused to decide as to the admissibility of the evidence, as the bill of exceptions did not show the substance of the evidence, and that it was material.

In *Kirby v. United States*, 174 U. S. 47, 43 L. ed. 890, 19 Sup. Ct. Rep. 574, which was the case of an indictment in the district court of the United States for the

southern division of the district of South Dakota, it was held that, admitting the judgment convicting the three persons of [266]*stealing postage stamps under the circumstances stated in the case, under the provisions of the act of Congress of March 3, 1875, chap. 144, § 2, that such judgment "shall be conclusive evidence in the prosecution against said receiver, that the property of the United States therein described has been embezzled, stolen, or purloined" [18 Stat. at L. 479, U. S. Comp. Stat. 1901, p. 3675], was improper in that the provision of the statute violated the clause of the Constitution of the United States declaring that in all criminal prosecutions the accused should be confronted with the witnesses against him, and the judgment was, therefore, reversed.

In *Motes v. United States*, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993, which was an indictment under § 5508 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3712), it was held that the admission upon the trial of written statements made by one Taylor at the preliminary examination was in violation of the rights of the accused under the 6th Amendment of the Constitution of the United States, declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. It was so held because, as the court found, the absence of the witness was manifestly due to the negligence of the officers of the government. The witness was a witness for the prosecution, and had been once committed to jail without bail, and his absence was, therefore, not within any recognized exceptions to the general rule prescribed in the Constitution.

These are the cases to which our attention has been called, and it is manifest there is nothing in them opposed to our judgment in this case. They are all cases arising in the Federal courts, with one exception (*Murray v. Louisiana*) and in that case the question was left untouched. In the other cases they were subject to the provision of the Federal Constitution assuring the accused the right to be confronted with the witnesses against him. But in not one of those cases was it held that, under facts such as were proved in this case, there would have been a violation of the Constitution in admitting the deposition in evidence. All the cases admit some exceptions to the general rule. What those exceptions may be [267]is a question *for the state courts, in prosecutions therein, under the rule as already stated. The exception alleged in this case has not been denied by this court heretofore.

We are unable to see that any applicable
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provision of the Federal Constitution has been violated by the judgment in this case, and it is, therefore, *affirmed*.

Mr. Justice **Harlan** dissented.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS, *Plff. in Err.*,

v.

CLAY MAY.

(See S. C. Reporter's ed. 267-271.)

Constitutional law—equal protection of the laws—discrimination against railroad companies—validity of Texas Johnson grass statute.

The imposition upon railway companies alone, by Tex. Stat. 1901, chap. 117, of the penalty therein given to contiguous landowners for allowing Johnson grass or Russian thistle to mature and go to seed, does not deny such railway companies the equal protection of the laws.

[No. 185.]

Submitted March 17, 1904. Decided May 2, 1904.

IN ERROR to the County Court of Bell County in the state of Texas to review a judgment enforcing against a railway company the penalty given to contiguous landowners by the Texas Johnson grass statute, for permitting Johnson grass to mature and go to seed upon its right of way. *Affirmed*.

The facts are stated in the opinion.

Mr. **James Hagerman** submitted the cause for plaintiff in error. *Messrs. T. S. Miller and J. M. Bryson* were with him on the brief:

It is conceded, in imposing penalties and liabilities for a public end, that the right to make classifications is in the scope of legislative authority; but it is denied that such classifications may be arbitrary, and that particular persons may be made to bear burdens when other persons similarly situated with respect to the purpose for which such burdens were imposed are exempted.

Barbier v. Connolly, 113 U. S. 27, 30, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357;

NOTE.—As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note, and *State v. Loomis*, 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

Yick Wo v. Hopkins, 118 U. S. 356, 368, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Dent v. West Virginia*, 129 U. S. 114, 124, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 153, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 111, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Fraser v. McConway & T. Co.* 82 Fed. 257; *State ex rel. Atty. Gen. v. Waters-Pierce Oil Co.* (Tex. Civ. App.) 67 S. W. 1057; *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *Luman v. Hitchens Bros. Co.* 90 Md. 14, 46 L. R. A. 393, 44 Atl. 1051; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Walby v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Cooley*, Const. Law, 7th ed. p. 559.

It is denied that there are no inducements for railway companies to prevent these plants from maturing on their right of way. A duty is imposed by law upon railway companies to use due care to clear their right of way from inflammable matter, which usually finds sufficient promptings in the fear of destruction of property by fire and damage claims therefor to induce its performance.

Ft. Worth & D. C. R. Co. v. Hogsett, 67 Tex. 685, 4 S. W. 365; *Texas & P. R. Co. v. Ross*, 7 Tex. Civ. App. 653, 27 S. W. 728; *St. Louis S. W. R. Co. v. Knight* (Tex. Civ. App.) 41 S. W. 416.

Supposing that the statute operated equally upon all owners of contiguous property unless there was some reason why they as a class, distinguished from the public generally, were in special need of protection from Johnson grass and Russian thistle, the statutes would still be open to the charge of being partial and discriminating.

Lawton v. Steele, 152 U. S. 133, 135, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

Statutes imposing burdens for the protection of a particular class have been upheld; but in such cases it seems there was some special reason which distinguished that class from the general public as in need of protection. A statute of Massachusetts making the liability of a railroad company for the destruction of property by fire communicated from its locomotive engines absolute was upheld in *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719.

So, if employees in the discharge of their duty are subjected to special perils and

hardships, special legislation for their protection would not seem objectionable.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 210, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161.

No counsel for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action to recover a penalty of \$25, *brought by the owner of a farm con-[269] tiguous to the railroad of the plaintiff in error, on the ground that the latter has allowed Johnson grass to mature and go to seed upon its road. The penalty is given to contiguous owners by a Texas statute of 1901, chap. 117, directed solely against railroad companies for permitting such grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing. The case is brought here on the ground that the statute is contrary to the 14th Amendment of the Constitution of the United States.

It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted also that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579. When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the 14th Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way we feel unable to say that the law before us may not have been justified by local *con-[270]

ditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. *Judgment affirmed.*

Mr. Justice **Brewer** concurs in the judgment.

Mr. Justice **Brown**, dissenting:

I am unable to concur in the opinion of the court in this case. While fully conceding that the legislature is the only judge of the policy of a proposed discrimination, it is not the only judge of its legality. Doubtless great weight will be given to its judgment in that regard, and the legislation will not be held invalid if it be founded upon a real distinction in principle between persons or corporations of the same class. Upon this principle spark arresters may be required upon locomotives when they are not required upon other smokestacks, because of their greater liability to communicate fires to adjoining property; so, although other proprietors are not bound to fence their lands, railway companies may be required to do so to prevent the straying of cattle upon their tracks. Upon the same principle gates and guards may be required at railway crossings when the same would be entirely unnecessary at the crossing of ordinary highways. Other discriminating [271] regulations *made necessary by the peculiar business and danger incident to railway transportation may be readily imagined.

In this case, however, the railway is not pursued as such, but merely as the proprietor of certain land alongside its track, and no reason can be conjectured why an obnoxious form of weed growing upon its land, should be more detrimental than the same weed growing upon adjoining lands. The railway is not made the sole object of the statutory prohibition by reason of the 194 U. S. U. S., Book 48.

fact that it is a railway, and the discrimination against it seems to be purely arbitrary. The only distinction suggested in support of the ordinance is that the seed of Johnson grass may be dropped from the cars in such quantities as to cause special trouble; but there is not only no evidence of such fact, but it is highly improbable that the seed of a noxious grass of this kind would be carried upon the cars at all. It is also suggested that the self-interest of owners of farms to keep down pests of this kind might be relied upon to prevent their growth. But this tends merely to show that if the law were made general, it would be more readily obeyed by private land proprietors than by the railway. It may be that railways are less given to the observance of precautions required of them as neighborhood landowners than the proprietors of individual property, but that does not create a distinction in principle. It merely tends to show that if the law were made general the railway companies would be oftener prosecuted than other proprietors. If Johnson grass growing upon railway tracks be a nuisance, it is equally so when growing upon the other side of the line fence, and I think the law should be made general, to avoid the charge of an arbitrary discrimination. If the land owned by every corporation were held to this liability, while the land of individuals were exempt, the discrimination would be more conspicuously unjust in its appearance, but scarcely more so in its reality.

Mr. Justice **White** and Mr. Justice **McKenna** also dissented.

*MARTHA RAPHAEL, Administratrix of [272] the Estate of Nathaniel Raphael, Deceased, *Appt.*,

v.

SPENCER TRASK, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols.

(See S. C. Reporter's ed. 272-279.)

Jurisdiction of Federal circuit court—diverse citizenship—ancillary bill.

1. Diverse citizenship is not available to sus-

NOTE.—As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L. R. A. 108, and note, and *Myers v. Murray, N. & Co.* 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

On the ancillary jurisdiction of the Federal courts—see note to *Rosenbaum Bros. v. Council Bluffs Ins. Co.* 3 L. R. A. 189.

tain the jurisdiction of a Federal circuit court of a suit to enjoin a sale of railway stock by a firm of bankers acting on behalf of the stockholders unless a sum shall first be deposited out of the proceeds of the sale sufficient to satisfy any judgment which may be recovered by complainant in a suit to foreclose a mortgage on the property of the railway company, where some of the members of such firm are citizens of the same state with complainant.

2. A bill to enjoin a sale of railway stock by a firm of bankers acting on behalf of the stockholders unless a sum shall first be deposited out of the proceeds of sale sufficient to satisfy any judgment which may be recovered by the complainant in a pending suit to foreclose a mortgage on the property of such railway company, to which suit the stockholders are not parties, cannot be sustained as ancillary to the bill in the foreclosure suit because such bankers, upon learning of the foreclosure proceedings, required an indemnity fund from the stockholders to protect their firm on its guaranty against any liability of the company in that suit.

[No. 229.]

Argued April 18, 19, 1904. Decided May 2, 1904.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment dismissing, for want of jurisdiction, a bill to enjoin a sale of railway stock by bankers acting on behalf of the stockholders unless a sum shall first be deposited out of the proceeds of sale sufficient to satisfy any judgment which may be recovered by complainant in a suit to foreclose a mortgage on the property of such railway company, pending in the United States Circuit Court for the District of Utah. *Affirmed.*

See same case below, 118 Fed. 777.

Statement by Mr. Justice Day:

This suit was begun by filing a bill in the circuit court of the United States for the southern district of New York, seeking an injunction restraining the defendants, Spencer Trask & Company, from selling certain shares of capital stock of the Rio Grande & Western Railway Company to the Denver & Rio Grande Railway Company, unless a sufficient sum of money was deposited to indemnify the complainant upon the demand hereinafter set forth.

It appears from the allegations of the bill that Nathaniel W. Raphael, since deceased, now represented by Martha Raphael as administratrix, on January 7, 1901, filed a bill in the United States circuit court for the district of Utah against the Wasatch & Jordan Valley Railroad Company and the Rio Grande & Western Railway Company and the Union Trust Company of New York, the

object being to foreclose a mortgage given by the Wasatch & Jordan Valley Railroad Company, and to redeem from two independent mortgages certain branch railroads in the possession of, and claimed to be owned by, the Rio Grande & Western Railway Company.

*While that suit was pending the present[273] action was begun. The bill averred that the defendants, composing the firm of Spencer Trask & Company, had undertaken to obtain stock of the Rio Grande & Western Railway Company, and to sell the same to the representatives of the Denver & Rio Grande Railway Company, which company was proceeding to acquire the railroad of the Rio Grande & Western Railway Company by acquiring the common and preferred stock of that company.

It is averred that Spencer Trask & Company, while negotiating the sale of said stock, learning of the foreclosure proceedings commenced by Raphael in the Utah court, made the following public advertisement:

"Since the commencement of the negotiations one Raphael has instituted in the United States circuit court of Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the \$80 per share and interest mentioned above, we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust."

The bill further avers:

"That the members of said firm of Spencer Trask & Company are not parties to the suit pending in Utah, and that there is no agreement existing between complainant and the other holders of the outstanding bonds similar to complainant's bonds, and Spencer Trask & Company, by which the said proposed 'fund' shall be applied toward the satisfaction of complainant's bonds and the other outstanding bonds."

There are further allegations that the complainant—

"Is informed and believes that if said consolidation, as set forth in the scheme contemplated by the advertisements referred to,[274] is allowed to be carried out, without some stipulation between your orator and the members of the said firm of Spencer Trask & Company, as to the custody of the said fund, proposed to be created as aforesaid,

the rights of remote purchasers of the mortgage premises, upon which complainant claims a lien, will have intervened pending complainant's suit in Utah, so that, if complainant succeeds at the final hearing of his suit in Utah, it will require the bringing into the suit, as defendants, such remote purchasers as the Denver & Rio Grande Western Railway Company and their proposed successors."

The prayer for relief is:

"That a preliminary injunction be issued restraining the said members of the firm of Spence Trask & Company from selling the said shares of the capital stock of the Rio Grande Western Railway Company to the Denver & Rio Grande Western Railway Company, as set forth in the said advertisements of Spence Trask & Company, and which injunction your orator prays may be made perpetual upon the final hearing of this suit, unless the firm of Spence Trask & Company shall agree to turn over to some trust company in the city of New York, at and before the completing of said sale of said shares, a sum of money which may be determined by this court, out of the proceeds of said sale, as will be sufficient to satisfy complainant's claim and the other outstanding bondholders' similar to his own, upon the final hearing of complainant's suit in Utah."

The bill also refers to the affidavit of one of the defendants, George Foster Peabody, filed in the Utah suit. This affidavit is annexed to the bill of complaint, and is in part as follows:

"One stipulation of the agreement for the sale of common stock of the Rio Grande Western Railway Company, made by my banking firm of Spence Trask & Company, is that my said firm shall guarantee the purchaser against any claim of the complainant in this suit. The statement in that respect contained in the circular letter [275] of my firm to the holders of the *common stock of that company, of which one of such cuttings is a copy, is as follows:

" 'Since the commencement of the negotiation one Raphael has instituted in the United States circuit court for Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guaranty be ratably shared by all who avail themselves of the contract made by us for the vendors. From the \$80 per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon

such guarantee. Such amount will be held in a special trust.'

"The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts, but also by a special amount to be held in trust. I am advised by the counsel of the Western Company that such provision is a fact against, and not in favor of, the complainant's motion, as it gives a greater assurance that, if the complainant's claim shall be established, it will be paid.

"The statement of the said Raphael in his affidavit, that the retention of a fund to indemnify my said firm for their proposed guaranty against complainant's claim, is an attempt on the part of the Western Company to hinder and delay the complainant, is unqualifiedly false. The Western Company is in no way a party to the agreement or provision for such indemnity or such guaranty. The Western Company, if the purchase of its common stock shall be completed, will be itself indemnified against any claim of complainant."

To the bill of complaint the defendant filed a plea to the jurisdiction of the court, appearing for that purpose and no other, setting forth that the plaintiff, at the time of the commencement of the suit, was, and continues to be, a citizen of the state of New Jersey; that two of the defendants, Charles J. *Peabody and Edwin M. Bulkley, were, at [276] the time of the filing of the bill and the beginning of the suit, citizens of the state of New Jersey, and were not and had not been for over eight years either citizens or residents of the state of New York.

The cause being brought on for hearing upon the plea, the bill of complaint was dismissed for want of jurisdiction.

Subsequently an application was made for leave to amend the bill and file a supplementary bill, which application was denied.

Upon dismissing the bill for want of jurisdiction, the trial court certified the question of jurisdiction, and the cause came here by direct appeal.

Mr. Charles Locke Easton argued the cause and filed a brief for appellant:

The bill in the court below is brought to stay waste and for general relief.

Lanier v. Alison, 31 Fed. 100; *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298; *Griffin v. Sketoe*, 30 Ga. 300; *Markham v. Howell*, 33 Ga. 508; *Marshall v. Turnbull*, 32 Fed. 124.

Where irremediable mischief, going to the destruction of the substance of the estate, is being done by the person in possession to

an estate in litigation at law, an injunction will be issued.

Erhardt v. Boaro, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 560.

If a threatened waste of the mortgaged property under foreclosure in the primary action is apprehended, the mortgagor is not compelled to wait the uncertain delays of the foreclosure suit in the primary action before taking steps to assert his rights. He may proceed against the threatened waste by an ancillary suit.

Equity rule 57 provides that, if the suit shall become defective by reason of the happening of an event after the filing of the bill, it is the duty of the party desiring to take advantage of such an event, and seeking to have a supplemental bill or other pleading filed in the cause, to move the court without unnecessary delay after the knowledge of such an event shall have come to such moving party.

Johns, Rules of Practice, equity rules, 57, 58; Dan. Ch. Pl. & Pr. 779 *et seq.*; 1515 *et seq.*; Mitford & T. Pl. & Pr. in Eq. chap. 4, pp. 158, 172; *Kennedy v. Bank of Georgia*, 8 How. 586, 12 L. ed. 1209; *Snead v. McCoull*, 12 How. 407, 13 L. ed. 1043; *Shaw v. Bill*, 95 U. S. 10, 24 L. ed. 333; *Chester v. Life Assn.* 4 Fed. 487; *Mosgrove v. Kountze*, 4 McCrary, 561, 14 Fed. 317.

Parties with a naked legal title, having no interest in the controversy,—as trustees,—can always be omitted as defendants.

Simms v. Guthrie, 9 Cranch, 19, 3 L. ed. 642; *Boon v. Chiles*, 8 Pet. 533, 8 L. ed. 1034; *Union Bank v. Stafford*, 12 How. 327, 13 L. ed. 1008; *New Orleans Canal & Bkg. Co. v. Stafford*, 12 How. 343, 13 L. ed. 1015; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963; *Bacon v. Rives*, 106 U. S. 99, 27 L. ed. 69, 1 Sup. Ct. Rep. 3.

In a suit against a firm by strangers, a partner beyond the jurisdiction may be omitted if no injustice will be done him by a decree in his absence.

Vose v. Philbrook, 3 Story, C. C. 335, Fed. Cas. No. 17,010; *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840; *Thayer v. Life Assn.* 112 U. S. 717, 28 L. ed. 864, 5 Sup. Ct. Rep. 355; *American Bible Soc. v. Price*, 110 U. S. 61, 28 L. ed. 70, 3 Sup. Ct. Rep. 440.

In England it has been held, in accordance with the maxim, *De minimis non curat lex*, that, when the interest of the absent person is evidently very small, the court will dispense with his presence in the suit.

Mechanics' Bank v. Seton, 1 Pet. 299, 7 L. ed. 152.

For relaxation as to the rule as to parties in special cases, see—

Caldwell v. Taggart, 4 Pet. 190, 7 L. ed. 828; *Robertson v. Carson*, 19 Wall. 94, 22 L. ed. 178; *Hoe v. Wilson*, 9 Wall. 501, 19

L. ed. 762; *Nashville & D. R. Co. v. Orr*, 18 Wall. 471, 21 L. ed. 810; *United States v. Union P. R. Co.* 98 U. S. 569, 25 L. ed. 143; *Foster*, Fed. Pr. § 50, p. 123.

Equity sometimes takes jurisdiction on account of the parties, and sometimes on account of the relief proper to be administered. The same considerations which invoke the jurisdiction may control the remedy.

May v. Le Claire, 11 Wall. 236, 20 L. ed. 54.

An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

Sioux City Terminal R. & Warehouse Co. v. Trust Co. 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 126.

The question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented they are indispensable parties, for, if their interests are severable, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained, and the suit dismissed as to them.

Horn v. Lockhart, 17 Wall. 579, 21 L. ed. 660.

On a bill to enforce a mortgage given to trustees where a majority of the trustees are parties, the other trustee is not necessary.

Stewart v. Chesapeake & O. Canal Co. 4 Hughes, 41, 1 Fed. 361; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152.

If the defendant has a distinct interest, and substantial justice can be done, jurisdiction attaches as to him alone.

Cameron v. M'Roberts, 3 Wheat. 591, 4 L. ed. 467; *Nesmith v. Calvert*, 1 Woodb. & M. 34, Fed. Cas. No. 10,123.

Where, by making one who has a severable interest a defendant would deprive the court of jurisdiction of the suit, the bill should be dismissed as to him.

Horn v. Lockhart, 17 Wall. 579, 21 L. ed. 660.

Amendments allowed to affect the jurisdiction relate back, and become a part of the original bill.

Gaylor v. Ft. Wayne, M. & C. R. Co. 6 Biss. 287, Fed. Cas. No. 5,284.

Amendments can be allowed to the pleadings for the purpose of more fully presenting the facts at issue between the parties, even after a reversal by the supreme court of the decree.

Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Douglas v. Butler*, 6 Fed. 228; *Conolly v. Taylor*, 2 Pet. 556, 7 L. ed. 518; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.* 1 Sawy. 470, Fed. Cas. No. 2,989; *Greeley v. Smith*, 3 Story, 76, Fed. Cas. No. 5,747.

If a declaration fails to allege the matter in controversy, it may be amended.

Lanning v. Dolph, 4 Wash. C. C. 624, Fed. Cas. No. 8,073.

Equity rule 35 is passed upon when the amendments which are desired to be made are shown.

Mercantile Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815.

Plaintiff may show a subsequent capacity to sue after demurrer is sustained.

Swatzel v. Arnold, Woolw. 383, Fed. Cas. No. 13,682.

Where a new cause of action is intended by amendment it may be allowed when it corresponds with the original bill.

United States v. 123 Casks of Distilled Spirits, 1 Abb. (U. S.) 573, Fed. Cas. No. 15,943.

An amendment which changed even the character of the bill was allowed in a special case, even after final decree.

Tremaine v. Hitchcock, 23 Wall. 518, 23 L. ed. 97.

The state courts and the Federal courts, alike, will permit a judgment binding partnership assets, and against a party actually served binding him individually.

Barney v. Baltimore City, 6 Wall. 280, 287, 18 L. ed. 825, 827; *Hall v. Lanning*, 91 U. S. 160, 166-169, 23 L. ed. 271, 273, 274.

The bill of complaint in the court below can be sustained as an ancillary bill.

Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; *McBee v. Marietta & N. G. R. Co.* 48 Fed. 243; *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24.

Messrs. William Mason Smith and Edward M. Shepard argued the cause and filed a brief for appellees:

The complainant having brought on the cause for argument upon his bill of complaint and upon the plea, the allegations of the plea had to be taken as admitted; and the complainant is in the position of demurring to the plea.

Farley v. Kittson, 120 U. S. 303, 314, 30 L. ed. 684, 688, 7 Sup. Ct. Rep. 534; *Rhode Island v. Massachusetts*, 14 Pet. 210, 257, 10 L. ed. 423, 445.

As the Federal jurisdiction here depends upon diverse citizenship, and as the controversy is indivisible, all the parties on one side must be of a citizenship diverse
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from that of all of the parties on the other side.

Blake v. McKim, 103 U. S. 336, 26 L. ed. 563; *Anderson v. Watt*, 138 U. S. 694, 702, 34 L. ed. 1078, 1081, 11 Sup. Ct. Rep. 449.

Every member of the firm is directly, and indeed, so far as appears, equally, interested in the result of the suit. Every member of the firm is a necessary party,—not merely a proper party, but an absolutely necessary party. Any judgment must affect the property rights of every member of the firm. The court below could not deal with the questions involved unless and until it should have every member of the firm before it. Until then the court could not take cognizance of the cause. Nor, unless it had, or might lawfully have, jurisdiction of all the parties, was the cause within its jurisdiction.

Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Bell v. Donohoe*, 8 Sawy. 435, 17 Fed. 710; *Duchesse d'Auxy v. Porter*, 41 Fed. 68; *Adams v. May*, 27 Fed. 907; *Mason v. Eldred*, 6 Wall. 231, 235, 18 L. ed. 783, 784.

Nor is this a matter of service of process. The defendants could not, if they would, consent to and thereby confer jurisdiction of a suit brought by a complainant of like citizenship with them. The point would be taken by the court itself against consent of all the parties,—and even in this court on appeal.

Anderson v. Watt, 138 U. S. 694, 702, 34 L. ed. 1078, 1081, 11 Sup. Ct. Rep. 449; *Morris v. Gilmer*, 129 U. S. 315, 325, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289.

The question is entirely different from that which arises where the cause is justiciable by the court against all the members of the firm, but where only one of them is served. A defendant who is made a party, and against whom the court may take jurisdiction, and who can, if he will, come in to protect himself, may, as to partnership assets, be concluded by a judgment obtained after service on his copartners. The state courts and the Federal courts, alike, will permit a judgment against a copartnership binding partnership assets, and against the partner actually served, binding him individually.

Barney v. Baltimore City, 6 Wall. 280, 287, 18 L. ed. 825, 827; *Hall v. Lanning*, 91 U. S. 160, 166, 169, 23 L. ed. 271, 273, 274; *Simonds v. Speed*, 6 Rich. L. 390.

The general rule that every member of a firm must be a party to a suit affecting rights or property of the firm has never been doubted.

Marvin v. Wilber, 52 N. Y. 270; *Woodhouse v. Duncan*, 106 N. Y. 527, 13 N. E. 334; *Wooster v. Chamberlin*, 28 Barb. 602.

The bill cannot be sustained as an ancillary or supplemental bill, or as a bill otherwise not original.

Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 195, note, 95 Fed. 497; *Anglo-Florida Phosphate Co. v. McKibben*, 13 C. C. A. 36, 23 U. S. App. 675, 65 Fed. 529.

An ancillary bill must, from its very nature, be filed in the same court as the original bill, and against the same parties, or their assignees or privies in interest, and with reference to the same subject-matter.

Story, Eq. Pl. 10th ed. §§ 326-342; *Christmas v. Russell*, 14 Wall. 80, 20 L. ed. 763; *Marshall v. Holmes*, 141 U. S. 599, 35 L. ed. 874, 12 Sup. Ct. Rep. 62; *McDonald v. Seligman*, 81 Fed. 753; *Dunn v. Clarke*, 8 Pet. 1, 8 L. ed. 845; *Root v. Woodworth*, 150 U. S. 401, 411, 37 L. ed. 1123, 1125, 14 Sup. Ct. Rep. 136; 1 Dan. Ch. Pl. & Pr. 6th Am. ed. pp. 305, 306; 2 Dan. Ch. Pl. & Pr. 6th Am. ed. pp. 1515-1547; 3 Ene. Pl. & Pr. p. 339; 21 Ene. Pl. & Pr. pp. 4 *et seq.*

The mere fact that the recovery of a judgment in the original Utah action is an indispensable ingredient to the supposed cause of action against the defendants here neither makes, nor helps to make, the present bill other than an original one.

Christmas v. Russell, 14 Wall. 69, 20 L. ed. 762.

A supplementary or ancillary bill, or any bill not original, must not present a new cause of action, but must present new facts relevant and material to an adjudication of the original cause of action.

Story, Eq. Pl. § 339.

Mr. Justice **Day**, after making the foregoing statement, delivered the opinion of the court:

The circuit court sustained the plea of the defendants upon two grounds: 1, that the suit could not be maintained for want of the required diversity of citizenship; and, 2, that it could not be maintained as an ancillary or dependent proceeding for want of proper averments to bring the case within that branch of equity jurisdiction.

As the offer to amend and file a supplemental bill was not entertained in the court below, and as the exercise of this discretion is not reviewable here, except in special cases, we are only concerned with the correctness of the conclusion of the circuit court in dismissing the original bill.

As the case was brought on for consideration on bill of complaint and plea, the allegations of the plea are taken as admitted as upon demurrer thereto. *Farley v. Kittson*, 120 U. S. 303-314, 30 L. ed. 684, 7 Sup. Ct. Rep. 534.

Looked at as an original bill, it is elementary that all the *parties on one side of [277] the controversy must be of diverse citizenship to those on the other. It is argued that the relief is sought not against the firm or its members personally, but to restrain the disposition of the fund pending the controversy, or to require it to be paid into the hands of a holder for the benefit of the complainant as his rights may be established, and as some of the defendants are residents of New York, the bill can be maintained.

But we cannot concede the soundness of this claim. The action is against the firm, and every member of the firm is interested in the result. The proceeding is against them jointly. As between the complainant and the members of the firm who are residents of the state of New York, there is no separable controversy. The partners are jointly and equally interested in the fund alleged to be held and in the disposition of the suit commenced by the complainant. This proposition is so plain as to scarcely require the citation of authorities. In *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799, the state of South Carolina commenced an action to recover certain money from partners. Stone, one of the partners, sought to remove the case on the ground that he was a citizen of the state of New York. The application was denied, and upon this subject Mr. Chief Justice Waite, speaking for the court, said:

"The cause of action is joint, and only one of the defendants petitions for removal. . . . Neither is there any separable controversy in the case, such as might, if the necessary citizenship existed, allow Stone alone to remove the suit without joining Corbin with him in the petition for removal. The money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all."

We have no doubt that the case cannot be sustained as an original suit dependent upon diverse citizenship.

Can the bill be sustained as an ancillary or supplementary bill?

We had occasion to consider the nature of ancillary bills in the *late case of *Julian v. Central Trust Co.* decided at this term, 193 U. S. 93, ante, 629, 24 Sup. Ct. Rep. 399, and we are unable to find any precedent in the reported cases or text books which will maintain this bill in that aspect. Ancillary bills are ordinarily maintained in the same court as the original bill is filed, with a view to protecting the rights adjudicated by the court in reference to the subject-matter of the litigation, and in aid of the jurisdiction of the court, with a purpose of car-

rying out its decree and rendering effectual rights to be secured or already adjudicated. Story, Eq. Pl. 8th ed. § 326; *Root v. Woolworth*, 150 U. S. 401, 411, 37 L. ed. 1123, 1125, 14 Sup. Ct. Rep. 136; 1 Bates, Fed. Eq. Proc. § 97.

In the present case, the original action was begun to foreclose a mortgage upon property in Utah. It had nothing to do with the sale of the stock by the stockholders represented by Speneer Trask & Company. The stockholders were not parties to the Utah bill, nor could any relief be had against them in that suit. The purpose of Spencer Trask & Company in calling upon the vendors of the stock to deposit a certain amount, while having reference to the suit begun in Utah, did not evidence any agreement upon their part to indemnify the complainant because of any obligation or desire to protect him, but was a matter between that firm and the stockholders for whom it was acting. The purpose was to protect the selling firm, because of its guaranty to the purchasers of the stock, in case of any diminution in the value of the property in the event that the complainant prevailed in the suit in the Utah court. There was no privity of contract or trust relation between the complainant and defendants to this suit.

It is true that the affidavit of George Foster Peabody, upon which much reliance is had, gives some support to the claim that the advertisement embodied an agreement for the indemnification of the complainant. At most, this is but the construction that Mr. Peabody placed upon the advertisement, and could not enlarge the rights of the complainant, nor in any way change the true nature of the proceeding. Nor does it appear that this fund, had the complainant [279] stood in such relation *of privity of contract that he could claim the benefit of it, was necessary to the protection of the complainant's right in the property held by the railroad company, against which he was proceeding in Utah. There is nothing to show that the railroad company, with the large surplus which it was alleged to have accumulated, could not have responded to any decree which the complainant might have recovered in the foreclosure suit.

Nor can the bill be maintained as one to stay waste. There is no estate of complainants in the hands of Speneer Trask & Company which is likely to be wasted pending the suit. As the complainant shows no legal or equitable right to the fund furnished by the stockholders, neither the method of its management nor its protection from diminution can concern him.

We are of opinion that the Circuit Court was right, and that the bill cannot be main-
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tained either as an original or ancillary proceeding.

Judgment affirmed.

UNITED STATES *ex rel.* JOHN TURNER,
Appt.,
v.

WILLIAM WILLIAMS, United States Commissioner of Immigration for the Port of New York.

(See S. C. Reporter's ed. 279-296.)

Constitutional law—validity of immigration act—exclusion of alien anarchists.

1. The enactment of the provisions of the Immigration act of March 3, 1903 (32 Stat. at L. 1213, chap. 1012; U. S. Comp. Stat. Supp. 1903, pp. 172, 180), for the exclusion and deportation of alien anarchists, does not violate either U. S. Const. art. 3, § 1, or Amendments 5 and 6.
2. Congress did not exceed its delegated powers by enacting the provisions of the Immigration act of March 3, 1903, for the exclusion and deportation of alien anarchists.
3. None of the guaranties of U. S. Const. 1st Amend. respecting freedom to worship, speak, publish, or petition, are infringed by the provisions of the Immigration act of March 3, 1903, for the exclusion and deportation of alien anarchists, whether such statute is construed to apply to persons whose opposition to all organized government is professed as a political ideal, or simply to include those who advocate the forcible overthrow of government or assassination of officials.
4. The conclusion of the immigrant inspectors, approved by the Secretary of Commerce and Labor, that an alien came within the provisions of the Immigration act of March 3, 1903, for the exclusion and deportation of alien anarchists, cannot be said, as a matter of law, to be wholly unsupported by the evidence, even though such act be so construed as to include only advocates of the forcible overthrow of the Federal government or of all governments, or of the assassination of officials, where there was evidence that such alien advocated "as an anarchist" a universal strike, and proposed to lecture upon "the legal murder of 1887," and to address mass meetings on that subject, in association with a person who had been convicted of advocating revolution and murder.

[No. 561.]

Argued April 6 and 7, 1904. Decided May 16, 1904.

A PPEAL from the Circuit Court of the United States for the Southern District of New York to review an order dismissing a writ of habeas corpus to inquire into the detention of a person sought to be

NOTE.—As to constitutional freedom of speech and of the press—see note to *Cowan v. Fairbrother*, 32 L. R. A. 829.

deported from the United States as an alien anarchist. *Affirmed.*

See same case below, 126 Fed. 253.

Statement by Mr. Chief Justice **Fuller**:

John Turner filed in the United States circuit court for the southern district of New York, October 26, 1903, a petition alleging—

“First. That on October 23, in the city of New York, your relator was arrested by divers persons claiming to be acting by authority of the government of the United States, and was by said persons conveyed to the United States immigration station at Ellis island, in the harbor of New York, and is now there imprisoned by the commissioner of immigration of the port of New York.

“Second. Your relator is so imprisoned by virtue of a warrant sworn out by the Secretary of the Department of Commerce and Labor, which warrant charges your relator with being an anarchist, and being unlawfully within the United States, in violation of § 2 and § 20 of the immigration laws of the United States, as amended by act of March 3, 1903 [32 Stat. at L. 1213, chap. 1012].

“Third. Upon information and belief, that a special board of inquiry, consisting of Charles Semsey, Captain Weldon, supervising inspector, and L. C. Stewart, all of whom are executive officers of the United States, has inquired into your relator's case, and decided that your relator is an anarchist, and is in the United States in violation of law, within the meaning of the act of March 3, 1903.

“Fourth. Your relator denies that he is an anarchist within the meaning of the immigration laws of the United States, and states to the court that about six years ago he took out his first papers of application for citizenship in this country, and that he has at no times been engaged as a propagandist of doctrines inciting to, or advising, violent overthrow of government, but for about six years last past he has been the paid organizer of the retail clerks of Great [281] Britain, and his business *in this country is solely to promote the interests of organized labor, and that he has at all times conducted himself as a peaceful and law-abiding citizen.

“By reason of all of which facts your relator says that his imprisonment is illegal, in that he is being deprived of his liberty without due process of law, and is being denied equal protection of the laws, contrary to the Constitution and laws of the United States.”

—and praying for a writ of habeas corpus to the commissioner of immigration of the port

of New York, and also for a writ of certiorari to bring up the record of the board of inquiry which adjudged him to be an anarchist and in the United States in violation of the immigration laws. The commissioner made return under oath, and also certified the record of the board of inquiry.

The return stated—

“That the above-named John Turner is an alien, a subject of the Kingdom of Great Britain and Ireland; that said alien came to the United States from England on, or about ten days prior to, October 24, 1903, as deponent is informed and believes.

“Said John Turner was arrested in the city of New York on or about October 23, 1903, under a warrant issued by the Secretary of the Department of Commerce and Labor of the United States, and was taken to the Ellis island immigration station, where he was examined by a board of special inquiry, duly constituted according to law, upon his right to remain in this country, and that said alien was, by said board, found to be an alien anarchist, and was, by unanimous decision of said board, ordered to be deported to the country from whence he came, as a person within the United States in violation of law. That on October 26, 1903, said alien appealed from the said decision of the board of special inquiry to the Secretary of Commerce and Labor, who dismissed the appeal, and directed that said alien be deported to the country from whence he came, upon the ground that said alien is an anarchist *and a person who dis-[282] believes in, and who is opposed to, all organized government, and was found to be in the United States in violation of law.

“That annexed hereto is a copy of the above mentioned warrant for the arrest and deportation of said John Turner, and copies of the minutes of said hearing before the board of special inquiry, and a copy of the order or decision of the Secretary of Commerce and Labor dismissing said appeal, and again directing deportation. That said John Turner is now held in deponent's custody at the Ellis island immigration station, pending deportation to the country from whence he came, in accordance with the above-mentioned decision or order of the Secretary of Commerce and Labor.”

The warrant issued by the Secretary was addressed to certain United States immigrant inspectors, and recited that from the proofs submitted the Secretary was satisfied that Turner, an alien anarchist, came into this country contrary to the prohibition of the act of Congress of March 3, 1903, and commanded them to take him into custody, and return him to the country from whence he came, at the expense of the United States. On appeal to the Secretary

the record of proceedings before the board of inquiry was transmitted, and the Secretary held: "The evidence shows that the appellant declined to give exact information as to the manner in which he secured admission to this country, although he swears that he arrived here about ten days ago. He admits that he is an anarchist and an advocate of anarchistic principles, which brings him within the class defined by § 38 of the act approved March 3, 1903 (U. S. Comp. Stat. Supp. 1903, p. 186). In view of these facts, the appeal is dismissed, and you are directed to deport the said John Turner, in conformity with warrant now in your hands for execution."

[283] The hearing before the board of inquiry was had October 24, 1903, and it appeared from the minutes thereof that Turner testified that he was an Englishman; that he had been in the United States ten days, and that he did not come through New York, but declined to either affirm or deny that he arrived **via* Canada; that he would not undertake to deny that he had, in the lecture delivered in New York, October 23, declared himself to be an anarchist, which, he said, was a statement that he would make; and that the testimony of the inspectors was about correct. That evidence gave extracts from the address referred to, including these: "Just imagine what a universal tie-up would mean. What would it mean in New York city alone if this idea of solidarity were spread through the city? If no work was being done, if it were Sunday for a week or a fortnight, life in New York would be impossible, and the workers, gaining audacity, would refuse to recognize the authority of their employers, and eventually take to themselves the handling of the industries. . . . All over Europe they are preparing for a general strike, which will spread over the entire industrial world. Everywhere the employers are organizing, and to me, at any rate, as an anarchist, as one who believes that the people should emancipate themselves, I look forward to this struggle as an opportunity for the workers to assert the power that is really theirs."

Certain papers were found on Turner, one of them being a list of his proposed series of lectures (which, when the warrant was in execution, he rolled up and threw away), the subjects including: "The Legal Murder of 1887," and "The Essentials of Anarchism;" notices of meetings, one of a mass-meeting November 9, at which "speeches will be delivered by John Turner in English, John Most in German, and several other speakers. Don't miss this opportunity to hear the truth expressed about the great Chicago tragedy on the eleventh of November, 1887;"

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and another, stating: "It may be interesting to all that Turner has recently refused to accept a candidacy to Parliament because of his anarchistic principles."

A demurrer was interposed to the return, and, after argument, the circuit court dismissed the writ and remanded the petitioner. 126 Fed. 253. From this order an appeal was prayed and allowed to this court, and, having been docketed, petitioner was admitted to bail.

*Sections 2 and 38 of the act of March 3, [284] 1903, entitled "An Act to Regulate the Immigration of Aliens into the United States" (32 Stat. at L. 1213, chap. 1012), are as follows:

"Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: All idiots, insane persons, epileptics, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with a loathsome or with a dangerous contagious disease; persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude; polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials; prostitutes, and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution; those who have been, within one year from the date of the application for admission to the United States, deported as being under offers, solicitations, promises or agreements to perform labor or service of some kind therein; and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes; but this section shall not be held to prevent persons living in the United States from sending for a relative or friend who is not of the foregoing excluded classes: *Provided*, That nothing in this act shall exclude persons convicted of an offense purely political, not involving moral turpitude: *And provided further*, That skilled labor may be imported, if labor of like kind unemployed cannot be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons **belonging to any recog-* [285]

nized learned profession, or persons employed strictly as personal or domestic servants."

"Sec. 38. That no person who disbelieves in, or who is opposed to, all organized government, or who is a member of, or affiliated with, any organization entertaining and teaching such disbelief in, or opposition to, all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof. This section shall be enforced by the Secretary of the Treasury, under such rules and regulations as he shall prescribe.

"That any person who knowingly aids or assists any such person to enter the United States or any territory or place subject to the jurisdiction thereof, or who conspires or conspires with any person or persons to allow, procure, or permit any such person to enter therein, except pursuant to such rules and regulations made by the Secretary of the Treasury, shall be fined not more than five thousand dollars, or imprisoned for not less than one nor more than five years, or both."

By the act of February 14, 1903 (32 Stat. at L. 825, chap. 552; U. S. Comp. Stat. Supp. 1903, p. 41), "To Establish the Department of Commerce and Labor," the jurisdiction, supervision, and control possessed and exercised by the Department of the Treasury over the immigration of aliens into the United States were transferred to the Department of Commerce and Labor established by the act, to take effect and be in force the first day of July, 1903.

Messrs. Edgar L. Masters and Clarence S. Darrow argued the cause and filed a brief for appellant:

The provision of the 1st Amendment to the Federal Constitution, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, etc., goes to the competency of Congress to pass a bill of that description.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

The subject of the prohibition or the abridgment is of no moment if Congress is incompetent to pass any such law.

In the organization of the government of

the United States the intent was clearly to divide the executive, legislative, and judicial branches of the government in such a manner that neither should encroach upon the jurisdiction and power of either of the others.

1 Bryce, *American Commonwealth*, pp. 282, 284; 1 Baneroff, *History of the Constitution*, p. 327; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377.

Courts must exercise the judicial functions.

Marbury v. Madison, 1 Cranch, 173, 2 L. ed. 72; *Martin v. Hunter*, 1 Wheat. 330, 4 L. ed. 103; 1 Kent, Com. 301; *Andreus v. Hovey*, 124 U. S. 694, 31 L. ed. 557, 8 Sup. Ct. Rep. 676; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281.

Many of the protections which are thrown about persons, whether aliens or citizens, by the organic law are repeatedly disregarded by the immigrant officials.

Re Lea, 126 Fed. 233; *United States v. Hung Chang*, 126 Fed. 400; *Ex parte Sing*, 82 Fed. 22.

The 5th Amendment protects an alien against Federal action.

Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Due process of law protects the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 4 Wheat. 244, 4 L. ed. 561; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.

The better and larger definition of due process of law is, that it means law in its regular course of administration, through courts of justice.

1 Kent, Com. 599.

Law in its regular course of administration through courts of justice is due process; and, when secured by the law of the state, the constitutional requisition is satisfied.

2 Kent, Com. 13.

Tested by the rule laid down in *Cohen v. Virginia*, 6 Wheat. 348, 5 L. ed. 277; and *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, the only question decided in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, was that the power to regulate commerce includes the power to regulate navigation.

New York v. Miln, 11 Pet. 101, 9 L. ed. 648; *License Cases*, 5 How. 504, 12 L. ed. 256.

The argument that the United States may exclude aliens because of their sovereign power, or because they are a nation, or be-

cause they have the powers of sovereign nations, is manifestly unsound.

1 Constitutional View of the War, pp. 40, 41, 487-489; *Chisholm v. Georgia*, 2 Dall. 470, 1 L. ed. 462; *Sturges v. Crowninshield*, 4 Wheat. 193, 4 L. ed. 548; *Dartmouth College v. Woodward*, 4 Wheat. 651, 4 L. ed. 662; *Rhode Island v. Massachusetts*, 12 Pet. 720, 9 L. ed. 1258; *Martin v. Waddell*, 16 Pet. 410, 10 L. ed. 1012; *Martin v. Hunter*, 1 Wheat. 325, 326, 4 L. ed. 102; *Fontain v. Ravenel*, 17 How. 369, 15 L. ed. 80; *Marbury v. Madison*, 1 Cranch, 176, 2 L. ed. 73; *McCulloch v. Maryland*, 4 Wheat. 405, 4 L. ed. 601; *Wayman v. Southard*, 10 Wheat. 43, 6 L. ed. 262; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95; *Buffington v. Day*, 11 Wall. 113, 20 L. ed. 122; *United States v. Cruikshank*, 92 U. S. 542, 28 L. ed. 588; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Robertson v. Baldwin*, 165 U. S. 296, 41 L. ed. 722, 17 Sup. Ct. Rep. 326.

Assistant Attorney General McReynolds argued the cause and filed a brief for appellee:

Where the constitutional question raised or suggested is one which has been settled by repeated adjudications of this court, and is no longer open to discussion, the case cannot be said to involve the construction or application of the Constitution of the United States, or to be one in which the constitutionality of any law of the United States is drawn in question, within the meaning of the judiciary act of 1891.

Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. ed. 721, 724, 23 Sup. Ct. Rep. 611; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 243, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867; *Lampasas v. Bell*, 180 U. S. 276, 282, 284, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 695, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 281, 45 L. ed. 859, 861, 21 Sup. Ct. Rep. 646.

The power of Congress to exclude aliens altogether, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is no longer open to discussion, but is settled beyond question by the decisions of this court.

Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Fok Yung Yo v. United States*, 185 U. S. 296,

46 L. ed. 917, 22 Sup. Ct. Rep. 686; *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; *Japanese Immigrant Case*, 189 U. S. 86, 97, 47 L. ed. 721, 724, 23 Sup. Ct. Rep. 611.

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign, independent nation, essential to its safety, its independence, and its welfare.

Fong Yue Ting v. United States, 149 U. S. 711, 37 L. ed. 912, 13 Sup. Ct. Rep. 1016; *Chinese Exclusion Case*, 130 U. S. 581, 603, 32 L. ed. 1068, 1074, 9 Sup. Ct. Rep. 623; *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This appeal was taken directly to this court on the ground that the case involved the construction or application of the Constitution of the United States, and that the constitutionality of a law of the United States was drawn in question; and although it may be, as argued by the government, that the principles which must control our decision have been practically settled, we think, the whole record considered, that we are not constrained to dismiss the appeal for that reason.

It is contended that the act of March 3, 1903, is unconstitutional because in contravention of the 1st, 5th, and 6th articles of amendment of the Constitution, and of § 1 of article 3 of that instrument; and because no power "is delegated by the Constitution to the general government over alien friends with reference to their admission into the United States or otherwise, or over the beliefs of citizens, denizens, sojourners, or aliens, or over the freedom of speech or of the press."

Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that [290] the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application. *Chae Chan Ping v. United States*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Fong Yue Ting v. United*

States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Fok Yung Yo v. United States*, 185 U. S. 296, 46 L. ed. 917, 22 Sup. Ct. Rep. 686; *Japanese Immigrant Case*, 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611; *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; *United States v. Sing Tuck*, 194 U. S. 161, ante, 917, 24 Sup. Ct. Rep. 621.

In the case last cited the distinction on which *Gonzales v. Williams*, 192 U. S. 1, ante, 317, 24 Sup. Ct. Rep. 177, turned was pointed out. The question whether a citizen of Porto Rico, under the treaty of cession [30 Stat. at L. 1754] and the act of April 12, 1900 [31 Stat. at L. 77, chap. 191], came within the immigration law of March 3, 1891 [26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1294], was purely a question of law, which, being decided in the negative, all questions of fact became immaterial.

In the present case alienage was conceded, and was not in dispute, and it was the question of fact thereupon arising that was passed on by the board, and by the Secretary on appeal.

Whether rested on the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States, the act before us is not open to constitutional objection. And while we held in *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977, a certain provision of an immigration law invalid on that ground, this act does not come within the ruling.

In that case Mr. Justice Shiras, speaking for the court, said:

"We regard it as settled by our previous [291] decisions that the *United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order, to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their de-

portation, upon executive or subordinate officials.

"But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment, by one of its own agents."

Detention or temporary confinement as part of the means necessary to give effect to the exclusion or expulsion was held valid, but so much of the act of 1892 [27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319] as provided for imprisonment at hard labor without a judicial trial was held to be unconstitutional. The cases of *Chae Chang Ping*, *Fong Yue Ting* and *Lem Moon Sing* were carefully considered and applied.

We do not feel called upon to reconsider these decisions, and they dispose of the specific contentions as to the application of the 5th and 6th Amendments, and § 1 of article 3, and the denial of the delegation to the general government of *the power to [292] enact this law. But it is said that the act violates the 1st Amendment, which prohibits the passage of any law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

We are at a loss to understand in what way the act is obnoxious to this objection. It has no reference to an establishment of religion, nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or of the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true, that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in

fact cut off from worshipping or speaking or publishing or petitioning in the country; but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.

Appellant's contention really comes to this: that the act is unconstitutional so far as it provides for the exclusion of an alien because he is an anarchist.

The argument seems to be that, conceding that Congress has the power to shut out any alien, the power, nevertheless, does not extend to some aliens, and that if the act includes all alien anarchists, it is unconstitutional, because some anarchists are merely political philosophers, whose teachings are beneficial rather than otherwise.

Counsel give these definitions from the Century dictionary:

[293] "ANARCHY. Absence or insufficiency of government; a state of society in which there is no capable supreme power, and in which the several functions of the state are performed badly or *not at all; social and political confusion. Specifically—2. A social theory which regards the union of order with the absence of all direct government of man by man as the political ideal; absolute individual liberty. 3. Confusion in general."

"ANARCHIST. 1. Properly, one who advocates anarchy or the absence of government as a political ideal; a believer in an anarchic theory of society; especially, an adherent of the social theory of Proudhon. See *Anarchy*, 2. 2. In popular use, one who seeks to overturn by violence all constituted forms and institutions of society and government, all law and order, and all rights of property, with no purpose of establishing any other system of order in the place of that destroyed; especially, such a person when actuated by mere lust of plunder. 3. Any person who promotes disorder or excites revolt against an established rule, law, or custom."

And Huxley is quoted as saying: "Anarchy, as a term of political philosophy, must be taken only in its proper sense, which has nothing to do with disorder or with crime, but denotes a state of society in which the rule of each individual by himself is the only government the legitimacy of which is recognized."

The language of the act is "anarchists, or

persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials." If this should be construed as defining the word "anarchists" by the words which follow, or as used in the popular sense above given, it would seem that when an alien arrives in this country, who avows himself to be an anarchist, without more, he accepts the definition. And we suppose counsel does not deny that this government has the power to exclude an alien who believes in or advocates the overthrow of the government or of all governments by force or the assassination of officials. To put that question is to answer it.

And if the judgment of the board and the Secretary was that Turner came within the act as thus construed, we cannot *hold, as [294] matter of law, that there was no evidence on which that conclusion could be rested. Even if Turner, though he did not so state to the board, only regarded the absence of government as a political ideal, yet when he sought to attain it by advocating, not simply for the benefit of workingmen, who are justly entitled to repel the charge of desiring the destruction of law and order, but "at any rate, as an anarchist," the universal strike to which he referred, and by discourses on what he called "The Legal Murder of 1887" (*Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898), and by addressing mass meetings on that subject in association with Most (*Queen v. Most*, L. R. 7 Q. B. Div. 244; *People v. Most*, 171 N. Y. 423, 58 L. R. A. 509, 64 N. E. 175), we cannot say that the inference was unjustifiable either that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end.

If the word "anarchists" should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers, innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few; and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, as applicable to any alien who is opposed to all organized government.

We are not to be understood as depreciating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, in itself unconquerable, but this case does not in-

volve those considerations. The flaming brand which guards the realm where no human government is needed still bars the entrance; and as long as human governments endure they cannot be denied the power of self-preservation, as that question is presented here.

Reference was made by counsel to the alien law of June 25, 1798 (1 Stat. at L. 570, chap. 58), but we do not think that the [295] controversy *over that law (and the sedition law) and the opinions expressed at the time against its constitutionality have any bearing upon this case, which involves an act couched in entirely different terms, and embracing an entirely different purpose. As Mr. Justice Field remarked in the *Chinese Exclusion Case*, 130 U. S. 610, 32 L. ed. 1077, 9 Sup. Ct. Rep. 632: "The act was passed during a period of great political excitement, and it was attacked and defended with great zeal and ability. It is enough, however, to say that it is entirely different from the act before us, and the validity of its provisions was never brought to the test of judicial decision in the courts of the United States."

Order affirmed.

Separate opinion by **Brewer, J.:**

In view of the range of discussion in the argument of this case at the bar, I feel justified in adding a few words to what has been said by the Chief Justice.

First. I fully indorse and accentuate the conclusions of the court, as disclosed by the opinion, that, notwithstanding the legislation of Congress, the courts may and must, when properly called upon by petition in habeas corpus examine and determine the right of any individual restrained of his personal liberty to be discharged from such restraint. I do not believe it within the power of Congress to give to ministerial officers a final adjudication of the right to liberty, or to oust the courts from the duty of inquiry respecting both law and facts. "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." Const. art. 1, § 9, clause 2.

Second. While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the 10th article of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor pro- [296] hibited by it to the *states, are reserved to the states respectively, or to the people." The powers the people have given to the general government are named in the Constitution, and all not there named, either

expressly or by implication, are reserved to the people, and can be exercised only by them, or upon further grant from them.

Third. No testimony was offered on the hearing before the circuit court other than that taken before the immigration board of inquiry, and none before such board save that preserved in its report. Hence, the facts must be determined by that evidence. It is not an unreasonable deduction therefrom that petitioner is an anarchist in the commonly accepted sense of the term,—one who urges and seeks the overthrow by force of all government. If that be not the fact, he should have introduced testimony to establish the contrary. It is unnecessary, therefore, to consider what rights he would have if he were only what is called, by way of differentiation, a philosophical anarchist,—one who simply entertains and expresses the opinion that all government is a mistake, and that society would be better off without any.

LOREN M. HEWIT, as Trustee in Bankruptcy of Clara E. Kellogg, *Appt.*,

v.

BERLIN MACHINE WORKS.

(See S. C. Reporter's ed. 296-303.)

Appeals in bankruptcy cases—title of trustee under conditional sale—trustee not a subsequent purchaser, pledgee, or mortgagee in good faith.

1. An appeal lies to the Federal Supreme Court, under the act of March 3, 1891, § 6 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550), from a judgment of a circuit court of appeals, entered on an appeal from a judgment of a court of bankruptcy, sustaining a title to property in the possession of a trustee in bankruptcy, asserted by intervention raising a distinct and separable issue, since the controversy may be regarded as one of those "controversies arising in bankruptcy proceedings," over which the circuit court of appeals could, under the bankruptcy act of July 1, 1898, § 24a (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), exercise appellate jurisdiction as in other cases.
2. A trustee in bankruptcy does not occupy the position of a subsequent purchaser, pledgee, or mortgagee in good faith, within the meaning of N. Y. Laws 1897, chap. 418, § 112, availing conditional sales as against such persons where the sale is accompanied by a change in possession, unless a copy of the contract is filed, although such trustee is vested, under the bankruptcy act of July 1, 1898, chap. 541, § 70a (30 Stat. at L. 565; U. S. Comp. Stat. 1901, p. 3451) with the title of the bankrupt to all property which he could, by any means, have transferred, or

NOTE.—On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

which might have been levied upon and sold under judicial process against him.

[No. 228.]

Argued April 18, 1904. Decided May 16, 1904.

A PPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of New York, reversing the decision of a referee in bankruptcy, and adjudging that the title to certain property sold to the bankrupt on condition not fulfilled was in the vendor, and not in the trustee in bankruptcy. *Affirmed.*

See same case below, 56 C. C. A. 383, 118 Fed. 1017.

Statement by Mr. Chief Justice **Fuller**:

[297] Loren M. Hewit, as trustee in bankruptcy of Clara E. *Kellogg, applied to the United States district court for the eastern district of New York for an order of sale of certain real estate, buildings, and machinery. Notice to creditors was given, and thereafter the Berlin Machine Works, a corporation, filed its petition, praying, on grounds set forth, to be declared the owner of certain machines included in the property, and be awarded possession thereof, and that they be exempted from sale, or that it be determined that the corporation is entitled to be first paid out of the proceeds of the sale of the machines, and to share in dividends on any unpaid balance. The matter was heard before the referee, who held that the corporation had lost the legal title to the machines, and must come in as an unsecured creditor. The corporation petitioned the district court for a review of the referee's decision, the referee made his certificate and return, and the matter was submitted to the court, which thereafter reversed the decision of the referee, and adjudged that the Berlin Machine Works had a good and valid title to the machines, and that the same be delivered to it, or, in the event that they had been disposed of, that the trustee pay over to the Berlin Machine Works the sum of \$1,200, the value of the machines. 112 Fed. 52.

The trustee then filed a petition in the district court, making application for revision and review in matter of law, and appealed to the circuit court of appeals for the second circuit from the judgment of the district court, and the district court ordered "that a superintendency and revision and review in matter of law and an appeal be and the same hereby is allowed in the above-entitled proceedings to the cir-

cuit court of appeals, second circuit of the United States." The circuit court of appeals affirmed the judgment of the district court, 56 C. C. A. 383, 118 Fed. 1017, and thereupon an appeal was allowed to this court.

Mr. Frank H. Robinson argued the cause and filed a brief for appellant.

Mr. Charles M. Harrington argued the cause, and, with *Messrs. Romer & Harrington*, filed a brief for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

If the trustee had carried the case to the circuit court of appeals on petition for supervision and revision under § 24b *of the [300] bankruptcy law [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432], the case would have fallen within *Holden v. Stratton*, 191 U. S. 115, ante, 116, 24 Sup. Ct. Rep. 45, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those "controversies arising in bankruptcy proceedings" over which the circuit court of appeals could, under § 24a, exercise appellate jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (*Holden v. Stratton*, 191 U. S. 115, ante, 116, 24 Sup. Ct. Rep. 45), while § 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by § 2, to settle the estates of bankrupts, and to determine controversies in relation thereto. *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; *Burleigh v. Foreman*, 125 Fed. 217.

The appeal to this court then followed, under § 6 of the act of March 3, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550].

This brings us to the consideration of the case on the merits. The material facts are these: October 10, 1900, Clara E. Kellogg contracted with the Berlin Machine Works for the purchase of two wood-working machines at the price of \$1,850, payment to be made within four months from date of shipment, and title to the property to remain in the machine company until fully paid for. The machines were shipped to Kellogg, October 29 and November 16, respectively, and

were received by her, set up in her planing mill, and put in operation. October 29 and November 16 she signed and delivered to the machine company in payment for the machines two promissory notes for \$925 each, payable in two and four months from their respective dates, to the order of the machine company, and each containing the following clause: "Title and right of possession of the property for which this note is given remains in the Berlin Machine Works until fully paid for." Kellogg, on her voluntary petition, was adjudicated a bankrupt, March 1, 1901, and a trustee was selected March 22, and thereafter duly qualified. The notes have not been paid, and were mentioned in the schedules as secured claims, the security being the machines in question. It also appeared that January 21, 1901, Clara E. Kellogg, being insolvent, executed a conveyance of the planing mill to a corporation called the C. E. Kellogg Company, which being attacked as fraudulent, the property was voluntarily released to the trustee, all the capital stock of the company, the entire consideration of the alleged transfer, being surrendered to the company.

This sale was a conditional sale, and the title did not pass to the vendee because the condition was not fulfilled (*Ballard v. Burgett*, 40 N. Y. 314; *Cole v. Mann*, 62 N. Y. 1) unless the statutes of New York otherwise provided. The applicable statute is § 112 of chapter 418 of the Laws of 1897, which reads as follows:

"Conditions and reservations in contracts for sale of goods and chattels.—Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees, or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article."

It is admitted that the machine company did not comply with the statute until after the appointment and qualification of the trustee; but if the trustee was not a subsequent purchaser, pledgee, or mortgagee in good faith, the omission to file the contract of sale was immaterial. *Prentiss Tool & Supply Co. v. Schirmer*, 136 N. Y. 305, 32 Am. St. Rep. 737, 32 N. E. 849.

Did the trustee occupy the position of a

subsequent purchaser, pledgee, or mortgagee in good faith? We dismiss the pretended conveyance by Kellogg to the Kellogg Company from discussion as the district court did, as it was attacked as fraudulent and without consideration, and was voluntarily released to the trustee, who derived no title thereby, and had none other than by operation of law.

Section 70a of the bankruptcy law [July 1, 1898, chap. 541; 30 Stat. at L. 565; U. S. Comp. Stat. 1901, p. 3451] provides:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, . . . to all . . . (5) property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The district court, Hazel, J., held that the reasonable construction of this provision was that the trustee was vested with the title which the bankrupt had to property situated as described, and not otherwise, and quoted from the opinion of the circuit court of appeals for the second circuit in the case of *Re New York Economical Printing Co.* 49 C. C. A. 133, 110 Fed. 514, upholding that view, as follows: "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee." And the circuit court of appeals, adhering to that decision, *held in this case that, in-[303]asmuch as, by the New York statute, a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the district court was right, and affirmed the judgment. 56 C. C. A. 383, 118 Fed. 1017.

We concur in this view, which is sustained by decisions under previous bankruptcy laws (*Winsor v. McLellan*, 2 Story, 492, Fed. Cas. No. 17,887; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993; *Yeatman v. New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589), and is not shaken by a different result in cases arising in states by whose laws conditional sales are void as against creditors.

In our opinion, these machines were not, prior to the filing of the petition, property which, under the law of New York, might have been levied upon and sold under judicial process against the bankrupt; nor could she have transferred it within the intent and meaning of § 70a. See *Low v. Welch*, 139 Mass. 33, 29 N. E. 216. The company's title was good as against the trustee, who could not claim as a subsequent purchaser in good faith.

Judgment affirmed.

HANKS DENTAL ASSOCIATION

v.

INTERNATIONAL TOOTH CROWN COMPANY.

(See S. C. Reporter's ed. 303-310.)

Depositions—examination of party before trial.

The examination of a party before trial, authorized by N. Y. Code Civ. Proc. § 870, cannot be required by a Federal circuit court sitting in that state, by virtue of the declaration of the act of March 9, 1892 (27 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 664), that, in addition to the mode of taking the depositions of witnesses in causes pending in the Federal district and circuit courts, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.

[No. 253.]

Argued and submitted April 26, 1904. Decided May 16, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question whether a Federal circuit court sitting in the state of New York may require the examination of a party before trial, authorized by the laws of that state. *Answered in the negative.*

Statement by Mr. Chief Justice **Fuller**:

The certificate in this case is as follows:

"This cause comes here upon a writ of error for the review of the judgment of the circuit court for the southern district of New York, entered upon the verdict of a jury in favor of the defendant in error, The International Tooth Crown Company, sus-

taining the validity of a patent, and awarding damages for infringement. Upon examination of the record it appears that the sole evidence of infringement was found in the deposition of the president of the Hanks Dental Association, the plaintiff in error, taken pursuant to an order of the circuit court under §§ 870 *et seq.* of the Code of Civil Procedure of the state of New York, the defendant in error contending the examination of a party before trial, if permitted by the law of the state, is authorized by act of Congress of March 9, 1892. 27 Stat. at L. 7, chap. 14 (U. S. Comp. Stat. 1901, p. 664).

"The taking of the deposition was objected to at every stage, and when offered in evidence at the trial it was again duly objected to, and to its reception the plaintiff in error duly excepted.

"Whether this practice is warranted or not is the question upon which we desire the instructions of the Supreme Court.

"Question Certified.

"Upon the facts above set out the question of law concerning which the court desires the instruction of the Supreme Court is:

"Was the order of the circuit court directing the president of the Hanks Dental Association, the defendant in that court, to appear before a master or commissioner appointed pursuant to the provisions of §§ 870 *et seq.* of the Code of Civil Procedure of the state of New York, valid and authorized under the act of March 9, 1892?"

Messrs. Philip B. Adams and Charles K. Ofield argued the cause, and, with **Mr. Charles C. Linthicum**, filed a brief for Hanks Dental Association.

Mr. Walter D. Edmonds submitted the cause for the International Tooth Crown Company.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Section 870 of the Code of Civil Procedure of New York provides that "the deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought, . . . may be taken at his own instance or at the instance of an adverse party or of a coplaintiff or codefendant at any time before the trial, as prescribed in this article." And succeeding sections set forth how such examinations may be ordered.

In *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724, decided at October term, 1884, it was held that this statute was in conflict with § 861 of the Revised

NOTE.—On the conformity of Federal practice and procedure to the practice of state courts—see note to *Nederland L. Ins. Co. v. Hall*, 27 C. C. A. 392; *O'Connell v. Reed*, 5 C. C. A. 594.

Statutes of the United States (U. S. Comp. Stat. 1901, p. 661), and not within any of the exceptions to the rule therein prescribed. The sections bearing on the subject were thus summarized by Mr. Justice Miller, who delivered the opinion of the court:

"Sec. 861 [U. S. Comp. Stat. 1901, p. 661]. The mode of proof, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

"Sec. 863 [U. S. Comp. Stat. 1901, p. 661]. The testimony of any witness may be taken in any civil cause depending in a district or circuit court, by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient or infirm." The remainder of this section, and §§ 864 and 865 [U. S. Comp. Stat. 1901, p. 663], are directory as to the officer before whom the deposition may be taken, the notice to the opposite party, and the manner of taking, testifying, and returning the deposition to the court.

[306] *'"Sec. 866 [U. S. Comp. Stat. 1901, p. 663]. In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States.'

"Section 867 [U. S. Comp. Stat. 1901, p. 664] authorizes the courts of the United States, in their discretion, and according to the practice in the state courts, to admit evidence so taken; and §§ 868, 869, and 870 [U. S. Comp. Stat. 1901, pp. 664, 665] prescribe the manner of taking such depositions, and of the use of the *subpœna duces tecum*, and how it may be obtained."

Mr. Justice Miller then continued: "No one can examine these provisions for procuring testimony to be used in the courts of the United States, and have any reasonable doubt that, so far as they apply, they were intended to provide a system to govern the practice, in that respect, in those courts. They are, in the first place, too complete, too far-reaching, and too minute to admit of any other conclusion. But we have not only this inference from the character of the legislation, but it is enforced by the express language of the law in providing

a defined mode of proof in those courts, and in specifying the only exceptions to that mode which shall be admitted."

And he further said: "Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof." "It is not according to common usage to call a party in advance of the trial at law, and to subject him to all the skill of opposing counsel, to extract something which he may then use or not, as it suits his purpose." "Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides. There is no place for exceptions made by state statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this."

*Sections 721 and 914 (U. S. Comp. Stat. [307] 1901, pp. 581 and 684) were held inapplicable because the law of the state was inconsistent with the law of Congress. And see *Beardsley v. Littell*, 14 Blatchf. 102, Fed. Cas. No. 1,185, Blatchford, J.; *United States v. Pings*, 4 Fed. 714, Choate, J.; *Fogg v. Fisk*, 22 Blatchf. 29, 19 Fed. 235, Wallace, J.; *Luxton v. North River Bridge Co.* 147 U. S. 337, 338, 37 L. ed. 194, 195, 13 Sup. Ct. Rep. 356.

In *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, decided at October term, 1890, the question was whether a court of the United States could order a plaintiff, in an action for an injury to the person, to submit to a surgical examination in advance of the trial, and it was held that it could not.

Mr. Justice Gray, among other things, said: "Congress has enacted that 'the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided,' and has then made special provisions for taking depositions. Rev. Stat. §§ 861, 863 *et seq.* (U. S. Comp. Stat. 1901, p. 661). The only power of discovery or inspection, conferred by Congress, is to 'require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery,' and to nonsuit or default a party failing to comply with such an order. Rev. Stat. § 724 (U. S. Comp. Stat. 1901, p. 583). And the provision of § 914 (U. S. Comp. Stat. 1901, p. 684), by which the practice, pleadings, and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same

state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court."

Ex parte Fisk was quoted from and applied, and the opinion concluded: "The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent, and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States. The circuit court, to adopt the [308] words of Mr. Justice Miller, *has no power to subject a party to such an examination as this."

March 9, 1892, the following act was approved (27 Stat. at L. 7, U. S. Comp. Stat. 1901, p. 664): "Chap. 14. An Act to Provide an Additional Mode of Taking Depositions of Witnesses in Causes Pending in the Courts of the United States. Be it enacted, . . . That in addition to the mode of taking depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

Mode usually means the manner in which a thing is done, and this act relates to the manner of taking "depositions and testimony," which the title treats as equivalent terms, and which may be so regarded so far as the question before us is concerned. But it is contended that the word "mode" as used in the act has a broader significance, and embraces the production of evidence, thereby qualifying § 861 (U. S. Comp. Stat. 1901, p. 661), which prescribes the mode of proof.

We cannot concur in this view. The act is clear upon its face, and does not call for construction, or, at all events, is susceptible of but one construction. It does not purport to repeal in any part, or to modify, § 861 (U. S. Comp. Stat. 1901, p. 661), or to create additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions, and as it is applicable alone to the taking of depositions or testimony in writing, we cannot attribute to it any such effect, nor hold, this being so, that it is supplementary to § 914 (U. S. Comp. Stat. 1901, p. 684).

That section refers to "the practice, pleadings, and forms and modes of proceeding in civil causes," and Mr. Justice Blatchford, then district judge, in *Beardsley v. Little*, thought the expression "forms and modes of proceeding" did not necessarily include the subject of evidence. But be that as it may, we do not think the words "mode of taking" were used in this act with the [309] intention of expanding the scope of the *sec-

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tion so as to cover the production of testimony through the examination of a party before trial.

In short, the courts of the United States are not given discretion to take depositions not authorized by Federal law, but, in respect of depositions thereby authorized to be taken, they may follow the Federal practice in the manner of taking, or that provided by the state law. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 601.

In *National Cash-Register v. Leland*, 77 Fed. 242, it was ruled by the circuit court for the district of Massachusetts that the act of 1892 did not "enlarge the instances in which depositions may be taken or in which answers may be obtained upon interrogatories, for use as proof in the Federal courts;" and "was only intended to simplify the taking of depositions by providing that the mode of taking in instances authorized by the Federal laws, might conform to the mode prescribed by the laws of the state in which Federal courts were held;" and this was approved by the circuit court of appeals for the first circuit. 37 C. C. A. 372, 94 Fed. 502. The conclusions announced by the circuit court of appeals for the fifth circuit in *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 953, and by the circuit court for the district of Kansas in *Shellaharger v. Oliver*, 64 Fed. 306; for the district court of Indiana in *Tabor v. Indianapolis Journal Newspaper Co.* 66 Fed. 423; for the western district of Missouri in *Seeley v. Kansas City Star Co.* 71 Fed. 556; for the eastern district of Pennsylvania in *Despeaux v. Pennsylvania R. Co.* 81 Fed. 897; for the eastern district of Missouri in *Zyeh v. American Car & Foundry Co.* 127 Fed. 728,—are to the same effect. The decision of the circuit court in this case is to the contrary (101 Fed. 306), and was concurred in by the circuit court for the northern district of Washington in *Smith v. Northern P. R. Co.* 110 Fed. 341.

In *Camden & Suburban R. Co. v. Stetson*, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617, October term, 1899, the question of the power of *the circuit court for the dis-[310] trict of New Jersey, under a statute of New Jersey providing therefor, was under consideration, and the power sustained. The validity of the statute had been affirmed by the supreme court of New Jersey, and in the course of the opinion of this court it was said: "The validity of a statute of this nature has also been upheld in *Lyon v. Manhattan R. Co.* 142 N. Y. 298, 25 L. R. A. 402, 37 N. E. 113, although the particular form of that statute would probably be regarded as conflicting with the law of Congress in relation to the examination of a party as a witness before trial, and hence

might not be enforced in courts of the United States, sitting within the state of New York."

Section 873 of the New York Code of Procedure provided that "in every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial, may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination;" and in *Lyon v. Manhattan R. Co.*, the court of appeals held that the physical examination could only "be procured in the same way and as part of the examination of the party before trial;" that it could not be had apart from, and independent of, the examination before trial. The reference to the New York statute in *Camden & Suburban R. Co. v. Stetson*, so far as it goes, indicates the opinion of the court that the ruling in *Ex parte Fisk* remained unaffected by the act of March 9, 1892, in any substantial particular. We think that that ruling applies, and that *the question must be answered in the negative.*

So ordered.

[311]*PLYMOUTH CORDAGE COMPANY, A. B. Kelley, Newton Wagon Company, and Maggie O'Brien

v.

J. A. SMITH and Clinton F. Irwin, Judge.

(See S. C. Reporter's ed. 311-315.)

Bankruptcy — summary revision in circuit court of appeals of proceedings in territorial district courts.

The summary revisory power of the circuit court of appeals for the eighth circuit, under the bankruptcy act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3431), § 24b, giving the several circuit courts of appeals jurisdiction "to superintend and revise, in matter of law, the proceedings of the several inferior courts of bankruptcy within their jurisdiction," extends to questions of law arising in the progress of bankruptcy proceedings in a district court of Oklahoma territory, which is assigned to the eighth circuit, although jurisdiction by appeal or writ of error is vested, by §§24a, 25a, in the territorial supreme court.

[No. 565.]

Submitted April 5, 1904. Decided May 16, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting the question whether that court has jurisdiction to superintend and revise, in matter of law, pro-

ceedings in bankruptcy had in the District Court of Kingfisher County, Oklahoma. *Answered in the affirmative.*

Statement by Mr. Chief Justice Fuller:

This was a petition to the circuit court of appeals for the eighth circuit to superintend and revise, in matter of law, certain proceedings in bankruptcy had in the district court of Kingfisher county, Oklahoma, on which a question or proposition of law arose concerning which that court desired the instruction of this court, and accordingly granted a certificate setting forth: (1) Section 24 a, b, of the bankruptcy law [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3431]; (2) the order of this court of May 11, 1891, assigning the territory of Oklahoma to the eighth judicial circuit, pursuant to § 15 of the judiciary act of March 3, 1891 [26 Stat. at L. 830, chap. 517, U. S. Comp. Stat. 1901, p. 554]; (3) the filing of the petition to superintend and revise in matter of law the proceedings of the district court of Kingfisher county, Oklahoma, in the following particulars:

"(a) On March 23, 1903, a petition was pending in said court to adjudge J. A. Smith an involuntary bankrupt. The district court on that date permitted three creditors to withdraw from said petition.

"(b) On April 6, 1903, the district court of Kingfisher county, Oklahoma, sustained a motion to dismiss a petition in involuntary bankruptcy theretofore filed against J. A. Smith.

"(c) On April 6, 1903, the district court of Kingfisher county, Oklahoma, denied the prayer of certain creditors of J. A. Smith, asking leave to join in the petition in involuntary bankruptcy against J. A. Smith.

"(d) On April 14, 1903, the district court [312] of Kingfisher county, Oklahoma, refused to permit certain creditors of J. A. Smith to file a motion asking the court to set aside the order of April 6, 1903, dismissing the petition in involuntary bankruptcy against J. A. Smith."

(4) That petitioners prayed the court "to set aside each and all of the foregoing orders so entered by the district court of Kingfisher county, Oklahoma."

And propounding the following question or proposition of law:

"Does the United States circuit court of appeals for the eighth circuit have the jurisdiction to superintend and revise, in matter of law, the proceedings of the district court of Kingfisher county, Oklahoma, in bankruptcy?"

Messrs. Edwin C. Brandenburg and Edwin A. Krauthoff submitted the cause for the Plymouth Cordage Co. Messrs. 194 U. S.

NOTE.—On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

Patrick S. Nagle, W. A. McCartney, Brandenburg & Brandenburg, and Karnes, New, & Krauthoff were with them on the brief.

No brief was filed for *Smith et al.*

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the bankruptcy law, the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian territory and the district of Alaska, are made courts of bankruptcy.

By subdivision 3 of § 1, the words "appellate courts" are defined to "include the circuit courts of appeals of the United States, the supreme courts of the territories, and the Supreme Court of the United States."

"Appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases," is vested by § 24a in the Supreme Court of the United States, the *circuit court of appeals of the United States, and the supreme courts of the territories. And by § 24b it is provided that the several circuit courts of appeals shall have jurisdiction in equity "to superintend and revise, in matter of law, the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

By § 25a appeals, "as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories" from judgments adjudging or refusing to adjudge the defendant a bankrupt; granting or denying a discharge; and allowing or rejecting a claim of \$500 or over.†

[314] *The act clearly distinguishes between "controversies arising in bankruptcy proceedings" and "bankruptcy proceedings" proper, and between supervisory jurisdiction in a summary way in matter of law, and

jurisdiction by appeal or writ of error. Appellate jurisdiction over controversies, as in other cases, is vested by § 24a, and over certain designated bankruptcy proceedings by § 25a, by appeal, as in equity cases, bringing up both law and fact.

The question before us arises on a petition to revise certain proceedings in a court of bankruptcy of the territory of Oklahoma. That territory, by order of this court, as required by law, was assigned in 1891 to the eighth judicial circuit (139 U. S. 707, 35 L. ed. 1128 b, 11 Sup. Ct. Rep. IV.) and the courts of the territory were thereby brought within the appellate jurisdiction of the circuit court of appeals for that circuit.

By the judiciary act of March 3, 1891, that jurisdiction embraced the review of the judgments, orders, and decrees of the supreme courts of the territories in cases in which the judgments of the circuit courts of appeals were made final by that act, but in other cases the jurisdiction remained in this court. *Shute v. Keyser*, 149 U. S. 649, 37 L. ed. 884, 13 Sup. Ct. Rep. 960.

Then came the bankruptcy law making the district courts of the territories courts of bankruptcy, and providing that their proceedings as such might be revised by the circuit *courts of appeals within whose jurisdiction they happened to be. [315]

We think the law should be taken as it is written, and perceive no adequate reason for concluding that the real intention of Congress is not expressed in the language used. Congress may well have believed it wisest that the circuit courts of appeals should deal in this summary way with questions of law arising in the progress of bankruptcy proceedings in the territorial courts, although jurisdiction by appeal or writ of error, and by appeal, as provided, was vested in the supreme courts of the territories.

The circuit court of appeals for the fifth circuit has announced the same conclusion (*Re Seebold*, 45 C. C. A. 117, 105 Fed. 910, 914), as has the supreme court of Okla-

†Sec. 24. Jurisdiction of Appellate Courts. a. The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States, and from the supreme court of the District of Columbia.

b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise, in matter

of law, the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Sec. 25. Appeals and Writs of Error. a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by

homa (*Ex parte Stumpff*, 9 Okla. 639, 60 Pac. 96). A different view appears to have been entertained by the circuit court of appeals for the eighth circuit in *Re Blair*, 45 C. C. A. 530, 106 Fed. 662, though apparently the case did not necessarily require the precise question to be passed on.

Question answered in the affirmative.

RIBAS Y HIJO, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 315-324.)

Appeal from district court of Porto Rico—jurisdiction of lower court — suits against the United States—action sounding in tort.

1. The Federal Supreme Court has jurisdiction of an appeal from the district court of the United States for the district of Porto Rico, under the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 35, where the final judgment in a like case in the supreme court of one of the territories of the United States could be so reviewed.
2. The jurisdiction of the district court of the United States for the district of Porto Rico extends, under the act of April 12, 1900 (31 Stat. at L. 84, chap. 191), § 34, to all actions which could be brought in a Federal circuit court.
3. The United States is not suable under the Tucker act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 732), on a claim for the value of the use by the Army of a Spanish merchant vessel captured during the war with Spain, since the action is one sounding in tort, and is not converted into one of implied contract because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898,—especially in view of the provision of the treaty of peace for the mutual relinquishment of all claims for national or individual indemnity that may have arisen since the beginning of the Cuban insurrection, and prior to the exchange of ratifications of such treaty.

[No. 151.]

the appellate court in term or vacation, as the case may be.

b. From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules, and within such time, as may be prescribed by the Supreme Court of the United States, in the following cases, and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or

2. Where some justice of the Supreme Court of the United States shall certify that, in his

Submitted April 28, 1904. Decided May 16, 1904.

APPEAL from the District Court of the United States for the District of Porto Rico to review a judgment dismissing an action to recover from the United States the value of the use by the Army of a Spanish merchant vessel captured during the war with Spain. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles M. Boerman submitted the cause for appellant.

Solicitor General Hoyt and Assistant Attorney General McReynolds submitted the cause for appellee.

Mr. Justice Harlan delivered the opinion of the court:

This action was brought against the United States by J. Ribas y Hijo, a Spanish corporation, to recover the sum of \$10,000 as the value of the use of a certain merchant vessel taken by the United States in the Port of Ponce, Porto Rico, when that city was captured by the United States Army and Navy on July 28th, 1898.

The vessel was kept and used by the quartermaster's department of the Army until some time in April, 1899, when the War Department ordered its return to the owner, if all claim for use or damage for detention should be waived. Such conditional return was refused by the captain, who claimed to be a part owner, and with his crew he left the vessel.

Subsequently the consignees of the vessel were notified that it was at their disposal; that the government was about to discharge those having it in care; and they were requested to put some one in control of it. This they declined to do, and the vessel was abandoned, and in August, 1899, was wrecked in a hurricane.

The vessel was never in naval custody nor condemned as prize. When seized it was a [317] Spanish vessel, carried the Spanish flag, and its owner, captain, and crew were all Spanish subjects. It did not come within any of the declared exemptions from seizure

opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c. Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d. Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof, and issue writs of certiorari, pursuant to the provisions of the United States laws now in force, or such as may be hereafter enacted.

set forth in the Proclamation of the President of April 26th, 1898. 30 Stat. at L. 1770. A claim filed in the War Department in February, 1900, for its use was rejected.

Such being the facts found, the court below, upon final hearing, dismissed the action, upon the general ground that the vessel was properly seized as enemy's property, and its use was by the war power for war purposes.

A rehearing was asked and was denied, the court saying: "A rehearing is asked upon the ground that the court has found, as a matter of fact, that the use continued until in April, 1899, and, as the protocol, followed by the President's proclamation, was dated August 12th, 1898 [30 Stat. at L. 1780], the complainants should recover on a *quantum meruit* the value of the use of the vessel between those dates. This was a seizure in time of war, and not in time of peace. It was, as has been said, a special case, arising from the necessary operation of war, and the war power of the government concluded it was necessary to take and use the property. Even conceding that the seizure did not terminate all right of the Spanish owner in the property, or to any use of it, yet the protocol and proclamation did not end the war. The protocol worked a mere truce. The President had not the power to terminate the war by treaty without the advice or consent of the Senate of the United States. If a treaty be silent as to when it is to become effective, the weight of authority is that it does not become so until ratified, and this was not done until in April, 1899 [30 Stat. at L. 1754], and the war did not end by treaty until then, and all the use made by the government of the vessel was justified by the rules of law and international law, without compensation."

1. By the 35th section of the act of Congress of April 12th, 1900, chap. 191, temporarily providing revenues and civil government for Porto Rico, it was declared that "writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed, and may be taken to the Supreme Court of the United States in the same manner, and under the same regulations, and in the same cases, as from the supreme courts of the territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question, and the right claimed thereunder is denied; . . ." As the value of the matter here in dispute exceeds the sum of \$5,000, and as the final judgment in a like case in the supreme court of one of

the territories of the United States could be re-examined here, we have jurisdiction of the present appeal from the district *court of the United States for Porto Rico. 23 Stat. at L. 443, chap. 355 (U. S. Comp. Stat. 1901, p. 572); 31 Stat. at L. 85, chap. 191, §§ 34, 35; *Royal Ins. Co. v. Martin*, 192 U. S. 149, *ante*, 385, 24 Sup. Ct. Rep. 247.

2. This action, we have seen, was brought to recover the value of the use of a vessel belonging to Spanish subjects, and taken by our Army and Navy during the war with Spain, and used by the quartermaster's department of the Army.

By the above act of April 12th, 1900, the court below was given, "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." 31 Stat. at L. 84, chap. 191, § 34. If, therefore, this action could have been brought in a circuit court of the United States, it was within the cognizance of the court below. We must, then, look to the act of March 3d, 1887, commonly known as the Tucker act, and which provides for the bringing of suits against the government of the United States. 24 Stat. at L. 505, chap. 359 (U. S. Comp. Stat. 1901, p. 752).

By the 1st section of that act it is provided that the court of claims shall have jurisdiction to hear and determine "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. . . ." The 2d section provides that "the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section, where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars, and does not exceed ten thousand dollars." The 5th *section is in these words: "That the plaintiff in any suit brought under the provisions of the 2d section of this act shall file a petition, duly verified, with the clerk of the respective court having jurisdiction of the case, and in

the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law."

The government insists that the requirement in that act, that the petition shall be filed "in the district where the plaintiff resides," precludes a suit against the United States by any person, natural or corporate, residing out of the country. We express no opinion upon that question, as there are other grounds upon which we may satisfactorily rest our decision.

The present suit finds no sanction in the above act, even if the plaintiff were not a foreign corporation. Its claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an executive department. Nor can it be said to be founded on contract, express or implied. There is no element of contract in the case; for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was, therefore, to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and not for any purposes of gain. The case does not come within the principle announced in *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 656, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306, 311, where this court said that "the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of claimant for public use, are [323] under an obligation, imposed *by the Constitution, to make compensation. The law will imply a promise to make the required compensation where property to which the government asserts no title is taken pursuant to an act of Congress as private property, to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims of actions founded 'upon any contract, expressed or implied, with the

government of the United States.'" The seizure, which occurred while the war was flagrant, was an act of war, occurring within the limits of military operations. The action, in its essence, is, for the recovery of damages; but as the case is one sounding in tort, no suit for damages can be maintained under the statute, against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12th, 1898. A state of war did not, in law, cease until the ratification in April, 1899, of the treaty of peace. "A truce or suspension of arms," says Kent, "does not terminate the war, but it is one of the *commercium belli* which suspends its operations. . . . At the expiration of the truce, hostilities may recommence without any fresh declaration of war." 1 Kent, Com. 159, 161. If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel, pending negotiations for a treaty of peace. Besides, the treaty of peace between the two countries provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either government, or of its citizens or subjects, against the other government, that may have arisen since the beginning of the late insurrection in Cuba, and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United *States will [324] adjudicate and settle the claims of its citizens against Spain, relinquished in this article." This stipulation clearly embraces the claim of the plaintiff,—its claim against the United States for indemnity having arisen prior to the exchange of ratifications of the treaty of peace with Spain.

We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail; for, it is well settled that in case of a conflict between an act of Congress and a treaty,—each being equally the supreme law of the land,—the one last in date must prevail in the courts. *The Cherokee Tobacco*, 11 Wall. 616, 621, 20 L. ed. 227, 229; *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456; *United States v. Lee Yen Tai*, 185 U. S. 213, 221, 46 L. ed. 878, 883, 22 Sup. Ct. Rep. 629.

It results that *the judgment below, dismissing the action, must be affirmed.*

It is so ordered.

EDWARD E. BESSETTE
v.
W. B. CONKEY COMPANY.

(See S. C. Reporter's ed. 324-338.)

Appeal to circuit court of appeals — conviction for contempt — writ of error proper mode of review.

1. The judgment or order of a Federal circuit court, finding a person not a party to the suit guilty of contempt in violating a restraining order of that court, and imposing a fine therefor, is reviewable in the appropriate circuit court of appeals, under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), § 6, giving that court appellate jurisdiction of final decisions in all cases other than those specified in § 5, which provides for a direct review in the Supreme Court, and limits such review in criminal proceedings to convictions of capital and otherwise infamous crimes.
2. Writ of error, and not appeal, is the proper mode of reviewing a judgment or order of a Federal court finding a person not a party to the suit guilty of contempt in violating a restraining order of that court, and imposing a fine therefor.

[No. 142.]

Argued and submitted April 7, 8, 1904. Decided May 16, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit, presenting the questions whether that court has jurisdiction, under the Circuit Courts of Appeals act, to review a judgment of the Circuit Court, finding a person not a party to the suit guilty of contempt in violating a restraining order of that court, and imposing a fine for such contempt, and whether, if the right to such review exists, it is to be exercised by writ of error or appeal. Answered by holding that the right to review exists, and is to be exercised by writ of error.

Statement by Mr. Justice **Brewer**:

This case is before us on questions certified by the circuit court of appeals for the seventh circuit. The facts as stated are that on August 24, 1901, the W. B. Conkey Company filed its bill of complaint in the circuit court of the United States for the district of Indiana against several parties, praying an injunction, provisional and per-

petual, restraining the defendants, their confederates, agents, and servants, from interfering with the operation of its printing and publishing house. A temporary restraining order was issued, and on December 3, 1901, a perpetual injunction was ordered against all the defendants appearing or served with process. On September 13, 1901, the complainant filed its verified petition, informing the court that various persons, among them Edward E. Bessette (who was not named as a party defendant in the bill), with knowledge of the restraining order, had violated it, describing fully the manner of the violation. Upon the filing of that petition Bessette was ordered to appear before the court and show cause why he should not be punished for contempt in violating the restraining order. He appeared and filed his answer to the charges, and upon a hearing the court found him guilty of contempt, and imposed a fine of \$250. From this order or judgment Bessette prayed an appeal to the circuit court of appeals, which was allowed, and the record filed in that court. Upon these facts the circuit court of appeals certified the following questions:

"First. Whether the circuit court of appeals has jurisdiction to review an order or judgment of the circuit court of the United States, finding a person guilty of contempt for violation of an order of that court, and imposing a fine for the contempt.

"Second. Whether the 'Act to Establish Circuit Courts of Appeals, and to Define and Regulate in Certain Cases Jurisdiction of the Courts of the United States, and for Other Purposes,' approved March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), authorizes a review by a circuit court of appeals of a judgment or order of a circuit court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that court, made in such suit, and imposing a fine for such contempt.

"Third. Whether, if such review be sanctioned by law, a person so adjudged in contempt, and fined therefor, who is not a party to the suit, can bring the matter to the circuit court of appeals by appeal. [326]

"Fourth. Whether, if such review be sanctioned by law, a person so adjudged in contempt, and fined therefor, who is not a party to the suit, can bring the matter to the circuit court of appeals by writ of error."

Mr. William Velpeau Rooker argued the cause and filed a brief for Bessette:

These contempt proceedings were intended to be remedial and were reviewable by appeal.

Lester v. People, 150 Ill. 408, 41 Am. St.

NOTE.—On the jurisdiction of the circuit court of appeals—see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *Salmon v. Mills*, 13 C. C. A. 374, and *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

On distinction between appeal and writ of error—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

Rep. 375, 23 N. E. 387, 37 N. E. 1004; *People ex rel. Munsell v. Oyer & Terminer Ct.* 101 N. Y. 245, 54 Am. Rep. 691, 4 N. E. 259; *Holbrook v. Ford*, 153 Ill. 633, 27 L. R. A. 324, 46 Am. St. Rep. 917, 39 N. E. 1091; *Farmers' Loan & T. Co. v. Bankers & M. Teleg. Co.* 148 N. Y. 315, 31 L. R. A. 403, 51 Am. St. Rep. 690, 42 N. E. 707; *Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814; *Seaward v. Paterson*, 76 L. T. N. S. 215; *Phillips v. Detroit*, 2 Flipp. 92, 19 Fed. Cas. No. 11,101; *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Bank Comrs. v. Bank of Buffalo*, 6 Paige, 497; 1 Barb. Ch. Pr. 633; High, Inj. §§ 853, 854, 862, 863; *Safford v. People*, 85 Ill. 558; Brown, Jurisdiction of Courts, §§ 118, 119.

This proceeding was carried on in the trial court under the administration of the W. B. Conkey Company, whose counsel directed the service and return of process, assembled the evidence, conducted the trial, and are here resisting the rights of the appellant. The nature of the charge, as well as the circumstances of the administration of the case, will convince this court that the proceeding is civil. If we look to the law for an exemplification of criminal contempt it will be found that the limitations in that branch of jurisprudence exclude this case from that class.

Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205; *Re Chiles*, 22 Wall. 157, *sub nom.* *Texas v. White*, 22 L. ed. 819; *Re Savin*, 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699.

Indirect contempt proceedings may be classified (1) according to the nature of the relief sought, and (2) according to the nature of the charge made in the petition or information. If classified according to the nature of the relief sought, we again find that there are two distinct divisions, *viz.*, those wherein a remedial fine is entered for the use and benefit of the party aggrieved (*Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814) and those wherein a punitive fine is entered for the use and benefit of the government, at the same time punishing the culprit and vindicating the majesty of the law.

New Orleans v. New York Mail S. S. Co. 20 Wall. 387, 22 L. ed. 354.

If contempt proceedings be considered according to the nature of the charge made; *i. e.*, according to the averments in the petition or information, we find again that there are the two distinct classes; *viz.*, those wherein the rights of the complaining party have been outraged (*Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814), and those wherein the administration of public justice has been ob-

structed (*New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354). An examination of these cases will show that, uniformly, a remedial fine has been entered when the complaint was made of a transgression upon the rights of the individual in whose behalf the injunction was issued, and that, uniformly, a punitive fine has been entered when the complaint was also made of an obstruction to the due administration of justice. These distinctions are clearly pointed out in many well-considered cases. Remedial fines for the vindication of private rights were before the courts in these cases:

Worden v. Searls, 121 U. S. 26, 30 L. ed. 857, 7 Sup. Ct. Rep. 814; *Re Graves*, 29 Fed. 60; *United States v. Berry*, 24 Fed. 783; *United States ex rel. D. & N. O. R. Co. v. Atcheson, T. & S. F. R. Co.* 16 Fed. 853; *Vanzandt v. Argentine Min. Co.* 2 McCrary, 642; *Re Chiles*, 22 Wall. 163, *sub nom.* *Texas v. White*, 22 L. ed. 819; *Durant v. Washington County*, Woolw. 377, Fed. Cas. No. 4,191; *New Orleans v. New York Mail S. S. Co.* 20 Wall. 392, 22 L. ed. 357; *Kirk v. Milwaukee Dust Collector Mfg. Co.* 26 Fed. 508.

The rules by which proceedings against Mr. Bessette may be classified are the following: (1) According to the parties invoking the jurisdiction in the original bill; (2) according to the subject-matter of the averments in the original bill; (3) according to the specified transgressions, as they are charged against the particular persons, and in the very peculiar manner in the original bill; (4) according to the relief demanded in the original bill; (5) according to the terms of the restraining order; (6) according to the parties invoking the jurisdiction in the petition for attachment; (7) according to the subject-matter of the averments in the petition for attachment; (8) according to the specific transgressions charged in the petition for attachment; (9) according to the procedure in the petition for attachment.

Worden v. Searls, 121 U. S. 26, 30 L. ed. 857, 7 Sup. Ct. Rep. 814; *New Orleans v. New York Mail S. S. Co.* 20 Wall. 392, 22 L. ed. 357; *Re Graves*, 29 Fed. 60; *United States v. Berry*, 24 Fed. 783; *United States ex rel. D. & N. O. R. Co. v. Atcheson, T. & S. F. R. Co.* 16 Fed. 853; *Vanzandt v. Argentine Min. Co.* 2 McCrary, 642; *Re Chiles*, 22 Wall. 163, *sub nom.* *Texas v. White*, 22 L. ed. 819; *Durant v. Washington County*, Woolw. 377, Fed. Cas. No. 4,191; *Kirk v. Milwaukee Dust Collector Mfg. Co.* 26 Fed. 508; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; *Eureka Lake & Y. Canal Co. v. Superior Court*, 116 U. S. 410, 29 L. ed. 671, 6 Sup.

Ct. Rep. 429; *Stimpson v. Putnam*, 41 Vt. 238.

In *Re Savin*, 131 U. S. 273, 33 L. ed. 152, 9 Sup. Ct. Rep. 699, the court reviewed the various acts of Congress relating to the obstruction of the due administration of justice, and applied the limitation of the statute; i. e.: The transgression must be committed near to the court before the offense can be punishable as contempt. The same rule is followed in *Re Cuddy*, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703. In *Eilenbecker v. Plymouth County*, 134 U. S. 32, 33 L. ed. 802, 10 Sup. Ct. Rep. 424, the court makes it plain that the function of contempt proceedings is to require compliance with, or performance of, the orders of the court, rather than to enforce strangers to desist from entering upon the scene, regardless of what their individual rights in the premises may be.

Thus, from every point of view it appears that the proceedings against Besette were civil and private; that the intent was to allow a remedy to the W. B. Conkey Company, rather than to redress a public wrong. On the plainest principles of justice Besette ought to be allowed to appeal from so much of the record as was final as to him.

Lester v. People, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004.

As to the nature of contempt in civil cases, and wherein the proceeding is a remedy for compensating the injured party, see —

Re Tift, 11 Fed. 463; *Searls v. Worden*, 13 Fed. 716; *Matthews v. Spangenberg*, 15 Fed. 813; *American Graphophone Co. v. Walcutt*, 86 Fed. 468; *Economist Furnace Co. v. Wrought-Iron Range Co.* 86 Fed. 1010; *Indianapolis Water Co. v. American Strawboard Co.* 75 Fed. 972; *Hendryx v. Fitzpatrick*, 19 Fed. 810; *Wells, F. & Co. v. Oregon R. & Nav. Co.* 9 Sawy. 601, 19 Fed. 20; *Mallory Mfg. Co. v. Fox*, 20 Fed. 409; *Roemer v. Neumann*, 23 Fed. 447; *Woodruff v. North Bloomfield Gravel Min. Co.* 27 Fed. 795; *Spill v. Celluloid Mfg. Co.* 28 Fed. 870; *Re Graves*, 29 Fed. 60; *The President ex rel. Moran v. Elizabeth*, 40 Fed. 799; *United States v. Taylor*, 44 Fed. 2; *Woodruff v. North Bloomfield Gravel Min. Co.* 45 Fed. 129; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 52 Fed. 937; *Re Copenhagen*, 54 Fed. 660; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *A. B. Dick Co. v. Henry*, 88 Fed. 80; *Rodgers v. Pitt*, 89 Fed. 424; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co.* 92 Fed. 774; *United States v. Sweeney*, 95 Fed. 434; *Re Recse*, 98 Fed. 984, 47 C. C. A. 87, 107 Fed. 942; *Callanan v. Friedman*, 101 Fed. 321; *Cary Mfg. Co. v. Acme Flexi-*
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ble Clasp Co. 48 C. C. A. 118, 108 Fed. 873; *Royal Trust Co. v. Washburn, B. & I. River R. Co.* 113 Fed. 531; *Matheson v. Hanna-Schoellkopf Co.* 122 Fed. 836; *Chicago Directory Co. v. United States Directory Co.* 123 Fed. 194; *Re Fortunato*, 123 Fed. 622; *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* 124 Fed. 736; *Re Atkinson*, 3 Pittsb. 423, Fed. Cas. No. 606; *Sparkman v. Higgins*, 2 Blatchf. 29, Fed. Cas. No. 13,209; *United States ex rel. Berrard v. Bearnce*, Fed. Cas. No. 14,551a; *Wartman v. Wartman*, Taney, 362, Fed. Cas. No. 17,210; *Wetherill v. New Jersey Zinc Co.* 1 Bann. & Ard. 105, Fed. Cas. No. 17,463; *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429.

And further, as to the nature of contempt in civil cases, and wherein the proceeding is a remedy to require obedience by coercion, see—

United States v. Sowles, 16 Fed. 536; *Norris v. Hassler*, 23 Fed. 581; *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. 17; *Bogart v. Electrical Supply Co.* 23 Blatchf. 552, 27 Fed. 722; *Southern Development Co. v. Houston & T. C. R. Co.* 27 Fed. 344; *Re Terry*, 37 Fed. 649; *Morss v. Domestic Sewing-Mach. Co.* 38 Fed. 482; *Johnson Steel Street-Rail Co. v. North Branch Steel Co.* 48 Fed. 196; *Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 803; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 746; *Re Copenhagen*, 54 Fed. 660; *Sabin v. Fogarty*, 70 Fed. 482; *Animarium Co. v. Bright*, 82 Fed. 197; *Davis v. Davis*, 90 Fed. 791; *Re Greenberg*, 106 Fed. 496; *Smith v. Belford*, 45 C. C. A. 526, 106 Fed. 658; *Tornanses v. Melsing*, 45 C. C. A. 615, 106 Fed. 775; *Champlain Constr. Co. v. O'Brien*, 107 Fed. 333; *Re Nevitt*, 54 C. C. A. 622, 117 Fed. 448; *Re Hausman*, 58 C. C. A. 260, 121 Fed. 984; *Thompson v. Scott*, 4 Dill. 508, Fed. Cas. No. 13,975; *United States v. Davis*, 5 Cranch C. C. 622, Fed. Cas. No. 14,926.

The offense is criminal when committed against the public or the agencies of the public, and the fine is punitive.

Re Ellerbe, 4 McCrary, 449, 13 Fed. 530; *Re Doolittle*, 23 Fed. 544; *United States v. Kane*, 23 Fed. 748; *United States v. Berry*, 24 Fed. 780; *Sharon v. Hill*, 24 Fed. 726; *Naumburg v. Hyatt*, 24 Fed. 898; *Ex parte Schulenburg*, 25 Fed. 211; *Re Higgins*, 27 Fed. 443; *Ex parte Perkins*, 29 Fed. 900; *Re Kays*, 35 Fed. 288; *Re Terry*, 13 Sawy. 440, 36 Fed. 419; *Re Birdsong*, 39 Fed. 599; *Re Sowles*, 41 Fed. 752; *United States v. Murphy*, 44 Fed. 39; *Re Manning*, 44 Fed. 275; *Vanzandt v. Argentine Min. Co.* 48 Fed. 770; *The P. I. Nevius*, 48 Fed. 927; *Lake Erie & W. R. Co. v. Bailey*, 61 Fed.

494; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 803; *United States v. Jose*, 63 Fed. 951; *Re Ackler*, 66 Fed. 290; *Re Sumnerhayes*, 70 Fed. 769; *Re Brule*, 71 Fed. 943; *Indianapolis Water Co. v. American Strawboard Co.* 75 Fed. 972; *Stateler v. California Nat. Bank*, 77 Fed. 43; *Mackall v. Ratchford*, 82 Fed. 41; *Re Huntley*, 29 C. C. A. 468, 56 U. S. App. 609, 85 Fed. 889; *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 86 Fed. 538; *Bowers v. Von Schmidt*, 87 Fed. 293; *Anderson v. Comptois*, 48 C. C. A. 1, 109 Fed. 971; *Re McKenzie*, 180 U. S. 536, 45 L. ed. 657, 21 Sup. Ct. Rep. 468; *United States v. Weber*, 114 Fed. 950; *Re Noyes*, 57 C. C. A. 445, 121 Fed. 210; *United States ex rel. Guaranty Trust Co. v. Haggerty*, 116 Fed. 510; *United States ex rel. Guaranty Trust Co. v. Gehr*, 116 Fed. 520; *Castner v. Pocahontas Collieries Co.* 117 Fed. 184; *Ex parte Richards*, 117 Fed. 658; *Ex parte McLeod*, 120 Fed. 130; *Chisolm v. Caines*, 121 Fed. 397; *Re Fortunato*, 123 Fed. 622; *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* 124 Fed. 736; *Ex parte Beebees*, 2 Wall. Jr. 127, Fed. Cas. No. 1,220; *Ex parte Benedict*, 4 West. Law Month. 449, Fed. Cas. No. 1,292; *Doubleday v. Sherman*, 8 Blatchf. 45, Fed. Cas. No. 4,020; *King v. Ohio & M. R. Co.* 7 Biss. 529, Fed. Cas. No. 7,800; *Re Mullee*, 7 Blatchf. 23, Fed. Cas. No. 9,911; *Secor v. Toledo, P. & W. R. Co.* 7 Biss. 513, Fed. Cas. No. 12,605; *Thompson v. Scott*, 4 Dill. 508, Fed. Cas. No. 13,975; *United States v. De Vaughan*, 3 Cranch C. C. 84, Fed. Cas. No. 14,952.

The circuit court of appeals act gives the right to a review by appeal or writ of error, according to the nature of the principal case in the court below.

Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *Rouse v. Hornsby*, 161 U. S. 588, 40 L. ed. 817, 16 Sup. Ct. Rep. 610; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 577, 578, 43 L. ed. 814, 817, 19 Sup. Ct. Rep. 500; *Baggs v. Martin*, 179 U. S. 206, 45 L. ed. 155, 21 Sup. Ct. Rep. 109.

This act was passed to facilitate the prompt disposition of cases in this court, and to relieve it of the oppressive burden of general litigation which impeded the examination of cases of public concern, and operated to delay suitors.

Lau Ow Bew v. United States, 144 U. S. 47, 55, 36 L. ed. 340, 343, 12 Sup. Ct. Rep. 517.

The act creating the circuit court of appeals confers upon that court jurisdiction in all cases save those which are reserved to this court by § 5. There is no class of cases unallotted or unassigned.

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United States v. American Bell Teleph. Co. 159 U. S. 548, 551, 40 L. ed. 255, 256, 16 Sup. Ct. Rep. 69; *Folsom v. United States*, 160 U. S. 121, 40 L. ed. 363, 16 Sup. Ct. Rep. 222; *United States v. Rider*, 163 U. S. 133, 139, 140, 41 L. ed. 102, 104, 16 Sup. Ct. Rep. 983; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 280, 45 L. ed. 859, 861, 21 Sup. Ct. Rep. 646.

Contempt proceedings are interlocutory in equity, and have the legal effect of an order continuing the injunction.

Fischer v. Hayes, 6 Fed. 63, 102 U. S. 121, 26 L. ed. 95; *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. 17; *Searls v. Worden*, 13 Fed. 716; *Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814; *United States v. Atchison, T. & S. F. R. Co.* 16 Fed. 853; *Hendryx v. Fitzpatrick*, 19 Fed. 810; *Burr v. Kimbark*, 29 Fed. 428; *Temple Pump Co. v. Goss Pump & Rubber Bucket Mfg. Co.* 31 Fed. 292; *Howard v. Mast, B. & B. Co.* 33 Fed. 867; *Clark v. Wilson*, 33 Fed. 331; *Ulman v. Ritter*, 72 Fed. 1000; *Newport Light Co. v. Newport*, 151 U. S. 527, 539, 38 L. ed. 259, 263, 14 Sup. Ct. Rep. 429.

Cases of contempt were contemplated by Congress in its designation given in the clause "in all other cases."

King v. McLean Asylum, 26 L. R. A. 784, 12 C. C. A. 145, 21 U. S. App. 481, 64 Fed. 331; *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 392, 22 L. ed. 354, 357; *Re Swan*, 150 U. S. 637, 652, 37 L. ed. 1207, 1211, 14 Sup. Ct. Rep. 225; *United States v. Jacobi*, 1 Flipp. 108, Fed. Cas. No. 15,460.

For reviews in contempt proceedings since the circuit court of appeals was created, see—

Re Spofford, 62 Fed. 443; *Gould v. Sessions*, 14 C. C. A. 366, 35 U. S. App. 281, 67 Fed. 163; *Cary Mfg. Co. v. Acme Flexible Clasp Co.* 48 C. C. A. 118, 108 Fed. 873; *Enoch Morgan's Sons Co. v. Gibson*, 59 C. C. A. 46, 122 Fed. 420; *Westinghouse Air Brake Co. v. Christiansen Engineering Co.* 123 Fed. 632; *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407.

Congress desired the courts of appeal to have the utmost latitude in speedily determining the issues presented by interlocutory orders, and accordingly passed the act approved February 18, 1895 (28 Stat. at L. 666), which makes all orders appealable which may involve the merits of the controversy.

Re Tampa Suburban R. Co. 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177; *Huguley Mfg. Co. v. Galetton Cotton Mills*,

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184 U. S. 290, 294, 46 L. ed. 546, 547, 22 Sup. Ct. Rep. 452; *Re Huguley Co.* 184 U. S. 297, 301, 46 L. ed. 549, 551, 22 Sup. Ct. Rep. 455.

Messrs. **Jacob Newman, Salmon O. Levinson, and Benjamin V. Becker** submitted the cause for W. B. Conkey Company:

An order adjudging a person in contempt, and imposing a punishment therefor, cannot be reviewed, either by appeal or writ of error.

Crosby's Case, 3 Wils. 188; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *Yates' Case*, 4 Johns. 315; *Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 374; *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354; *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *Re Chetwood*, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385.

The order finding Besette guilty of contempt, and sentencing him to pay a fine, is, in effect, a judgment in a criminal case, and can be reviewed, if at all, only by writ of error.

Ex parte Kearney, 7 Wheat. 38, 5 L. ed. 391; *New Orleans v. New York Mail S. S. Co.* 20 Wall. 392, 22 L. ed. 357; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; *O'Neal v. United States*, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776; *Bucklin v. United States*, 159 U. S. 680, 40 L. ed. 304, 16 Sup. Ct. Rep. 182; *Sessions v. Gould*, 11 C. C. A. 546, 26 U. S. App. 358, 63 Fed. 1001.

The act of March 3, 1891, creating circuit courts of appeal, did not give an appeal or writ of error from orders or judgments which, prior thereto, were not reviewable.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

Mr. Justice **Brewer** delivered the opinion of the court:

The primary question is whether the circuit court of appeals can review an order of a district or circuit court in contempt proceedings. A secondary question is, How, if there be a right of review, can it be exercised?

A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action.

The power to punish for contempt is inherent in all courts. It is true Congress, by statute (1 Stat. at L. 83, chap. 20), declared that the courts of the United States

"shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." And this general power was limited by the act of March 2, 1831 (4 Stat. at L. 487, chap. 99, Rev. Stat. § 725, U. S. Comp. Stat. 1901, p. 583), the limitation being—

"That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the *administration of justice, the [327] misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

But in respect to this it was held in *Ex parte Robinson*, 19 Wall. 505, 510, 22 L. ed. 205, 208:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and, consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by acts of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."

The purpose of contempt proceedings is to uphold the power of the court, and also to secure to suitors therein the rights by it awarded. As said in *Re Chiles*, 22 Wall. 157, 168, *sub nom. Texas v. White*, 22 L. ed. 819, 823:

"The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and second, to compel his performance of some act or duty required of him by the court, which he refuses to perform."

In *Re Nevitt*, 54 C. C. A. 622-632, 117

[328] Fed. 448, 458, Judge Sanborn, of the court of appeals for the eighth circuit, *considered the nature of contempt proceedings at some length. We quote the following from his opinion:

"Proceedings for contempts are of two classes,—those prosecuted to preserve the power, and vindicate the dignity, of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *Thompson v. Pennsylvania R. Co.* 48 N. J. Eq. 105, 108, 21 Atl. 182; *Hendryx v. Fitzpatrick*, 19 Fed. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Barn. & C. 652; *People ex rel. Munsell v. Oyer & Terminer Ct.* 101 N. Y. 245, 247, 54 Am. Rep. 691, 4 N. E. 259; *Phillips v. Welch*, 11 Nev. 187, 190; *State v. Knight*, 3 S. D. 509, 513, 44 Am. St. Rep. 809, 54 N. W. 412; *People ex rel. Gaynor v. McKane*, 78 Hun, 154, 160, 28 N. Y. Supp. 981; 4 Bl. Com. 285; 7 Am. & Eng. Enc. Law, p. 68. A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings." See also *Rapalje, Contempts*, § 21.

[329] Doubtless the distinction referred to in this quotation is the cause *of the difference in the rulings of various state courts as to the right of review. Manifestly, if one inside of a court room disturbs the order of proceedings, or is guilty of personal misconduct in the presence of the court, such action may properly be regarded as a contempt of court; yet it is not misconduct in which any individual suitor is specially interested. It is more like an ordinary crime which affects the public at large, and the criminal

nature of the act is the dominant feature. On the other hand, if, in the progress of a suit, a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. He is the one primarily interested, and if it should turn out, on appeal from the final decree in the case, that the original order was erroneous, there would, in most cases, be great propriety in setting aside the punishment which was imposed for disobeying an order to which the adverse party was not entitled.

It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party.

In the case at bar the controversy between the parties to the suit was settled by final decree, and from that decree, so far as appears, no appeal was taken. An appeal from it would not have brought up the proceeding against the petitioner, for he was not a party to the suit. Yet, being no party to the suit, he was found guilty of an act in resistance of the order *of the court. His [330] case, therefore, comes more fully within the punitive than the remedial class. It should be regarded like misconduct in a court room or disobedience of a subpoena, as among those acts primarily directed against the power of the court, and in that view of the case we pass to a consideration of the questions presented.

In *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, a case of habeas corpus brought to review an order of the circuit court imprisoning for contempt, we said (p. 596, L. ed. p. 1106, Sup. Ct. Rep. p. 911):

"In brief, a court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

And again, in summing up our conclusions (p. 599, L. ed. p. 1108, Sup. Ct. Rep. p. 912):

"That the proceeding by injunction is of a civil character, and may be enforced by

proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for, and no defense to, a prosecution for any criminal offenses committed in the course of such violation."

At common law it was undoubted that no court reviewed the proceedings of another court in contempt matters. In *Crosby's Case*, 3 Wils. 188, Mr. Justice Blackstone said:

"The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court."

In the case of *Ex parte Yates*, 4 Johns. 318, 369, Chief Justice Kent, after reviewing the English cases, and referring to the *Case of Shaftsbury*, 1 Mod. 144, concluded as follows:

"The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle, that every court, at least of the superior kind, in which great confidence is placed, must be the sole judge, in the last resort, of contempts arising therein, is more [331] explicitly defined and more *emphatically enforced in the two subsequent cases of *Reg. v. Paty* [2 Ld. Raym. 1105], and of *Brass v. Crosby* [3 Wils. 188]."

Without stopping to notice the decisions of the courts of the several states, whose decisions are more or less influenced by the statutes of those states, we turn to an examination of the rulings of this court in respect to the finality of contempt proceedings.

In *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391, a writ of habeas corpus was issued by this court in behalf of a party committed to jail by the circuit court of the district of Columbia for contempt in refusing to answer a question put to him on a trial. The application for a discharge was refused. The reasons therefor are disclosed by the following quotations from the opinion delivered by Mr. Justice Story (p. 42, L. ed. p. 392):

"It is to be considered that this court has no appellate jurisdiction confided to it in criminal cases, by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the circuit court, in any case where a party has been convicted of a public offence. . . . If, then, this court cannot directly revise a judgment of the circuit court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly? . . . If this

were an application for a habeas corpus, after judgment on an indictment for an offense within the jurisdiction of the circuit court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside and discharge the prisoner. There is, in principle, no distinction between that case and the present; for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled, upon full deliberation, in the case of *Brass Crosby, Lord Mayor of London*, 3 Wils. 188."

New Orleans v. New York Mail S. S. Co. 20 Wall. 387, 22 L. ed. 354, was a suit by the company in the circuit court of the United States for an injunction restraining the city from interfering with its *possession [332] of certain premises. Pending this suit the mayor of the city applied to a state court for an injunction restraining the company from rebuilding an inclosure of the premises which the city had destroyed, and the injunction was granted. At this time the city was the only party defendant in the circuit court, although service upon it had been made by delivering process to the mayor. Subsequently the mayor was made a party defendant by a supplemental bill. A final decree was entered against the defendants, and, as a part thereof, was an order adjudging the mayor guilty of contempt in suing out the injunction in the state court, and imposing a fine therefor. Thereupon the case was brought to this court, and, among other things, the validity of the punishment for contempt was challenged, in respect to which we said (p. 392, L. ed. p. 357):

"The fine of \$300 imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion."

Hayes v. Fischer, 102 U. S. 121, 26 L. ed. 95, was a suit in equity to restrain the use of a patented device. An interlocutory injunction was granted. The defendant was fined for contempt in violating this injunction, and the entire amount of the fine ordered to be paid over to the plaintiff in reimbursement. To reverse this order defendant sued out a writ of error. A motion to dismiss was sustained, Mr. Chief Justice Waite saying for the court (p. 122, L. ed. p. 96):

"If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

[333] *"If the proceeding below, being for contempt, was independent of and separate from, the original suit, it cannot be re-examined here, either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391, and the rule then established was followed as late as *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354. It follows that we have no jurisdiction."

In *Ex parte Fisk*, a case of habeas corpus, 113 U. S. 713, 718, 28 L. ed. 1117, 1119, 5 Sup. Ct. Rep. 724, 726, Mr. Justice Miller speaking for the court declared:

"There can be no doubt of the proposition that the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error or appeal to this court. Nor is there in the system of Federal jurisprudence any relief against such orders, when the court has authority to make them, except through the court making the order, or, possibly, by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

In *Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814, a final decree was entered in a suit for infringement of a patent, in favor of the plaintiff, and from that decree the defendants appealed. A preliminary injunction had been granted, and prior to the final decree the defendants were adjudged guilty of a contempt in violating it, and ordered to pay to the complainant the sum of \$250 as a fine therefor, together with the costs of the contempt proceedings. This court was of opinion that the decree in favor of the plaintiff was erroneous, and reversed it; and in addition to directing a dismissal of the bill, set aside the order imposing the fines in the contempt proceedings, saying in respect thereto (p. 25, L. ed. p. 857, Sup. Ct. Rep. p. 820):

"We have jurisdiction to review the final decree in the suit and all interlocutory de-
[334] crees and orders. These fines were *directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this

direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent."

But, while setting aside the orders imposing the fines, it was "without prejudice to the power and right of the circuit court to punish the contempt referred to in those orders by a proper proceeding."

Again, in *Re Chetwood*, an application for prohibition (165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385, 392) is this ruling:

"Judgments in proceedings in contempt are not reviewable here on appeal or error. *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95; *Re Debs*, 158 U. S. 564, 573, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, 159 U. S. 251, 15 Sup. Ct. Rep. 1039. But they may be reached by certiorari, in the absence of any other adequate remedy. The writ of certiorari will be allowed to bring up the record, so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error, and directing them, or either of them, to refrain from prosecuting the one writ in the name of the bank, and to dismiss the other, may be revised and annulled."

In *O'Neal v. United States*, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776, in which an order of the district court punishing for contempt was brought here on writ of error, we said (p. 38, L. ed. p. 946, Sup. Ct. Rep. 777):

"While proceedings in contempt may be said to be *sui generis*, the present judgment is, in effect, a judgment in a criminal case, over which this court has no jurisdiction on error. § 5, act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549), as amended by the act of Jan. 20, 1897 (29 Stat. at L. 492, chap. 68, U. S. Comp. Stat. 1901, pp. 549, 556); *Chetwood Case*, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385; *Tinsley v. Anderson*, 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; *Cary Mfg. Co. v. Aeme Flexible Clasp Co.* 187 U. S. 427, 428, 47 L. ed. 244, 245, 23 Sup. Ct. Rep. 211."

In *Re Watts*, 190 U. S. 1, 47 L. ed. 933, 23 Sup. Ct. Rep. 718, the petitioners having been found guilty of a contempt of court by the district court *of Indiana, applied for a [335] writ of habeas corpus. We issued with that writ a certiorari, and brought the entire record to this court, and, upon the evidence, discharged the petitioners.

From these decisions it is apparent that the uniform ruling of this court has been

against the right to review the decisions of the lower court in contempt proceedings by writ of error or by appeal, except in cases of purely remedial and interlocutory orders. Yet we have issued certioraries in aid of habeas corpus proceedings and applications for prohibition, by which the facts in the contempt case have been brought before us, and then we have passed upon the merits of the decision in the lower court.

The thought underlying the denial by this court of the right of review by writ of error or appeal has not been that there was something in contempt proceedings which rendered them not properly open to review, but that they were of a criminal nature, and no provision had been made for a review of criminal cases. This was true in England as here. In that country, as is well known, there was no review of criminal cases by appeal or writ of error. Neither was there in our Federal system prior to the act of February 3, 1889 (25 Stat. at L. 656, chap. 113), which provided for a writ of error from this court in capital cases. While the act creating the court of appeals, March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), authorized a review of criminal cases, yet it limited the jurisdiction of this court to cases of a conviction for a capital or otherwise infamous crime—since limited to capital cases (29 Stat. at L. 492, chap. 68, pp. 549, 556), and gave the right of review of all other criminal cases to the circuit courts of appeal; and, of course, a proceeding in contempt cannot be considered as an infamous crime. Habeas corpus is not treated as a writ of error, and while it may be issued by one court to inquire into the action of a court of co-ordinate jurisdiction, yet the inquiry is only whether the action of the court in imposing punishment was within its jurisdiction. Even in an appellate court, the writ of habeas corpus is not of itself the equivalent of a writ of error, although, [336] when supplemented by certiorari, as *shown in the case of *Re Watts*, 190 U. S. 1, 47 L. ed. 933, 23 Sup. Ct. Rep. 718, it may bring the whole case before the appellate court for review.

The act of March 3, 1891, establishing circuit courts of appeals must now be more fully considered. While its primary purpose was the relief of this court by the creation of new appellate courts, and the distribution between those courts and this of the entire appellate jurisdiction of the United States (*The Paquete Habana*, 175 U. S. 677, 681, 44 L. ed. 320, 321, 20 Sup. Ct. Rep. 290, and cases cited), yet it also enlarged the area of appellate jurisdiction. As originally passed it gave to this court jurisdiction over cases of infamous crimes

in addition to that which it theretofore had in capital cases. By § 6 it gave to the circuit courts of appeals appellate jurisdiction to review by appeal or writ of error final decisions in the district court and the existing circuit courts in all cases other than those provided for in the preceding section. That this was intended to include criminal cases is evident from a subsequent clause, which makes the decision of the courts of appeals final "in all cases arising . . . under the criminal laws." See *United States v. Rider*, 163 U. S. 132, 138, 41 L. ed. 101, 103, 16 Sup. Ct. Rep. 983, 986, in which, referring to §§ 5 and 6, we said:

"Thus, appellate jurisdiction was given in all criminal cases by writ of error, either from this court or from the circuit courts of appeals."

As, therefore, the ground upon which a review by this court of a final decision in contempt cases was denied no longer exists, the decisions themselves cease to have controlling authority, and whether the circuit courts of appeals have authority to review proceedings in contempt in the district and circuit courts depends upon the question whether such proceedings are criminal cases. That they are criminal in their nature has been constantly affirmed.

The orders imposing punishment are final. Why, then, should they not be reviewed as final decisions in other criminal cases? It is true they are peculiar in some respects, rightfully styled *sui generis*. They are triable only by the court against *whose au- [337] thority the contempts are charged. No jury passes upon the facts; no other court inquires into the charge. *Ex parte Tillinghast*, 4 Pet. 108, 7 L. ed. 798. As said by Mr. Justice Miller, speaking for the court, in *Eilenbecker v. Plymouth County Dist. Ct.* 33 L. ed. 801, 803, 10 Sup. Ct. Rep. 424, 426, 134 U. S. 31, 36:

"If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

See also *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, in which we said (p. 594, L. ed. p. 1106, Sup. Ct. Rep. p. 910):

"But the power of a court to make an order carries with it the equal power to punish for disobedience of that order, and the inquiry as to the question of disobedience

has been from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

But the mode of trial does not change the nature of the proceeding, or take away the finality of the decision. So when, by § 6 of the courts of appeals act, the circuit courts of appeals are given jurisdiction to review the "final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and the preceding section gives to this court jurisdiction to review convictions in only capital or otherwise infamous crimes, and no other provision is found in the statutes for a review of the final order in contempt cases, upon what satisfactory [338]ground can it be held that the final decisions in contempt cases in the circuit or district courts are not subject to review by the circuit courts of appeals? Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of opinion that there is a right of review in the circuit court of appeals. Such review must, according to the settled law of this court, be by writ of error. *Walker v. Dreville*, 12 Wall. 440, 20 L. ed. 429; *Deland v. Platte County*, 155 U. S. 221, 39 L. ed. 128, 15 Sup. Ct. Rep. 82; *Bucklin v. United States*, 159 U. S. 680, 40 L. ed. 304, 16 Sup. Ct. Rep. 182. On such a writ only matters of law are considered. The decision of the trial tribunal, court or jury, deciding the facts, is conclusive as to them.

We, therefore, answer the questions in this way: The second and fourth in the affirmative, the third in the negative. It is unnecessary to answer the first.

NORTHERN PACIFIC RAILWAY COMPANY

v.

ALLINE A. DIXON, Administratrix of the Estate of Chauncey A. Dixon, Deceased.

(See S. C. Reporter's ed. 338-356.)

Master and servant—fellow-servant rule—local telegraph operator and fireman.

Negligence of a local telegraph operator and

station agent of a railway company in observing and reporting by telegraph to the train despatcher the movement of trains past his station, which causes the death of a fireman on such railway, without any fault or negligence of the train despatcher, is the negligence of a fellow servant of the fireman, the risk of which the latter assumes.

[No. 211.]

Argued and submitted April 13, 1904. Decided May 16, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting questions as to the application of the fellow-servant rule to an action against a railway company for the death of a fireman, caused by the negligence of a local telegraph operator and station agent in observing and reporting by telegraph to the train despatcher the movement of trains past his station. *Answered in the affirmative.*

Statement by Mr. Justice Brewer:

This case is before us on questions certified by the circuit court of appeals for the eighth circuit. The facts as stated are that Chauncey A. Dixon was employed on December 25, 1899, by the Northern Pacific Railway Company as a fireman in operating extra freight train No. 162, and while so engaged was killed by means of a head-end collision of that train with extra freight train No. 159. The company had made and promulgated time-tables for its regular trains, and had adopted reasonable rules for the operation of all its trains. The time-tables did not and could not provide for the running of extra trains. The company had in its employ a train despatcher at Missoula, Montana, who had general power and sole authority to make and promulgate orders for the running, on the division of the road on which this collision occurred, of those trains which were not governed by the time-tables. A large proportion of its freight trains on this division were run as extra trains, and the times of their arrival and departure were not shown on the regular time-tables, but their movements were made upon telegraphic orders issued by the train despatcher upon information furnished by telegraph to him by the station agents and operators along the line of the road. All these facts were known to Dixon. One of the rules of the company was: "Operators will promptly record in a book to be kept for the purpose, and report to the superintendent, the time of arrival and de-

NOTE.—Railway telegraph operators as fellow servants of railway trainmen.

In some cases it has been held, generally, 1006

that a telegraph operator at a wayside railroad station is a fellow servant of the men operating trains. *Dana v. New York C. & H. R. R. Co.* 23 Hun, 473; *Slater v. Jewett*, 85 N. Y. 194 U. S.

parture of all trains, and the direction in which extra trains are moving." The reports mentioned in this rule were made to the train despatcher, and he was vested with the authority of the superintendent to issue orders for the movement of trains.

[340] These two freight trains were running in opposite directions, train No. 162 going east. It arrived at Bonita at 12.35 A. M. and left there at 12.50 A. M. The local operator and station agent at that place was asleep, and did not know of or report its arrival and passage to the despatcher. None of the crew of that train were aware of the fact that train No. 159 was coming west. The railroad had but one track. At 1.05 A. M. No. 159 reached Garrison, about 48 miles east of Bonita, and that was reported to the train despatcher. Thereupon he asked the operator at Bonita, by telegraph, whether No. 162 had arrived there, and the operator promptly answered that it had not. This question was repeated, and the operator was asked if he was sure that No. 162 had not passed Bonita, and he replied that he was sure that it had not. Thereupon the train despatcher issued orders for the movement of these two trains, which were sufficient to guard against collision if the information received had been correct, but as it was not correct, the movement of the trains resulted

in a collision and the death of Dixon, to recover damages for which this action was brought. Upon these facts the circuit court of appeals certified the following questions:

"First. When a local telegraph operator is called upon specially by a train despatcher to give information relative to the arrival of a train at his station, to enable the despatcher to formulate orders for the movement of other trains, does the local operator, in the matter of giving such information, act as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the despatcher, that was induced by false information given by the local operator?

"Second. Is the negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train despatcher the movement of trains past his station, which causes the injury or death of a fireman of the company, without any fault or negligence of the train despatcher, the negligence of a vice principal, for which the railway company is liable in damages to the fireman or his personal representatives, or is it the negligence of a fellow servant of the fireman, the risk of which the latter assumes?"

61, 39 Am. Rep. 627; *Price v. Detroit*, G. H. & M. R. Co. 145 U. S. 651, 36 L. ed. 843, 12 Sup. Ct. Rep. 986; *Illinois C. R. Co. v. Bentz*, 40 C. C. A. 56, 99 Fed. 657.

In other cases it has been conceded that the telegraph operator was in a common employment with trainmen, and the ground on which it was sought unsuccessfully to hold the company responsible was that the operator was a vice principal. *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; *Oregon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965; *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125; *Monaghan v. New York C. & H. R. R. Co.* 45 Hun, 113; *Dealey v. Philadelphia & R. R. Co. (Pa.)* 3 Cent. Rep. 112, 4 Atl. 170; *McKaig v. Northern P. R. Co.* 42 Fed. 288; *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 25 L. R. A. 710, 47 Am. St. Rep. 392, 29 Atl. 994; *Reiser v. Pennsylvania Co.* 152 Pa. 39, 34 Am. St. Rep. 620, 25 Atl. 175.

The same doctrine was assumed in *Sheehan v. New York C. & H. R. R. Co.* 91 N. Y. 332, and *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737, 26 N. E. 609.

But there are decisions to the contrary. Thus, a telegraph operator has been held not to be a fellow servant of an engineer (*Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610, 57 Am. Rep. 695); or of a conductor (*East Tennessee, V. & G. R. Co. v. DeArmand*, 86 Tenn. 73, 6 Am. St. Rep. 816, 5 S. W. 600); or of a fireman (*Hail v. Galveston, H. & S. A. R. Co.* 39 Fed. 18); or of a brakeman (*Flannegan v. Chesapeake & O. R. Co.* 40 W. Va. 436, 52 Am. St. Rep. 896, 21 S. E. 1028).

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A fireman and telegraph operator are engaged in different departments, or "about a different piece of work," within the meaning of *Miss. Coust.* 1890, § 193. *Illinois C. R. Co. v. Hunter*, 70 Miss. 471, 12 So. 482.

And a telegraph operator and fireman are not fellow servants under *Sandels & Hill's Dig. (Ark.)* § 6249, declaring only those railway employees to be fellow servants who are engaged in a common service, working together for a common purpose of the same grade, and not engaged in different departments or services. *St. Louis & S. F. R. Co. v. Furry*, 52 C. C. A. 518, 114 Fed. 898.

Some of the cases make a distinction between train dispatchers and telegraph operators, the former only being regarded as vice principals. *Lewis v. Seifert*, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L. R. A. 396, 40 Am. St. Rep. 610, 37 N. E. 466. And see note to *Little Rock & M. R. Co. v. Barry*, 25 L. R. A. 386, on question whether train despatcher or telegraph operator is a fellow servant of trainmen.

On the general question, what servants are deemed to be in the same common employment, apart from statutes, where no questions as to vice principalship arise—see note to *Sofield v. Guggenheim Smelting Co.* 50 L. R. A. 417.

On vice principalship considered with reference to the superior rank of a negligent servant—see note to *Stevens v. Chamberlin*, 51 L. R. A. 513.

For a discussion of vice principalship as determined with reference to the character of the act which caused the injury—see note to *Lafayette Bridge Co. v. Oisen*, 54 L. R. A. 33.

Messrs. **C. W. Bunn**, **Emerson Hadley**, and **James B. Kerr** submitted the cause for the Northern Pacific Railway Company:

The questions certified should not be regarded as open questions in this court. In principle the case seems like several which the court has passed upon.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 387, 37 L. ed. 772, 781, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 353, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345; *Northern P. R. Co. v. Poirier*, 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741; *Northern P. R. Co. v. Charless*, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848. See also *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952, 31 U. S. App. 213; *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125.

The precise question was passed upon by the circuit court of appeals of the sixth circuit in the case of *Illinois C. R. Co. v. Bentz*, 40 C. C. A. 56, 99 Fed. 657, where a failure of the telegraph operator to keep the train despatcher advised as to the whereabouts of a train was, as in this case, the cause of wrong orders resulting in a collision. The court held that the case was controlled by *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952, between which and it there was no distinction.

See also *Oregon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965; *Reiser v. Pennsylvania Co.* 152 Pa. 38, 34 Am. St. Rep. 620, 25 Atl. 175; *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737, 26 N. E. 609.

Mr. A. M. Antrobus argued the cause for administratrix Dixon. Messrs. **D. J. O'Connell** and **R. J. Burglehaus** were with him on the brief:

It is a rule of law that a railroad company should provide safe schedules of times for the running of trains, so that there will be no danger of collisions if the times are observed by the men in charge of the trains running thereunder; and if, from any reason the ordinary schedules have to be departed from, as they are continually, still it is the duty of the railroad company, under such circumstances, to use reasonable care to advise those in charge of other trains on the road of the movement of such trains so as to avoid collisions.

Baltimore & O. R. Co. v. Andrews, 17 L. R. A. 190, 1 C. C. A. 639, 6 U. S. App. 75, 50 Fed. 728; *Northern P. R. Co. v. Poirier*, 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed.

881; *Lewis v. Seifert*, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; *Oregon Short Line & U. N. R. Co. v. Frost*, 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590.

It was as much the duty of the company to give correct orders for the running of its trains, so they would not collide, as was its duty to see that its servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work.

Hough v. Texas & P. R. Co. 100 U. S. 213-226, 25 L. ed. 612-618.

Every reason for the rule that the master is obligated to furnish such tools and machinery, with which his servant is to work, as shall be reasonably safe, is applicable when a railway company is making a schedule for the running of trains. That such duty is nonassignable is well settled.

Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; *Northern P. R. Co. v. Herbert*, 116 U. S. 642-660, 29 L. ed. 755-763, 6 Sup. Ct. Rep. 590.

The local operator is not a fellow servant of train operatives in such a sense as to exonerate the master from liability to operatives injured by obeying an erroneous order of the train despatcher, that was induced by false information given by the local operator.

Dana v. New York C. & H. R. R. Co. 92 N. Y. 639; *Sheehan v. New York C. & H. R. Co.* 91 N. Y. 332; *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L. R. A. 97, 26 Am. St. Rep. 621, 48 N. W. 222; *Northern P. R. Co. v. Mix*, 57 C. C. A. 592, 121 Fed. 476.

If two trains are set in motion, running in opposite directions on the same track, the nature of the act requires that a meeting place be made for them to pass, and that the trainmen be timely notified of the place, to avoid collision. This arises from the character of the act; and it must follow that whoever is connected with the making of the meeting point is necessarily performing a master's duty. The courts have held the despatcher to be a vice principal.

Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 188, 102 Fed. 96; *Lewis v. Seifert*, 116 Pa. 627, 2 Am. St. Rep. 631, 11 Atl. 514; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L. R. A. 396, 40 Am. St. Rep. 616, 37 N. E. 466; *Harrison v. Detroit, L.*

& N. R. Co. 79 Mich. 409, 7 L. R. A. 623, 19 Am. St. Rep. 180, 44 N. W. 1034.

Mr. Justice **Brewer** delivered the opinion of the court:

A servant is entitled to recover damages for injuries suffered through the personal fault or misconduct of his employer, but when the employer has been personally free from blame, and the injury results from the fault or misconduct of a fellow servant, it would seem reasonable that the wrongdoer should be alone responsible, and that one who is innocent should not be called upon [343] to pay damages. And such is the *general rule. But where the employer is a railroad or other corporation having a large number of employees, sometimes engaged in different departments of service, certain limitations or qualifications of this general rule have been prescribed. Perhaps no question has been more frequently considered by the courts than that of fellow servant, and none attended with more varied suggestions and attempted qualifications. It has been discussed so often that any extended discussion in the present case is unnecessary, and it is sufficient to state the principal suggestions, and consider their applicability to the case at bar.

In a recent case in this court (*New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85), it was said (p. 328, L. ed. p. 184, Sup. Ct. Rep. p. 86):

"We have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each, in his particular sphere or department, are directed to the accomplishment of the same general end."

Tested by this, it is obvious that the local operator was a fellow servant with the fireman. They were "engaged in the same general undertaking,"—the movement of trains. They were called upon "to perform duties tending to accomplish the same general purposes," and "the services of each in his particular sphere or department were directed to the accomplishment of the same general end." The fireman who shovels coal into the fire-box of the engine is not doing precisely the same work as the engineer,
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neither is the conductor who signals to the engineer to start or to stop, nor the operator who delivers from the telegraph office at the station to the *engineer orders to [344] move, and who reports the coming and going of trains; and yet they are all working, each in his particular sphere, towards the accomplishment of this one result,—the movement of trains.

Another qualification suggested is where the one guilty of the negligence has such general control, and occupies such relation to the work, that he, in effect, takes the place of the employer,—becomes a vice principal, or *alter ego*, as he is sometimes called. If an employer, whether an individual or a corporation, giving no personal attention to the work, places it in the entire control of another, such person may be not improperly regarded as the principal, and his negligence that of the principal. That thought has, in some cases, been carried further, and when it appeared that the work in which the employer was engaged was divided into separate and distinct departments, the one in charge of each of those departments has been regarded as also a vice principal. In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 383, 37 L. ed. 772, 779, 13 Sup. Ct. Rep. 914, 919, we said:

"It is only carrying the same principle a little further, and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice principals,—representatives of the master as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the *Ross Case* [112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184], holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are, in and of themselves, separate and distinct."

So also in *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, it was held that the foreman of a gang of laborers employed *in putting in [345] ties and keeping in repair a part of the road, although he had the power to hire or discharge any laborer, and exclusive control and management in all matters connected with their work, was a fellow servant with the men in the gang; and on page 355, L. ed.

p. 997, Sup. Ct. Rep. p. 846, the rule was thus stated:

"The rule is that in order to form an exception to the general law of nonliability the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case."

Obviously there is nothing in this qualification which has application here. The negligent person was a local operator and station agent, and, in no reasonable sense of the term, a vice principal or in charge of any department.

Another suggestion is, that the doctrine of fellow servant does not apply where the servant injured and the servant guilty of the negligence are engaged in separate departments of service. In *Northern P. R. Co. v. Hamby*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, a common laborer was employed under the direction of a section boss in building a culvert on the line of defendant's railroad, and while so employed was struck and injured by a moving passenger train, the injury resulting solely through the misconduct and negligence of the conductor and engineer of the train. It was held that they were fellow servants; and in respect to this suggestion it was said (p. 357, L. ed. p. 1012, Sup. Ct. Rep. p. 984):

"As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the [346] possibility *of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply."

Applying this to the case before us, manifestly the work of the fireman and the operator brought the parties closely together in the matter of the movement of the trains. Dixon knew that any negligence on the part of the operator might result in injury to him, and must have contemplated such possibility when he entered the service of the company.

It is urged that "it is as much the duty

of the company to give correct orders for the running of its trains so they would not collide as it was to see that their servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work," and hence, that one who is employed in securing the correct orders for the movement of trains is doing the personal work of the employer, and not to be regarded as a fellow servant of those engaged in operating and running the trains. But the master does not guarantee the safety of place or of machinery. His obligation is only to use reasonable care and diligence to secure such safety. Here the company had adopted reasonable rules for the operation of all its trains. No imputation is made of a want of competency in either the train despatcher or the telegraph operator. So far as appears, they were competent and proper persons for the work in which they were employed. A momentary act of negligence is charged against the telegraph operator. No reasonable amount of care and supervision which the master had taken beforehand would have guarded against such unexpected and temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere and at all times, and, in the nature of things, cannot guard against *every temporary act of negligence [347] by one of his employees. As said in *Whitaker v. Bent*, 167 Mass. 588, 589, 46 N. E. 121, 122, by Mr. Justice Holmes, then a member of the supreme court of Massachusetts:

"The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes. *McCann v. Kennedy*, 167 Mass. 23, 44 N. E. 1055. See also *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209, 46 Am. Rep. 458; *Moynihan v. Hills Co.* 146 Mass. 586, 592, 593, 4 Am. St. Rep. 348, 16 N. E. 574; *Bjbjian v. Woonsocket Rubber Co.* 164 Mass. 214, 219, 41 N. E. 265."

Without discussing more at length the various forms and phases of the question of fellow servants, or the many suggestions which have been made to qualify or limit the general doctrine, we answer the questions presented as follows:

First. The telegraph operator was, under the circumstances described, a fellow servant of the fireman.

Second. The negligence of the telegraph operator was the negligence of a fellow

servant of the fireman, the risk of which the latter assumed.

Mr. Justice **White**, with whom concurred the CHIEF JUSTICE, Mr. Justice **Harlan**, and Mr. Justice **McKenna**, dissenting:

As it is given to me to understand the ruling now made, it reverses many previous decisions of this court, and introduces into the doctrine of fellow servant, as hitherto applied in those decisions, a contradiction which will render it impossible in the future to test the application of the rule of fellow servant by any consistent principle.

It is undoubtedly true that in many decisions of state courts of last resort the rigor of the rule of fellow servant has been assuaged by an extension of two conceptions: the one designated as "the department theory," and the other as the "doctrine of vice principal." By the application made

[348] of the *first of these in the decisions referred to the relation of fellow servant would not exist in any case where the servants were working in separate departments, even although engaged in a single enterprise or common employment. By the second, where even a limited authority was possessed by a particular employee, such authority would cause him not to be a fellow servant with those over whom the authority was exercised.

But the decisions of this court, whilst not rejecting absolutely either the department or the vice principal theories, have, with practical uniformity, refused to adopt the broad import given to those theories as above stated. Accordingly, it has been consistently held that the fact of separate departments did not destroy the relation of fellow servant unless the departments were substantially so distinct as to cause them to be independent one of the other to such an extent that the persons engaged in one or the other were not really employed in the same business. And so also as to the doctrine of vice principal: it has been uniformly held that it did not apply to every limited exercise of authority, but was only applicable in cases where the person charged to be a vice principal possessed such general authority and supervision over the business as to cause him in effect to stand in the relation of master to those employed under him. But whilst thus declining to fritter away the rule of fellow servant by a latitudinarian application of the department and vice principal theories, such theories have always been applied by the decisions of this court wherever a given case was embraced in the doctrine as expounded in the rulings of this court above referred to. Besides, it has been declared by an unbroken line of authority in this

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court that, wherever there rests upon the master a positive duty which the law has imposed upon him towards his servants, liability of the master for a failure to perform such positive legal duty could not be escaped by a resort to the principle of fellow servant, because, in an action for damage occasioned by the neglect of the master to perform such positive duties, the doctrine of fellow servant had no application. *I con-[349] tent myself with referring to some of the leading and more recent cases of this court, establishing all the propositions which I have previously stated. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Hamby*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85.

The inapplicability of the doctrine of fellow servant to a violation by the master of a positive duty resting on him, often stated in previous decisions, was reiterated in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 387, 37 L. ed. 781, 13 Sup. Ct. Rep. 914, and was fully restated in *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269, where it was said (p. 263, L. ed. p. 421, Sup. Ct. Rep. p. 270):

"We held in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, that an engineer and fireman of a locomotive engine running alone on a railroad, without any train attached, when engaged on such duty, were fellow servants of the railroad company; hence, that the fireman was precluded from recovering damages from the company for injuries caused, during the running, by the negligence of the engineer. In that case it was declared that: 'Prima facie all who enter the employment of a single master are engaged in a common service, and are fellow servants.

. . . All enter in the service of the same master, to further his interests in the one enterprise.' And whilst we in that case recognized that the heads of separate and distinct departments of a diversified business may, under certain circumstances, be considered, with respect to employees under them, vice principals or representatives of the master as fully and as completely as if the entire business of the master was by him placed under the charge of one superintendent, we declined to affirm that each separate piece of work was a distinct department, and made the one having control of that piece of work a vice principal or representative of the master. It was fur-

ther declared that 'the danger from the negligence of one specially in charge of the particular work is as obvious and as great as [350] from that of those *who are simply coworkers with him in it; each is equally with the other an ordinary risk of the employment,' which the employee assumes when entering upon the employment, whether the risk be obvious or not. It was laid down that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was whether the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair and reasonable precautions to surround his employees with fit and careful coworkers, and the furnishing to such employees of a reasonably safe place to work and reasonably safe tools or machinery with which to do the work, thus making the question of liability of an employer for an injury to his employee turn rather on the character of the alleged negligent act than on the relations of the employees to each other, so that, if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor."

And the *Keegan Case* was cited approvingly in *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, and *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85.

With the rules thus conclusively determined by the prior decisions of this court, let me come to consider the questions certified, in the light of the facts stated in the certificate. Now, it is undoubted from those facts that the accident was caused by an croneous order issued by the train despatcher in charge of the movement of all the trains, and it is equally undoubted that the fatal error committed by the train despatcher was caused by the neglect of an operator on the line of the railroad with whom the train despatcher communicated before he gave the erroneous order. To determine whether the doctrine of fellow servant applies to such a case it must be ascertained, first, whether the train despatcher was a fellow servant with those operating the train; and, second, if he was not, can the [351] *corporation avoid liability because the error of the train despatcher was occasioned by the wrong of an operator.

First. Whether it be considered in the light of the doctrine of vice principal as applied in the decisions of this court, or from the point of view of the positive duties of

the master, it seems to me that the train despatcher was not the fellow servant of the men running the trains. The despatcher was a vice principal in the narrowest significance of that term. He represented the master as to the operation and movement of trains over the road. He formulated and transmitted the orders by which all were to be governed. The duty to obey his orders rested on those in charge of every train, and upon complying with this duty of obedience on their part their safety, as well as the safety of persons employed on or moved by every train, depended. As the duties of the train despatcher were of the character just stated, it must besides follow, in any view, it seems to me, that in performing them he was discharging a positive duty imposed by law upon the master. For it cannot, in reason, I submit, be questioned that the law placed a positive duty on the master to furnish a safe place to work and to give such orders as would save those who obeyed them from loss of life or limb. The opinions of this court in the cases already referred to leave no room for question on this latter proposition, and there are other decisions not previously referred to which treat it as elementary. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Union P. R. Co. v. Daniels*, 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 353, 40 L. ed. 994, 997, 16 Sup. Ct. Rep. 843.

The doctrine of positive duty was applied to the determination of whether a train despatcher was a vice principal, and performed the master's duty, by the court of appeals of the state of New York, in *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, 25 L. R. A. 396, 40 Am. St. Rep. 616, 37 N. E. 466, and was also applied to the case of a train despatcher by the supreme court of Pennsylvania in *Lewis v. Seifert*, 116 Pa. 629, 2 Am. St. Rep. 631, 11 Atl. 514. Indeed, elaboration *to show [352] that a train despatcher is either a vice principal or one who, in the discharge of his functions, performs a positive duty of the master, is unnecessary, since the opinion of the court in this case proceeds upon the assumption that such is the case, and rests its conclusion upon the theory that the rule of fellow servant applies because the error of the train despatcher was caused by the fault of the operator. This, then, is the real issue.

Second. It being then established that the train despatcher was either a vice principal or performing the positive duty of the master, does the fact that his wrongful order

for the movement of the train was occasioned by the neglect of the operator with whom he communicated give rise to the application of the rule of fellow servant? I fail to perceive how it can, if the principles which the previous decisions of this court have upheld are to be adhered to. Those principles are these: That where the act is one done in the discharge of a positive duty of the master, negligence in the performance of the act, however occasioned, is the act of the master, and not the act of a fellow servant. To say to the contrary, it seems to me, is to cause the decisions of this court to reduce themselves to two contradictory propositions: first, that a servant when injured by the act of another person cannot be allowed to recover by applying the broad construction given by many of the state courts to the vice principal and department theories, because the correct rule is the one which narrows those theories, and because, besides, the truer test by which to ascertain the existence of the relation of fellow servant is to determine whether the act done was one concerning a positive duty of the master; and, second, when a case is presented where the act complained of has been done by a vice principal, under the view adopted by this court of that theory, or involves a positive duty of the master, there may be no recovery because of the application of the doctrine of fellow servant to the case. The result being that recovery cannot be had in any event.

The decisions of this court leave no doubt [353] as to the true rule *on the subject. In *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, speaking of the positive duty of the master, the court, through Mr. Justice Field, said (p. 647, L. ed. p. 758, Sup. Ct. Rep. p. 593):

"This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skilful collaborators, or from defective machinery, or other instruments with which he is to work. His contract implies that, in regard to these matters, his employer will make adequate provision that no danger shall ensue to him."

In *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, the court, speaking through Mr. Justice Brown, thus approvingly referred to the *Herbert Case* (p. 357, L. ed. p. 1012, Sup. Ct. Rep. p. 985):

"The case of *Northern P. R. Co. v. Her-*
194 U. S.

bert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, is an illustration of this principle. The plaintiff in this case was a brakeman in defendant's yard at Bismarck, where its cars were switched upon different tracks and its trains were made up for the road. He received an injury from a defective brake, which had been allowed to get out of repair through the negligence of an officer or agent of the company, who was charged with the duty of keeping the cars in order. It was held, upon great unanimity of authority, both in this country and in England, that the person receiving, and the person causing, the injury, did not occupy the relative position of fellow servants. See also *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Union P. R. Co. v. Daniels*, 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756."

In *Union P. R. Co. v. Daniels*, 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, an action for injury occasioned by the breaking of a defective car wheel, the existence of which defect had not been discovered owing to insufficient inspection, liability was sought to be escaped upon the plea that a sufficient number of competent inspectors had been employed. But, declaring the liability of the railroad company, the court said (p. 689, L. ed. p. 600, Sup. Ct. Rep. p. 758):

*"There can be no doubt that, under the [354] circumstances of the case at bar, the duty rested upon the company to see to it, at this inspecting station, that the wheels of the cars in this freight train, which was about to be drawn out upon the road, were in safe and proper condition, and this duty could not be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform that duty, or through its negligent performance."

Again, in *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, speaking through Mr. Justice Peckham of the positive duties of the master, the court said (p. 353, L. ed. p. 997, Sup. Ct. Rep. p. 845):

"He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his bus-

iness, including the government of the machinery, and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employees, and if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

And these principles have been applied by the court of appeals of the state of New York to a case like the one at bar. *Dana v. New York C. & H. R. R. Co.* 92 N. Y. 639. In that case, in communicating verbally to a conductor an order received from [355] the *train despatcher, an error was committed by one Keifer, a telegraph operator, and a collision between trains resulted. In the course of the opinion, reversing the judgment which had been entered in favor of the railroad company, the court said (p. 642):

"For Keifer's act, in this respect, the defendant is clearly liable. The act he was required to do, and did perform, was one for which the master was responsible as a duty pertaining to itself, and as to it Keifer occupied the place of the master. *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545."

Nor do I perceive the pertinency, as applied to the facts in the case at bar, of the extract made from the opinion of the supreme judicial court of Massachusetts in the case of *Whittaker v. Bent*, 167 Mass. 588, 589, 46 N. E. 121. The doctrine of transitory risk, as expounded in the case referred to and in previous cases in Massachusetts which that case followed, really amounts only to this: that where the work is of such a character that dangers which cannot be foreseen or guarded against by the master may, in the nature of things, suddenly and unexpectedly arise, there is no neglect of a positive duty owing by the master in failing, by himself or the agencies he employs, to anticipate and protect against that which the utmost care on his part could not have prevented. But this doctrine can have no application to a case like the one in hand, where the damage was occasioned by an act of obvious neglect in the performance of a positive duty.

That the doctrine of transitory risk applied in the Massachusetts cases relied upon has no application here, it seems to me, is made clear by the fact that it is stated

in the certificate that the trains in question were extra trains, obliged by the rules of the company to run on no preordained schedule, and solely under the command of the despatcher, and that, to quote the certificate, "a large proportion of its freight trains on this division were run as extra trains, and the times of their arrivals and departures were not shown on the regular time-tables, but *their movements were made [356] upon telegraphic orders issued by the train despatcher upon information furnished by telegraph to the train despatcher by its station agents and operators along the line of the railroad." To apply the transitory risk theory to this condition of affairs, it seems to me, is to say that the method permanently adopted by the company for running the class of trains in question is to be governed, not by that fact, but by the fictitious assumption that the trains were temporarily operated by wire alone. The consequence of the application of the doctrine of transitory risk to the condition of affairs shown in the certificate is, as I understand it, but to say that a railroad which chooses to operate its trains solely through orders of the train despatcher is a licensed wrongdoer as respects its employees, since thereby it is exempt from those rules of positive duty which the law would otherwise impose. The result is, besides, to decide that if a railroad adopts a regular schedule the law casts a positive duty on it as regards its employees, but that it may escape all such duty on the theory of transitory risk, if only the road elects to adopt no schedule, and to operate its trains solely by telegraph.

For the foregoing reasons I dissent.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice **Harlan**, and Mr. Justice **McKenna** concur in this dissent.

HIPPOLITE FILHIOL, Francis J. Watts,
Harriet L. Watkins, *et al.*, *Plffs. in Err.*,
v.

GEORGE H. TORNEY.

(See S. C. Reporter's ed. 356-361.)

Direct appeal from circuit court—certificate of jurisdiction—jurisdiction of circuit court in ejectment.

1. The record does not show an equivalent of

NOTE.—On direct review of Federal circuit and district court judgments in Supreme Court—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308; and *Re Buchanan*, 39 L. ed. U. S. 884.

the certificate of jurisdiction required to sustain a direct review in the Federal Supreme Court of a judgment of the circuit court which had dismissed a complaint for want of jurisdiction, where the assignment of errors is directed both to the jurisdiction and the merits, and the petition for the writ of error, which was allowed generally and without any limitation or specification, prays for a review to the end that the rulings and judgment of the court may be reversed.

2. Averments in a complaint in ejectment, that defendant's possession rests upon an infraction by the United States of its treaty obligations, and upon a taking of private property for public use without just compensation, do not bring the case within the jurisdiction of a Federal circuit court, where the averments respecting plaintiff's title disclose no case within the jurisdiction of that court.

[No. 252.]

Submitted April 25, 1904. Decided May 16, 1904.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment dismissing a complaint in ejectment for want of jurisdiction. *Affirmed.*

See same case below, 119 Fed. 974.

Statement by Mr. Justice **Brewer**:

This was an action of ejectment, commenced in the circuit court of the United States for the eastern district of Arkansas, based upon the same title which was presented in *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109, and *Filhiol v. Maurice*, 185 U. S. 108, 46 L. ed. 827, 22 Sup. Ct. Rep. 560. A demurrer to the complaint was sustained on the ground of want of jurisdiction, and a judgment entered for the defendant, and thereupon the case was brought directly to this court on writ of error.

Mr. Branch K. Miller submitted the cause for plaintiffs in error:

In a case where the issue is whether certain acts amounted to a crime under a treaty this court has taken jurisdiction.

Terlinden v. Ames, 184 U. S. 270, 282, 46 L. ed. 534, 22 Sup. Ct. Rep. 484.

In *Rice v. Ames*, 180 U. S. 371, 374, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406, this court took jurisdiction in a case involving the question whether or not the provisions of a treaty applied to an affidavit describing a supposed extraditable offense.

In *Ornelas v. Ruiz*, 161 U. S. 502, 507, 40 L. ed. 787, 789, 16 Sup. Ct. Rep. 689, it was held that in such a case the construction of the extradition treaty was involved, and the appeal was properly taken to this court.

In *Mitchell v. Furman*, 180 U. S. 402, 427, 194 U. S.

428, 45 L. ed. 596, 608, 609, 21 Sup. Ct. Rep. 430, where the question was whether a certain alleged title under a Spanish grant was protected by treaty, the appeal to this court was held maintainable for the reason that it involved the construction of a treaty.

In *Filhiol v. Maurice*, 185 U. S. 108, 110, 46 L. ed. 827, 828, 22 Sup. Ct. Rep. 560, it was decided that the acts set up by the petition, or declaration, stated a case which arose under the Constitution or laws of the United States, and was one in which a writ of error was properly taken direct to the circuit court from this court. The court, on the merits, however, decided that upon its examination of the case, it was met with the question whether or not the jurisdiction of the circuit court could have been maintained irrespective of adverse citizenship; and the conclusion of the court was that such jurisdiction could not be maintained.

It was declared that it must appear from the plaintiffs' own statement that the case was one which arose under the Constitution or the treaties of the United States in order to confer such jurisdiction, and, the court being of the opinion that such was not the case, it was declared that the circuit court should have dismissed the suit. It is respectfully submitted that the omissions found to be fatal in the cited case have been supplied in the case at bar.

Messrs. William F. Vilas, James K. Jones, and J. H. McGowan also submitted the cause for plaintiffs in error:

Since one view of the treaty's meaning will support the right of property asserted by these plaintiffs, and its immunity from invasion by the acts complained of, although the contrary might defeat them, construction is involved, and the case "arises" under the treaty.

Starin v. New York, 115 U. S. 257, 29 L. ed. 390, 6 Sup. Ct. Rep. 28; *Southern P. R. Co. v. California*, 118 U. S. 109, 30 L. ed. 103, 6 Sup. Ct. Rep. 993; *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437.

The case of *Mitchell v. Furman*, 180 U. S. 436, 45 L. ed. 611, 21 Sup. Ct. Rep. 430, seems to render all discussion needless. Seemingly there is no distinction in principle between that case and the one at bar. If difference exists, it consists in the greater amplitude of the facts set forth here to support the jurisdiction of the Federal court.

And see *Rice v. Ames*, 180 U. S. 371, 374, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406; *Terlinden v. Ames*, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484; *Ornelas v. Ruiz*, 161 U. S. 502, 507, 40 L. ed. 787, 16 Sup. Ct. Rep. 689.

Solicitor General Hoyt and *Messrs. Marsden C. Burch* and *Robert A. Howard* submitted the cause for defendant in error:

This is an ordinary action in ejectment, which could have been, in its present form, brought in the state court. If the allegations of the complaint had been confined to those which were necessary under the state statute, there would be no jurisdiction in the United States court. Can a plaintiff, by the averment of facts not essential to the cause of action, or which are merely assertive of a supposed defense, bring his cause within the jurisdiction?

Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Sawyer v. Kochersperger*, 170 U. S. 303, 42 L. ed. 1046, 18 Sup. Ct. Rep. 946; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738.

The present pleading, as amended,—for that is what it amounts to,—does not present as strong a case for jurisdiction as was presented in *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

Mr. Justice **Brewer** delivered the opinion of the court:

The only question decided by the circuit court was one of jurisdiction, but the record contains no certificate of that question, nor anything which can be considered an equivalent thereto. The demurrer filed by the defendant stated three grounds therefor: First, a want of jurisdiction over the present defendant; second, a like want of jurisdiction over the subject-matter of the action; and, third, that the complaint did not state facts sufficient to constitute a cause of action. The judgment was that the "demurrer to the jurisdiction . . . be sustained" and the complaint dismissed. In the opinion of the court, only the question of jurisdiction over the subject-matter was discussed. The assignment of errors contains nine specifications, some going to the matter of jurisdiction; others, such as the fifth, eighth, and ninth, running to the merits, the ninth being general and in this language: "The court erred in divers other matters manifest upon the face of the record of said action." The petition for a writ of error alleged that the plaintiffs, "being aggrieved by the judgment made and entered [358] in *the above entitled cause on the 12th day of January, 1903, and the several rulings of the court herein, file herewith their assignment of errors in said cause, and pray a writ of error, to the end that the rulings and judgment of said court in said cause may be reversed by the Supreme Court of the United States." This petition was al-

lowed generally, and without any limitation or specification. The necessity of a certificate was affirmed in *Maynard v. Hecht*, 151 U. S. 324 38 L. ed. 179, 14 Sup. Ct. Rep. 353, and what may be considered a sufficient certificate, or taken as equivalent thereto, considered in *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *The Bayonne*, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185; *Interior Constr. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Van Wagenen v. Sewall*, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490. The case of *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397, is closely in point. In that case Mr. Justice Gray, speaking for the court, after referring to tests laid down in prior cases, observed (p. 508, L. ed. p. 513, Sup. Ct. Rep. p. 399):

"The record in the present case falls far short of satisfying any such test. The defendant, among many other defenses, and in various forms, objected to the jurisdiction of the district court, because the act of Congress under which the proceedings were instituted was unconstitutional, because the proceedings were not according to the laws of the United States, and because they should have been had in a court of the state of Maryland; and the court, overruling or disregarding all the objections, whether to its jurisdiction over the case, or to the merits or the form of the proceedings, entered final judgment for the petitioners. There is no formal certificate of any question of jurisdiction; the allowance of the writ of error is general, and not expressly limited to such a question; and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the 'rulings, judgments, and orders' of the court 'upon the question of jurisdiction raised in said exceptions, pleas, and demurrers, and the other papers on file in this cause,' without defining or indicating any *specific question of jurisdiction. Here, [359] certainly, is no such clear, full, and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate under the first clause of the statute."

There being no sufficient certificate of jurisdiction, counsel for plaintiffs in error rely upon the proposition that there is involved in the case the application of the Constitution of the United States, and also the meaning and force of the treaty of

October 21, 1803, between the United States and the Republic of France, and that, therefore, the case was rightfully brought directly to this court.

"But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question." *Chappell v. United States*, 160 U. S. 509, 40 L. ed. 513, 16 Sup. Ct. Rep. 400. See also *Giles v. Harris*, 189 U. S. 475, 486, 47 L. ed. 909, 912, 23 Sup. Ct. Rep. 639.

The title upon which the plaintiffs rest was a grant made on February 22, 1788, by the governor general, in the name of the King of Spain, then the sovereign of the territory, and, as contended, protected by the treaty of 1803, which provided that the inhabitants of the province ceded should, among other things, "be maintained and protected in the free enjoyment of their . . . property." [8 Stat. at L. 202.] It was alleged that such provision, by a just construction of the treaty, extended to the property of the original grantee, and descended from him to his heirs; but that the United States, denying that plaintiffs were entitled to be maintained and protected in the enjoyment of their said property by any construction of the treaty, asserted title to the land, expelled the plaintiffs from possession, and delivered it over to the defendant in this action, and that said defendant is in possession by direction of the United States, in pursuance of the unlawful and unjust possession so given him, and without any other right or claim of right than as an officer of the United States.

[360] Plaintiffs also *averred that they were lawfully possessed of the land by inheritance from their ancestor, and that the United States, without process of law, and without legal right so to do, took the same for public use without any compensation, and established defendant in possession thereof wrongfully and unjustly. By virtue of these allegations they contend that there is involved in this case the construction of a treaty, as well as the application of the Constitution of the United States, which forbids the taking of private property for public use without just compensation.

But it is well settled that in ejectment the plaintiffs must rest on their own title. If that title falls it is immaterial what wrong the defendant may have committed. There is nothing in the statutes of Arkansas which changes this rule. The averments of an infraction by the United States of its

obligations under the treaty, or an unlawful act in taking possession without compensation, in defiance of the Constitution, do not add to the plaintiff's title. So far as the cause of action is concerned, these averments are superfluous. Any action by the government is matter of defense, and may never be presented by the defendant. He has a right to go to trial on the sufficiency of the title presented by the plaintiffs, and need neither plead nor prove the rightfulness of his possession by whomsoever it may have been given to him until they have shown that they have a title to the premises.

"The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought." *Osborn v. Bank*, 9 Wheat. 738, 824, 6 L. ed. 204, 224.

"By the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 464, 38 L. ed. 511, 515, 14 Sup. Ct. Rep. 654, 657.

*See also *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Sawyer v. Kochersperger*, 170 U. S. 303, 42 L. ed. 1046, 18 Sup. Ct. Rep. 946, in which this court said: "The case was removed into the circuit court of the United States, but improvidently, as it falls within the rule laid down in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654, notwithstanding the petition stated that defendants declined to pay on the ground that the law imposing the taxes was in violation of the Constitution of the United States." *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 329, 44 L. ed. 486, 490, 20 Sup. Ct. Rep. 399; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47.

We have not considered whether the averments distinctively made of the plaintiffs' title were sufficient to vest jurisdiction in the circuit court, for that question was settled against the plaintiff by the decision in *Filhiol v. Maurice*, 185 U. S. 108, 46 L. ed. 827, 22 Sup. Ct. Rep. 560.

As the plaintiffs' statement of their right to the possession of this land disclosed no case within the jurisdiction of the circuit court, that jurisdiction was not established by allegations as to the defense which the

defendant might make, or the circumstances under which he took possession.

The judgment of the Circuit Court is affirmed.

JOHN G. FISCHER, *Plff. in Err.*,

v.

CITY OF ST. LOUIS.

(See S. C. Reporter's ed. 361-372.)

Error to state court — Federal question — constitutional law — due process of law — equal protection of the laws — validity of municipal ordinance against dairies and cow stables.

1. Whether or not a municipal corporation has the power, under its charter, to adopt a certain ordinance, is not a question which can be considered on a writ of error from the Federal Supreme Court to a state court.
2. The question whether certain acts amount to a violation of a municipal ordinance is not a Federal one, which can be reviewed on writ of error from the Federal Supreme Court to a state court.
3. A decision of a state court construing the provisions of a city charter authorizing the city to prohibit the erection of cow stables and dairies "within prescribed limits" so as to permit the city to make the limits for the operation of the ordinance coincident with the city limits presents no Federal question, which can be reviewed on writ of error from the Federal Supreme Court to a state court.
4. Neither due process of law nor the equal protection of the laws is denied by a municipal ordinance adopted under legislative authority, forbidding the establishment or maintenance of a dairy or cow stable within the city limits without having received permission so to do from the municipal assembly, by a proper ordinance.

[No. 204.]

Argued April 12, 1904. Decided May 16, 1904.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri *ex rel. Hill v. Dockery*, 63 L. R. A. 571.

As to what constitutes due process of law—see Kuntz v. Sumption, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; Ulman v. Baltimore, 11 L. R. A. 224, and note; and Gilman v. Tucker, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation—see State v. Goodwill, 6 L. R. A. 621, and note, and State v. Loomis, 21 L. R. A. 789, and note.

[N ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the St. Louis Court of Criminal Correction, which had in turn affirmed a conviction in the Police Court of that city for the violation of an ordinance forbidding the establishment and maintenance of dairies or cow stables within the city limits without having first received permission of the municipal assembly. *Affirmed.*

See same case below, 167 Mo. 654, 67 S. W. 872.

Statement by Mr. Justice **Brown**:

This proceeding was originally instituted by a criminal complaint filed by the city of St. Louis against Fischer in the police court for a violation of an ordinance of the city in erecting, building, and establishing on certain premises occupied by Fischer, at Nos. 7208 and 7210 North Broadway, a dairy and cow stable, without first having obtained permission so to do from the municipal assembly by proper ordinance, and for maintaining such dairy and cow stable without permission of such assembly.

Motion was made to quash the complaint upon the ground, amongst others, that § 5 of the ordinance under which the conviction was held was in violation of the 14th Amendment of the Constitution of the United States.

The case was submitted to the court upon the following agreed statement of the facts:

"The plaintiff, the city of St. Louis, is a municipal corporation, organized and existing under the laws of the state of Missouri, and defendant is and was on the 16th day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, state of Missouri, upon which premises, at said time, stood a dwelling-house and frame stable, which had been erected and built

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

On the power of municipal corporations to define, prevent, and abate nuisances—see note to Grossman v. Oakland, 36 L. R. A. 593.

As to municipal power over buildings and other structures as nuisances—see note to *Evansville v. Miller*, 38 L. R. A. 161.

Respecting municipal power over nuisances relating to trade or business—see note to *Ex parte Lacey*, 38 L. R. A. 640.

As to municipal power over nuisances affecting safety, health, and personal comfort—see note to *Harrington v. Providence*, 38 L. R. A. 305.

On municipal power over nuisance affecting public morals, decency, peace, and good order—see note to *State v. Karstendiek*, 39 L. R. A. 520.

prior to the occupancy of said premises by defendant."

"At the time of the approval of ordinance No. 18,407, of said city and state, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant, for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, in said city and state. Some time in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling-house thereon was occupied by a private family for residence purposes only, and no dairy or cow stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, on to premises Nos. 7208 [363] and 7210 *North Broadway, placed them in the old stable, and did proceed to conduct upon said premises a dairy establishment, and produce from said cows milk, and sell the same to his customers for profit, and was so doing on the said 16th day of November, 1898, without having first obtained permission so to do from the municipal assembly by proper ordinance, as provided by § 5 of ordinance No. 18,407 of the city of St. Louis, approved April 6, 1896," a copy of which section is given in the margin.†

Upon this state of facts defendant was convicted and fined. An appeal was granted to the St. Louis court of criminal correction, which affirmed the judgment. An appeal was then taken to the supreme court of the state, where the judgment was again affirmed. 167 Mo. 654, 67 S. W. 872.

Mr. Louis A. Steber argued the cause, and, with **Mr. J. E. McKeighan**, filed a brief for plaintiff in error:

The ordinance violates U. S. Const. 14th Amend.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The Supreme Court of the United States will give its own interpretation to an ordinance whose validity is assailed as in violation of the United States Constitution.

Ibid.

It will determine finally whether legisla-

tion or action under state authority is due process of law.

State v. Sponaugle, 45 W. Va. 415, 43 L. R. A. 727, 32 S. E. 283.

The discretion of the municipal assembly, being exercised against the dairyman's right to use the property, deprives him of his property without due process of law; and, by granting a right so to do to the one party, and refusing it to another without the intervention of rules of law, denies to the one not in favor, the equal protection of the laws.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The use of one's property is as much property as the property itself.

St. Louis v. Hill, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861; *St. Louis v. Dorr*, 145 Mo. 466, 42 L. R. A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976.

The dairy and cow stable had been lawfully erected prior to, and was in lawful operation at, the time of the passage of the ordinance in controversy. It was therefore "property" in the broadest sense of the term.

St. Louis v. Hill, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861; *St. Louis v. Dorr*, 145 Mo. 466, 42 L. R. A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976.

The right of use and occupation was a vested right which could not be arbitrarily or capriciously destroyed at the uncontrolled will of the local authorities.

Yates v. Milwaukee, 10 Wall. 497, 504, 505, 19 L. ed. 984, 986, 987.

The question of nuisance does not enter into this case.

Ibid.; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6.

A dairy or cow stable is not a nuisance *per se*.

St. Louis v. Schnuckelberg, 7 Mo. App. 536.

If the power be to regulate, then the regulation must be uniform, and apply to all of the same class.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Boyd v. Board of Councilmen* (Ky.) 77 S. W. 669.

If the power be to prohibit, it must apply to all persons alike and without discrimination.

Tugman v. Chicago, 78 Ill. 405; *Hibbard v. Chicago*, 173 Ill. 91, 40 L. R. A. 621, 50 N. E. 256; *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; *State v.*

†Sec. 5. No dairy or cow stable shall hereafter be erected, built, or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained

on any premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$100 nor more than \$500.

Walsh, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277; *Crowley v. West*, 52 La. Ann. 526, 47 L. R. A. 652, 78 Am. St. Rep. 355, 27 So. 53; *Cooley*, Const. Lim. 6th ed. p. 137, note 1, pp. 481-483.

There is a substantial difference between prohibition and regulation.

Chillicothe v. Brown, 38 Mo. App. 617; *State v. Burgdoerfer*, 107 Mo. 1, 14 L. R. A. 846, 17 S. W. 646; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Merced County v. Fleming*, 111 Cal. 46, 43 Pac. 392; *Los Angeles v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153.

Whatever charter power is relied upon, whether it be to prohibit or to regulate, it must be by general laws or ordinances, applying to all, alike, of the same class. The exercise of the power in any given particular or individual case cannot be delegated to any individual, officer, board, committee, or even to the municipal legislative body itself.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *St. Louis v. Russell*, 116 Mo. 256, 20 L. R. A. 721, 22 S. W. 470; *Barthet v. New Orleans*, 24 Fed. 564; *Re Quong Woo*, 13 Fed. 229; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464; *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718; *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *Tugman v. Chicago*, 78 Ill. 409; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Boyd v. Board of Councilmen* (Ky.) 77 S. W. 669; *Cooley*, Const. Lim. 6th ed. p. 137.

The legislature which is the representative of what might be termed the sovereign power, cannot constitutionally declare a given use of a particular property as harmful, or as a nuisance. This would be exercising a judicial function.

Quintini v. St. Louis Bay, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625; *Tiedeman*, Pol. Power, § 122a, p. 426; *Wood*, Nuisances, 3d ed. § 744, p. 976; *Hudson v. Thoruc*, 7 Paige, 261; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203; *First Municipality v. Blinneau*, 3 La. Ann. 689; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Evansville v. Miller*, 146 Ind. 613, 38 L. R. A. 161, 45 N. E. 1054; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

The judicial powers cannot be delegated as attempted in the ordinance.

Cooley, Const. Lim. 6th ed. pp. 137, 504.

No such power of confiscation without any

judicial ascertainment of the fact of harmfulness is given by the charter.

St. Louis v. Schnuckelberg, 7 Mo. App. 536.

The ordinance is not only leveled at dairies or cow stables from which milk is sold or delivered to the public, but applies as well to the householder who may want to keep one or two cows for milk, butter, and cheese for his own family. Ordinances restricting private rights in so sweeping a degree have been declared unreasonable and oppressive.

Stockton Laundry Case, 26 Fed. 611; *St. Louis v. Edward Heitzberg Packing & Provision Co.* 141 Mo. 375, 39 L. R. A. 551, 64 Am. St. Rep. 516, 42 S. W. 954.

The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere. The executive, legislative, and judicial branches of these governments are all of limited and defined power.

Curry v. District of Columbia, 14 App. D. C. 423; *Citizens Sav. & L. Asso. v. Topeka*, 20 Wall. 662, 22 L. ed. 461; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 237, 41 L. ed. 979, 985, 17 Sup. Ct. Rep. 581; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 41 L. R. A. 481, 53 Am. St. Rep. 557, 66 N. W. 624.

The personal liberty of the citizen, and his right of property, cannot thus be invaded under the guise of a police regulation.

Ex parte Sing Lee, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Dill. Mun. Corp.* 4th ed. § 374, pp. 447-449; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; *United States v. Sweeney*, 95 Fed. 434.

The ordinance, being highly penal in its nature and consequences, must be subject to strict construction. This is the rule in Missouri.

St. Louis v. Dorr, 136 Mo. 370, 37 S. W. 1108; *St. Louis v. Robinson*, 135 Mo. 460, 37 S. W. 110.

Its provisions cannot be carried beyond its express terms.

Pacific v. Seifert, 79 Mo. 210.

Nothing can be taken by intendment in such a prosecution.

St. Louis v. Robinson, 135 Mo. 460, 37 S. W. 110; *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842.

When doubts arise concerning their interpretation, such doubts are to weigh only in favor of the accused.

State v. Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; *Canton v. Dawson*, 71 Mo. App. 235; *State v. Bryant*, 90 Mo. 534, 2 S. W. 836.

Equitable constructions are never given to mere arbitrary regulations of public policy.

Westport ex rel. Whiting v. Mastin, 62 Mo. App. 658.

The municipal assembly cannot limit the use of this building, and force the owner to convert it to other uses for which it was unfit, and to that extent deprive the owner of his property and the use of it, without due process of law.

Stockton Laundry Case, 26 Fed. 611; *Hutton v. Camden*, 39 N. J. L. 130, 23 Am. Rep. 203.

Mr. William F. Weerner argued the cause, and, with *Messrs. Charles W. Bates* and *Charles R. Skinner*, filed a brief for defendant in error:

No question is open for the consideration of this court save whether the ordinance in question violates the 14th Amendment to the United States Constitution. On all other points the plaintiff in error is concluded by the ruling of the state supreme court.

Barbier v. Connolly, 113 U. S. 27, 29, 30, 32, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Wilson v. Eureka City*, 173 U. S. 32, 35, 43 L. ed. 603, 604, 19 Sup. Ct. Rep. 317; *Crowley v. Christensen*, 137 U. S. 86, 92, 94, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Gundling v. Chicago*, 177 U. S. 183, 185, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633.

The only ground upon which plaintiff in error can plausibly urge the alleged unconstitutionality of the ordinance is his contention that it confers arbitrary power on the municipal assembly to grant or refuse permission to operate a dairy. And as to this the plaintiff in error is not in a position to raise the question. He made no application for a permit or license, and, of course, has not been refused one; *non constat* that the assembly would have refused an application. Whether the discretion of the assembly is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor, and was not refused permission.

Gundling v. Chicago, 177 U. S. 183, 186, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633.

But, assuming that the question may be

raised by the plaintiff in error, the requirement of the ordinance that he, like every other person similarly situated, must first obtain the permission of the municipal assembly before establishing or maintaining a dairy within the limits of the city of St. Louis does not operate as a violation of the 14th Amendment, either in regard to the clause requiring due process of law, or to that providing for the equal protection of the laws.

Gundling v. Chicago, 177 U. S. 183, 186, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; *Wilson v. Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; *Davis v. Massachusetts*, 167 U. S. 43, 48, 42 L. ed. 71, 72, 17 Sup. Ct. Rep. 731; *St. Louis v. Galt*, (Mo.) 63 L. R. A. 778, 77 S. W. 876; *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872; *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310; *Slaughter-House Cases*, 16 Wall. 36, 80, 21 L. ed. 394, 409; *Barbier v. Connolly*, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

The maintenance of dairies and cow stables within the city limits is not an absolute right, but a privilege; and whether, under the individual circumstances of each case, the operation of a dairy in the particular locality may be advantageous or injurious to the public is a question, the determination of which is properly left to the discretion of the municipal assembly, and the ordinance is not, for that reason, void as conferring an arbitrary and unregulated power.

Wilson v. Eureka City, 173 U. S. 32, 35-37, 43 L. ed. 603, 605, 19 Sup. Ct. Rep. 317; *Davis v. Massachusetts*, 167 U. S. 43, 48, 42 L. ed. 71, 72, 17 Sup. Ct. Rep. 731; *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872; *Gundling v. Chicago*, 177 U. S. 183, 186-188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; *Crowley v. Christensen*, 137 U. S. 86, 92, 34 L. ed. 620, 624, 11 Sup. Ct. Rep. 13; *Com. v. Parks*, 155 Mass. 531, 30 N. E. 174; *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310; *Re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, 38 Pac. 981; *Easton v. Covey*, 74 Md. 262, 22 Atl. 266; *Love v. Recorder's Court Judge*, 128 Mich. 545, 55 L. R. A. 618, 87 N. W. 785; *St. Louis v. Howard*, 119 Mo. 47, 24 S. W. 772; *St. Louis v. Weber*, 44 Mo. 547; *State ex rel. Kyger v. Holt County Justices*, 39 Mo. 521; *Perry v. Salt Lake City*, 7 Utah, 143, 11 L. R. A. 446, 25 Pac. 739, 998; *Hine v. New Haven*, 40 Conn. 478; *Com. v. Davis*, 162 Mass. 510, 26 L. R. A. 712, 44 Am. St. Rep. 389, 39 N. E. 113; *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47.

Where the determination of the question whether the pursuit of a certain occupation

may or may not be a nuisance according to conditions and circumstances, is left to the discretion of the municipal assembly, the presumption is indulged by the courts that such body will make the proper investigation and act impartially; not that it will favor one and discriminate against another, or exercise its powers for purposes of profit or oppression. Such favorable presumptions are constantly indulged in regard to legislative action.

St. Louis v. Fischer, 167 Mo. 654, 67 S. W. 872; *St. Louis v. Howard*, 119 Mo. 47, 24 S. W. 772; *Re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, 38 Pac. 981; *Ex parte Fiske*, 72 Cal. 125, 15 Pac. 310; *Perry v. Salt Lake City*, 7 Utah, 143, 11 L. R. A. 446, 25 Pac. 739, 998; *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

The possibility of the abuse of legislative power does not disprove its existence. That possibility exists, even in reference to powers that are conceded to exist.

Powell v. Pennsylvania, 127 U. S. 678, 686, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; *Williams v. Mississippi*, 170 U. S. 213, 225, 42 L. ed. 1012, 1016, 18 Sup. Ct. Rep. 583; *Verdin v. St. Louis*, 131 Mo. 26, 130, 33 S. W. 480, 36 S. W. 52; *Crowley v. Christensen*, 137 U. S. 86, 91, 92, 34 L. ed. 620, 623, 624, 11 Sup. Ct. Rep. 13.

There must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage.

Powell v. Pennsylvania, 127 U. S. 685, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

As it does not appear upon the face of the ordinance, or from any facts in evidence or of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, or that there is any unjust discrimination, the legislative determination of the questions of the public policy requiring its enactment is conclusive upon this court, and forms no subject for Federal interference.

Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Gundling v. Chicago*, 177 U. S. 183, 187, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 246, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; *State v. Layton*, 160 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 487, 61 S. W. 171.

The ordinance in question is a valid ex-

ercise of the police power, expressly delegated by the state to the city. The 14th Amendment was not designed to interfere with the exercise of the police power by the states, and nothing in that amendment has shorn the states of their police power to prohibit or regulate trades and occupations which are, or may be, unwholesome, nor of regulating the use of property so as to guard against a use which is injurious to the community.

Davis v. Massachusetts, 167 U. S. 43, 47, 42 L. ed. 71, 72, 17 Sup. Ct. Rep. 731; *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872; *Slaughter-House Cases*, 16 Wall. 36, 62, 81, 21 L. ed. 394, 405, 410; *Powell v. Pennsylvania*, 127 U. S. 678, 683, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Holden v. Hardy*, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383.

While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, nor to confiscate property under the guise of a police law, yet a good deal must be left to its discretion in that regard; and, if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice, not only in the subject-matter, but in the means employed.

Lawton v. Steele, 152 U. S. 133, 136, 140, 38 L. ed. 385, 388, 390, 14 Sup. Ct. Rep. 499; *Powell v. Pennsylvania*, 127 U. S. 678, 685, 686, 32 L. ed. 253, 256, 257, 8 Sup. Ct. Rep. 992, 1257; *St. Louis v. Galt* (Mo.) 63 L. R. A. 778, 77 S. W. 876; *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *Crowley v. Christensen*, 137 U. S. 86, 89, 91, 34 L. ed. 620, 622, 624, 11 Sup. Ct. Rep. 13; *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; *Re Linchan*, 72 Cal. 114, 13 Pac. 170; 2 Tiedeman, *State & Federal Control of Persons & Property* (1900), p. 730, § 145; *Parker & W. Public Health & Safety* (1892), § 254, pp. 291, 292.

Stricter police regulations are essential to the welfare and safety of a crowded metropolis than are required in the sparsely peopled portions of the country, and which would be wholly unnecessary and intolerable in the latter. Every man who selects urban life necessarily gives up certain natural rights that would pertain to life in the country.

St. Louis v. Galt (Mo.) 63 L. R. A. 778, 77 S. W. 876; *Ex parte Cheney*, 90 Cal. 617, 27 Pac. 436; *Westport v. Mulholland*, 159 Mo. 86, 53 L. R. A. 442, 60 S. W. 77; 2 Tiedeman, *State & Federal Control of Persons & Property* (1900), pp. 730, 731.

Mr. Justice **Brown** delivered the opinion of the court:

The authority of the city of St. Louis to adopt the ordinance in question is found in the Revised Statutes of the state (1899, pp. 2484 and 2488), which declare: "The mayor and assembly shall have power, within the city, by ordinance not inconsistent with the Constitution or any law of this state, or of this charter, . . . to . . . prohibit the erection of . . . cow stables and dairies . . . within prescribed limits, and to remove and regulate the same."

"Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or of the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same by fines and penalties not exceeding \$500, and by forfeitures not exceeding \$1,000.

The authority of the municipality of St. Louis, under this charter, to adopt the ordinance in question, was settled by the decision of the supreme court, and is not open to attack here.

Considerable stress is laid upon the fact that at the time the ordinance was adopted (April 6, 1896), the dairy and cow stable had already been erected, and at that time was occupied and in use for that purpose, though such use was subsequently abandoned, and the premises used as a private residence for a *short time, when defendant moved his cattle there and established anew the dairy and cow stable which had theretofore been used. The supreme court, however, found that defendant was guilty of maintaining a dairy and cow stable, within the meaning of the ordinance, without permission of the municipal assembly, and as this construction of the ordinance involves no Federal question, we are relieved from the necessity of considering it.

Defendant's objection to the ordinance, that it is made to apply to the whole city, when authority was only given by the charter to prohibit the erection of cow stables and dairies "within prescribed limits," is equally without foundation. If it were possible to prescribe limits for the operation of the ordinance, it was held by the supreme court to be equally possible to declare that those limits should be coincident with the limits of the city. This is also a non-Federal question.

Defendant's main contention, however, is that, by vesting in the municipal assembly the power to permit the erection of dairy and cow stables to certain persons, a discrimination is thus declared in favor of such persons, and against all other persons, and the equal protection of the laws denied to

all the disfavored class. The power of the legislature to authorize its municipalities to regulate and suppress all such places or occupations as, in its judgment, are likely to be injurious to the health of its inhabitants, or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question. The keeping of swine and cattle within the city or designated limits of the city has been declared in a number of cases to be within the police power. The keeping of cow stables and dairies is not only likely to be offensive to neighbors, but it is too often made an excuse for the supply of impure milk from cows which are fed upon unhealthful food, such as the refuse from distilleries, etc. *Re Linehan*, 72 Cal. 114, 13 Pac. 170; *Quiney v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Love v. Recorder's Court Judge*, 123 Mich. 545, 55 L. R. A. 618, 87 N. W. 785.

*We do not regard the fact that permis-[371] sion to keep cattle may be granted by the municipal assembly as impairing, in any degree, the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows, and another fifty; where one desired to establish a stable in the heart of the city, and another in the suburbs; or, where one was known to keep his stable in a filthy condition, and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors, and denying it to others. The question in each case is whether the establishing of a dairy and cow stable is likely, in the hands of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused, and the permission accorded to social or political favorites and denied to others, who, for reasons totally disconnected with the merits of the case, are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the

neighborhood. *Crowley v. Christiansen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Davis v. Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730.

[372] The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal. This would operate with great hardship upon persons who desire to establish dairies and cow stables in the outskirts of the city, as well as inconvenience to the inhabitants, who, to *that extent, would be limited in their supply of milk. It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases; and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual (*Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *State v. Fiske*, 9 R. I. 94; *Baltimore v. Radeeke*, 49 Md. 217, 33 Am. Rep. 239; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L. R. A. 621, 60 N. W. 156), and in others that such authority cannot be delegated to the adjoining lot owners (*St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245). But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority (*Quiney v. Kenard*, 151 Mass. 563, 24 N. E. 860; *Com. v. Davis*, 162 Mass. 510, 26 L. R. A. 712, 44 Am. St. Rep. 389, 39 N. E. 113), and by this court the delegation of such power, even to a single individual, was sustained in *Wilson v. Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; and *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

Whether the defendant be in a position to avail himself of the alleged invalidity of the ordinance without averring that he applied for, and had been refused a permit to establish the dairy and cow stable in question, as was intimated in the latter case, is not necessary to a decision here, and we express no opinion upon the point.

It is sufficient for us to hold, as we do, that the ordinance in question does not deprive the defendant of his property without due process of law, nor deny to him the equal protection of the laws.

The judgment of the Supreme Court of Missouri is, therefore, affirmed.

*BERNARD SCHEFE

v.

CITY OF ST. LOUIS.

(See S. C. Reporter's ed. 373.)

[373]

Error to state court — Federal question — constitutional law — due process of law — equal protection of the laws — validity of municipal ordinance against dairies and cow stables.

This case is governed by the decision in *Fischer v. St. Louis*, ante, 1018.

[No. 62.]

Argued April 12, 1904. Decided May 16, 1904.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the St. Louis Court of Criminal Correction, which had in turn affirmed a conviction in the Police Court of that city for the violation of an ordinance forbidding the establishment and maintenance of dairies or cow stables within the city limits without having first received permission of the municipal assembly. *Affirmed.*

See same case below, 167 Mo. 666, 67 S. W. 1100.

Mr. George N. Fickeissen argued the cause, and, with Mr. J. D. Johnson, filed a brief for plaintiff in error:

In a suit brought to this court from a state court, which involves the constitutionality of ordinances made by a municipal corporation, this court will, when necessary, put its own independent construction upon the ordinances.

Yick Wo v. Hopkins, 118 U. S. 356, 366, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

An ordinance which denies to a person the right to engage in a lawful business or occupation followed and engaged in by others deprives such person of his property and liberty without due process of law, abridges his privileges, and denies him the equal protection of the laws, contrary to the provisions of the 14th Amendment to the Constitution of the United States, and is void.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Hong Wah*, 82 Fed. 623; *Re Tie Loy*, 26 Fed. 611; *Barthet v. New Orleans*, 24 Fed. 563; *Re Quong Woo*, 13 Fed. 229; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464; *Tugman v. Chi-*

cago, 78 Ill. 405; *Hudson v. Thorne*, 7 Paige, 261; *St. Louis v. Dorr*, 145 Mo. 466, 42 L. R. A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976.

An ordinance which treats a lawful business and occupation, irrespective of location, or the manner in which it is carried on, as a nuisance, and tends to suppress such business, denies to the person or persons carrying on such business the equal protection of the law, and tends to create a monopoly, and is void as conflicting with the 14th Amendment to the United States Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *The Stockton Laundry Case*, 26 Fed. 611; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

Under the decision of the supreme court of the state of Missouri, the scope, purpose, and effect of this ordinance are to compel the dairymen of St. Louis to move their business outside the limits of the city whenever, by circumstances, they are compelled to leave the premises upon which their dairies and cow stables were in operation at the time the ordinance went into effect. Such an ordinance tends to destroy a lawful occupation and business, and conflicts with the 14th Amendment to the United States Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *The Stockton Laundry Case*, 26 Fed. 611.

The police power of the state extends only to the regulation of the pursuits of man so that they shall not become in their mode of exercise unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Barthet v. New Orleans*, 24 Fed. 563; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *Baltimore v. Radcke*, 49 Md. 217, 33 Am. Rep. 239; *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110, 19 Pac. 719.

Mr. William F. Woerner argued the cause, and, with Messrs. Charles W. Bates and Charles R. Skinker, filed a brief for defendant in error.

For their contentions see their brief as reported in *Fischer v. St. Louis*, ante, 1018.

Mr. Justice Brown delivered the opinion of the court:

This case is similar to the last in every material particular, and, for the reasons stated in that case, is also affirmed.

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UNITED STATES *ex rel.* FERDINAND
HOLZENDORF, *Plff. in Err.*,
v.

JOHN HAY, Secretary of State.

(See S. C. Reporter's ed. 373-376.)

*Appeal from court of appeals of District
of Columbia—amount in dispute.*

The value of the matter in dispute in a proceeding to compel, by mandamus, the Secretary of State to seek to obtain \$500,000 damages from the German Empire in redress of petitioner's alleged wrongful imprisonment while on a visit to that country, is not such as will bring the cause within the appellate jurisdiction over judgments of the court of appeals of the District of Columbia conferred upon the Federal Supreme Court by D. C. Code, § 233, in cases in which the matter in dispute, exclusive of costs, exceeds \$5,000.

[No. 210.]

*Argued and submitted April 12, 13, 1904.
Decided May 16, 1904.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing a petition for a writ of mandamus to compel the Secretary of State to institute proceedings to recover \$500,000 damages from the German Empire for the petitioner's alleged wrongful imprisonment while on a visit to that country. *Dismissed* for want of jurisdiction.

See same case below, 20 App. D. C. 576.

Statement by Mr. Justice White:

The relator, plaintiff in error, filed his petition in the Supreme Court of the District of Columbia, praying a writ of mandamus directed to the then and present Secretary of State of the United States. In substance it was averred that Holzendorf, prior to and since May, 1898, had been a naturalized citizen of the United States, and while on a visit to Germany, his native country, he was wrongfully imprisoned in an asylum for the insane at Dalldorf, near Berlin, from May 11, 1898, to July 8, 1899, when he was released by the judgment of a German court, as being "perfectly sound in mind and body." The grievance complained of was alleged to have been the act of the German Empire, and it was averred that said grievance "was manifestly in contempt of his rights as a citizen of the United States," which "oppressively deprived him of liberty,

NOTE.—As to amount necessary to give United States Supreme Court jurisdiction—see notes to *Schunk v. Moline*, M. & S. Co. 37 L. ed. U. S. 256, and *Commercial Bank v. Buckingham*, 12 L. ed. U. S. 169.

reputation, and time, greatly to his cost, loss, damage, and injury." Alleging a refusal by the defendant in mandamus "to proceed, on the part of the United States, to seek to obtain redress of grievance in behalf of your petitioner," it was prayed that a writ of mandamus issue, "addressed to said defendant, John Hay, the Secretary aforesaid, commanding and requiring him forthwith to institute vigorous and proper proceedings against the Empire of Germany, or Kingdom of Prussia, or both, that is to say, against the Emperor, for the recovery of \$500,000 damages, in behalf of your petitioner."

The matter was heard, and an order was entered, dismissing the petition. An appeal was allowed, and the court of appeals of the District affirmed the judgment. 20 App. D. C. 576. By writ of error the cause was then brought to this court.

Mr. R. S. Tharin argued the cause, and, with **Mr. A. E. L. Leckie**, filed a brief for plaintiff in error.

Assistant Attorney General McReynolds submitted the cause for defendant in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The relief demanded was denied by the [375] court below substantially *upon the ground that no legal duty rested upon the defendant to do the act the performance of which it was the purpose of the proceeding to coerce, because such act concerned the political department of the government, involving solely the exercise of official discretion, which was not subject to judicial control. Without intimating in the slightest degree that the dismissal was not justified upon the ground referred to, we are compelled to dispose of the case upon the objection made to the want of jurisdiction in this court to entertain the writ of error.

It is provided in the Code of the District of Columbia (31 Stat. at L. 1227, chap. 854), as follows:

"Sec. 233. Any final judgment or decree of the court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner, and under the same regulations, as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute,

wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

It is clear, therefore, unless the case is one in which the matter in dispute, exclusive of costs, exceeds the sum of \$5,000, we have no power to review the final judgment of the court of appeals in this case.

The meaning of the term "matter in dispute," as employed in prior and analogous statutes regulating appeals from the courts of the District of Columbia, has been considered in previous decisions of this court, to one only of which we shall specially refer.

In *South Carolina v. Seymour*, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871, the court had *under consideration § 8 of the act [376] of 1893 [27 Stat. at L. 436, chap. 74, U. S. Comp. Stat. 1901, p. 573], referred to in § 233 of the District Code, *supra*. Particularly discussing the preliminary provision conferring jurisdiction upon this court where "the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars," the court said (p. 357, L. ed. p. 744, Sup. Ct. Rep. p. 873):

"In order to bring a case within the first alternative, the matter in dispute, according to the settled construction, must be money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value."

Now, assuming that the term "matter in dispute" may embrace a right to have a claim against a foreign government presented through the political department of the United States, and that the value of such a right may be gauged by the possible pecuniary injury which may be sustained if no such action is taken, it is yet evident that the claim under consideration is one having merely a conjectural value. The "matter in dispute," as respects a money demand, has relation to justiciable demands. Now, the averments in the petition for mandamus in this case do not, under the principles of the law of false imprisonment prevailing in this country, state a cause of action even against individuals, much less against a sovereignty; nor is it shown that the alleged wrong was actionable under the laws of Germany. So far as appears, the right to assert the demand in question upon the German Empire is merely a right to appeal to the grace of that country. The value of such a right is manifestly purely conjectural, and not susceptible of a pecuniary estimate. It certainly cannot be said to have the value declared by the statute to be essential to our power to entertain a writ

of error. *The writ of error must therefore be dismissed.*

Mr. Justice **Brewer** and Mr. Justice **Brown** think the judgment should be affirmed.

[377]*SUN PRINTING & PUBLISHING ASSOCIATION, *Plff. in Err.*,
v.

CHARLES WILLIAM EDWARDS.

(See S. C. Reporter's ed. 377-383.)

Pleading—sufficiency of allegations of citizenship—defective averments cured by record.

1. An allegation of a complaint admitted by answer, that "defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the northern district of New York," sufficiently avers that the corporation is a citizen of New York, for the purpose of giving jurisdiction to a Federal circuit court.
2. Resort may be had to the entire record for the purpose of curing a defective averment of citizenship, where the jurisdiction of the lower Federal court is asserted to depend upon diversity of citizenship.
3. The testimony contained in a certificate from a circuit court of appeals of the United States, and recited to have been given on the trial of an action at law in the court below, will be assumed to have been preserved in a bill of exceptions which formed part of the transcript of record filed in the circuit court of appeals on the writ of error from that court to the court below.
4. An averment that plaintiff is a resident of the state of Delaware will be regarded by an appellate court as a sufficient averment of citizenship in that state, for the purpose of giving jurisdiction to a Federal circuit court, where the uncontradicted testimony shows a legal domicile therein, and that any absence from the state was without intention to abandon such domicile.

[No. 239.]

Argued April 20, 1904. Decided May 16, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question

NOTE.—As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L. R. A. 108, and note; and *Myers v. Murray, N. & Co.* 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

On sufficiency of averments of diverse citizenship to confer jurisdiction on Federal courts—see note to *Shipp v. Williams*, 10 C. C. A. 261. 194 U. S.

whether diversity of citizenship was sufficiently shown to give jurisdiction of the action to a Federal circuit court. *Answered in the affirmative.*

The facts are stated in the opinion.

Mr. **Franklin Bartlett** argued the cause and filed a brief for the Sun Printing & Publishing Association:

"Citizenship" and "residence" are not synonymous terms.

Parker v. Overman, 18 How. 141, 15 L. ed. 318; *Robertson v. Cease*, 97 U. S. 648, 24 L. ed. 1058.

There must be an explicit averment of citizenship.

Bingham v. Cabot, 3 Dall. 382, 1 L. ed. 646; *Abercrombie v. Dupuis*, 1 Cranch, 343, 2 L. ed. 129; *Wood v. Wagon*, 2 Cranch, 9, 2 L. ed. 191; *Capron v. Van Noorden*, 2 Cranch, 126, 2 L. ed. 229; *Brown v. Keene*, 8 Pet. 112, 8 L. ed. 885.

The essential jurisdictional fact should be averred or alleged in the bill of complaint.

Hornthall v. The Collector, 9 Wall. 560, 19 L. ed. 560.

There is no presumption in favor of jurisdiction in the circuit court, but the presumption is against jurisdiction.

Robertson v. Cease, 97 U. S. 646, 24 L. ed. 1057; *Grace v. American Cent. Ins. Co.* 109 U. S. 283, 27 L. ed. 934, 3 Sup. Ct. Rep. 207; *Börs v. Preston*, 111 U. S. 255, 28 L. ed. 420, 4 Sup. Ct. Rep. 407.

An averment of residence is not the equivalent of an averment of citizenship for the purposes of jurisdiction in the courts of the United States.

Everhart v. Huntsville Female College, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; *Denny v. Pironi*, 141 U. S. 123, 35 L. ed. 657, 11 Sup. Ct. Rep. 966.

The record fails to disclose diverse citizenship in the parties.

Ex parte Smith, 94 U. S. 455, 24 L. ed. 165; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207.

The record must show affirmatively and with distinctness that at the time of the commencement of the action a diversity of citizenship existed.

Emsheimer v. New Orleans, 186 U. S. 44, 46 L. ed. 1047, 22 Sup. Ct. Rep. 770; *Gibson v. Bruce*, 108 U. S. 561, 27 L. ed. 825, 2 Sup. Ct. Rep. 873; *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; *Peper v. Fordyce*, 119 U. S. 471, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; *Thayer v. Life Asso. of America*, 112 U. S. 717, 28 L. ed. 864, 5 Sup. Ct. Rep. 355.

It is error for the circuit court to proceed, unless its jurisdiction be shown.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Horne v. George H. Hammond Co.* 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 219, 40 L. ed. 401, 16 Sup. Ct. Rep. 272.

A party cannot, by proceedings in the circuit court, waive a question of jurisdiction in that court, so as to prevent its being raised and passed upon by the Supreme Court of the United States.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Metcalf v. Watertown*, 128 U. S. 589, 32 L. ed. 544, 9 Sup. Ct. Rep. 173; *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912.

Jurisdiction cannot be inferred argumentatively, either from the averments or allegations of the complaint, or from the testimony appearing in the record.

Brown v. Keene, 8 Pet. 115, 8 L. ed. 886; *Robertson v. Cease*, 97 U. S. 649, 650, 24 L. ed. 1059.

A man may actually reside in one place, and have his home or residence there, and yet may have a domicile in another place.

Story, Conf. L. § 44.

In the matter of the jurisdiction of the Federal courts, the discrimination between suits between citizens of the same state, and suits between citizens of different states is established by the Constitution and laws of the United States. And it has been the constant effort of Congress and of this court to prevent this discrimination from being evaded, by bringing into the Federal courts controversies between citizens of the same state.

Bernards Twp. v. Stebbins, 109 U. S. 353, 27 L. ed. 960, 3 Sup. Ct. Rep. 252; *Shreveport v. Cole*, 129 U. S. 44, 32 L. ed. 592, 9 Sup. Ct. Rep. 210.

Facts or acts which in legal intendment constitute citizenship must be proved, and not be mere declarations of the party.

Butler v. Farnsworth, 4 Wash. C. C. 103, Fed. Cas. No. 2,240.

The diversity of citizenship must exist at the time of the commencement of the action, which is the time of the test.

Stevens v. Nichols, 130 U. S. 231, 232, 32 L. ed. 914, 9 Sup. Ct. Rep. 518; *Jackson v. Allen*, 132 U. S. 34, 33 L. ed. 249, 10 Sup. Ct. Rep. 9.

The decision of this court in the case of *Brown v. Keene*, 8 Pet. 112, 8 L. ed. 885, is fatal to the argument of the defendant in error.

Having a permanent domicile and resi-

dence in the United States is not the equivalent of citizenship.

United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

Neither the place of organization, nor the principal place of business, is an absolute test of citizenship.

Union P. R. Co. v. Harris, 158 U. S. 327, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; *Guinn v. Iowa C. R. Co.* 4 McCrary, 566, 14 Fed. 323; *New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 188.

Mr. Thomas F. Bayard argued the cause and filed a brief for Edwards:

If the diversity of citizenship affirmatively appears upon the record, the jurisdiction of the circuit court must be affirmed.

Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Peper v. Fordyce*, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193.

An affirmative averment that one of the parties is a corporation, duly organized and existing under the laws of a certain state, is a sufficient allegation to establish the citizenship of the party in that state.

Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 558, 11 L. ed. 353, 377; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 329, 14 L. ed. 953, 959; *United States Exp. Co. v. Kountze Bros.* 8 Wall. 342, 351, 19 L. ed. 457, 460; *Muller v. Dows*, 94 U. S. 444, 445, 24 L. ed. 207; *Black's Dillon, Removal of Causes*, § 178; *Foster*, Fed. Pr. 3d ed. § 19, p. 67.

For the purpose of jurisdiction of the courts of the United States, domicile is the test of citizenship.

Poppenhauser v. India-Rubber Comb Co. 14 Fed. 707; *Carter*, Jurisdiction of Federal Courts, p. 18.

As a resident in Delaware, with his home in Delaware, and with the *animus manendi*, Edwards was a citizen of the state of Delaware.

Story, Conf. L. § 44; *Wharton*, Conf. L. 2d ed. § 21; *Mitchell v. United States*, 21 Wall. 350, 22 L. ed. 584; *Anderson v. Watt*, 138 U. S. 694, 706, 34 L. ed. 1078, 1082, 11 Sup. Ct. Rep. 449; *Rucker v. Bolles*, 25 C. C. A. 600, 49 U. S. App. 358, 80 Fed. 504; *Marks v. Marks*, 75 Fed. 321; *Carter*, Jurisdiction of Federal Courts, p. 20.

Edwards was not a citizen of the state of New York.

Butler v. Farnsworth, 4 Wash. C. C. 101, Fed. Cas. No. 2,240; *Cooper v. Galbraith*, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; *Dickerman v. Northern Trust Co.* 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311;

Jacob, Domicil, § 134; *Winn v. Gilmer*, 27 Fed. 817; Story, Conf. L. §§ 47, 48; Wharton, Conf. L. § 58; Dicey, Conf. L. chap. 2, rule 2; *Guier v. O'Daniel*, 1 Binn. 349, note; Bluntschli, National Law Codified, § 394.

Mr. Justice **White** delivered the opinion of the court:

The certificate of the United States circuit court of appeals for the second circuit is as follows:

"This cause comes here upon a writ of error to review a judgment of the circuit court, southern district of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. Upon examination of the record it appears that, in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the circuit court is in issue. Under §§ 5 and 6 of the act of March 3, 1891, writs of errors in such cases are to be [380] taken direct to the *Supreme Court, and the grant of appellate jurisdiction to the circuit courts of appeal does not include such cases.

"In accordance, therefore, with the practice indicated in *Cincinnati, H. & D. Co. v. Thiebaud*, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822, and *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646, and followed by this court in *United States v. Lee Yon Tai*, 51 C. C. A. 299, 113 Fed. 465, this court elects to reserve judgment upon the other questions, and to certify the question of jurisdiction to the Supreme Court.

"Statement of Facts.

"The facts out of which the question of jurisdiction arises are as follows:

"The action is for breach of contract of employment. The complaint avers, and the answer admits, that defendant is a domestic corporation, duly organized and existing under the laws of New York, having its principal office for the transaction of business in the southern district of New York. The complaint further avers, and the answer admits, that 'plaintiff' is a resident of the state of Delaware.' Upon the trial the plaintiff testified: 'I started in the printing business about thirty years ago. . . . I have been on the New York Tribune, on the World, the Philadelphia Record, and the American Press Association. . . . I had charge of the Morning News, Wilmington, Delaware. . . . In this city [New York] I worked on the New York Tribune, on the Sun, on the World, and in the American Press Association. . . . Just prior to my going to work upon the New York Sun [under the contract in suit] I was the

publisher and business manager of the Evening Journal of Wilmington, Delaware, and president of the company. . . . [After my discharge from the employ of the Sun] I finally secured a place with the New Haven Palladium, and I was there a while. . . . One of the reasons I left the New Haven Palladium was that it was too far away from home. I live in Delaware, and I had to go back and forth. My family were over in Delaware.'

"There was no other testimony in any [381] way bearing upon plaintiff's residence or citizenship.

"The jurisdiction of the circuit court was not questioned by the defendant in the court below, and the assignments of error do not present any such question.

"Questions Certified.

"Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court is:

"Had the circuit court jurisdiction of the controversy between plaintiff and defendant?"

"In accordance with the provisions of § 6 of the act of March 31, 1891, establishing courts of appeal, etc., the foregoing question of law is, by the circuit court of appeals for the second circuit, hereby certified to the Supreme Court."

In the argument at bar on behalf of the Sun Printing & Publishing Association,—the plaintiff in error in the circuit court of appeals,—the jurisdiction of the circuit court over the controversy was denied, not only upon the hypothesis that Edwards, the plaintiff, was not alleged or shown to have been a citizen of Delaware, but also upon the assumption that the Sun Association was not averred to have been a citizen of New York. The latter contention may be at once dismissed from view, because the allegation of the complaint, admitted by the answer, "that defendant is a domestic corporation, duly organized and existing under the laws of New York, having its principal office for the transaction of business in the southern district of New York," clearly imported that the corporation was originally created by the state of New York. The presumption necessarily followed that the corporation was composed of citizens of that state, and consequently the corporation was entitled to sue or be sued in the courts of the United States as a citizen of New York. *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713.

We come to the contention that the citizenship of Edwards *was not averred in the [382] complaint or shown by the record, and hence jurisdiction did not appear.

In answering the question whether the

circuit court had jurisdiction of the controversy, we must put ourselves in the place of the circuit court of appeals, and decide the question with reference to the transcript of record in that court.

Had the transcript shown nothing more as to the status of Edwards than the averment of the complaint that he was a "resident of the state of Delaware," as such an averment would not necessarily have imported that Edwards was a citizen of Delaware, a negative answer would have been impelled by prior decisions. *Mexican C. R. Co. v. Duthie*, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; *Horne v. George H. Hammond Co.* 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Denny v. Pironi*, 141 U. S. 121, 35 L. ed. 657, 11 Sup. Ct. Rep. 966; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057. The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which, in legal intendment, constitute such allegation, that is sufficient. *Horne v. George H. Hammond Co.* 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167, and cases cited.

As this is an action at law, we are bound to assume that the testimony of the plaintiff contained in the certificate of the circuit court of appeals, and recited to have been given on the trial, was preserved in a bill of exceptions, which formed part of the transcript of record filed in the circuit court of appeals. Being a part of the record, and proper to be resorted to in settling a question of the character of that now under consideration (*Robertson v. Cease*, 97 U. S. 648, 24 L. ed. 1058), we come to ascertain what is established by the uncontradicted evidence referred to.

In the first place, it shows that Edwards, prior to his employment on the New York Sun and the New Haven Palladium, was legally domiciled in the state of Delaware. Next, it demonstrates that he had no intention to abandon such domicile, for he testified under oath as follows: "One of the [383] reasons I *left the New Haven Palladium was, it was too far away from home. I lived in Delaware, and I had to go back and forth. My family are over in Delaware." Now, it is elementary that, to effect a change of one's legal domicile, two things are indispensable: First, residence in a new domicile; and, second, the intention to remain there. The change cannot be made, except *facto et animo*. Both are alike necessary. Either without the other is insuffi-

cient. Mere absence from a fixed home, however long continued, cannot work the change. *Mitchell v. United States*, 21 Wall. 353, 22 L. ed. 588.

As Delaware must, then, be held to have been the legal domicile of Edwards at the time he commenced this action, had it appeared that he was a citizen of the United States, it would have resulted, by operation of the 14th Amendment, that Edwards was also a citizen of the state of Delaware. *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449. Be this as it may, however, Delaware being the legal domicile of Edwards, it was impossible for him to have been a citizen of another state, district, or territory; and he must then have been either a citizen of Delaware or a citizen or subject of a foreign state. In either of these contingencies, the circuit court would have had jurisdiction over the controversy. But, in the light of the testimony, we are satisfied that the averment in the complaint, that Edwards was a resident "of" the state of Delaware, was intended to mean, and, reasonably construed, must be interpreted as averring, that the plaintiff was a citizen of the state of Delaware. *Jones v. Andrews*, 10 Wall. 331, 19 L. ed. 936; *United States Exp. Co. v. Kountze*, 8 Wall. 342, 19 L. ed. 457.

The question is answered in the affirmative, and it will be so certified.

Mr. Justice Harlan and Mr. Justice Peckham dissenting.

*EDWIN T. MORRIS, *et al.*, *Appts.*, [384]
v.

ETHAN A. HITCHCOCK *et al.*

(See S. C. Reporter's ed. 384-393.)

Constitutional law — validity of Indian legislation — privilege taxes — validity of rules promulgated by Secretary of the Interior for enforcement and collection.

1. Chickasaw legislation imposing an annual privilege or permit tax on live stock owned or held by noncitizens within the limits of the Chickasaw Nation, which has received the approval of the governor of such nation and the sanction of the President of the United States, made by the act of June 28, 1898, § 29 (30 Stat. at L. 505, chap. 517), a condition of its validity, is not repugnant to the Federal Constitution.
2. The Federal Constitution is not violated by regulations promulgated by the Secretary of the Interior for the enforcement and collection of the annual privilege or permit tax on live stock owned or held by noncitizens within the territory of the Chickasaw Na-

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tion, imposed by Chickasaw legislation which had received the approval of the governor of such nation and the sanction of the President of the United States, made by the act of June 28, 1898, § 29, a condition of its validity.

[No. 272.]

Submitted April 29, 1904. Decided May 16, 1904.

A PPEAL from the Court of Appeals of the District of Columbia to review a judgment which affirmed a decree of the Supreme Court of that District dismissing a bill to enjoin interference with live stock grazing upon land in the Chickasaw Nation under the authority of Chickasaw legislation imposing a privilege tax on such live stock when owned by noncitizens, and of the regulations promulgated by the Secretary of the Interior for the enforcement and collection of such tax. *Affirmed.*

See same case below, 21 App. D. C. 565.

Statement by Mr. Justice White:

This is an equity suit, begun in the supreme court of the District of Columbia by Edwin T. Morris and nine other persons, all averred to be citizens of the United States, and not Indians, against Ethan A. Hitchcock, as Secretary of the Department of the Interior, William A. Jones, as Commissioner of Indian Affairs, J. George Wright, as Indian inspector, and J. Blair Shoenfelt, as United States Indian agent, resident at the city of Muscogee, in the Indian territory. Certain of the complainants were averred to be residents either of the state of Texas or of the state of Missouri, and others were averred to be residents of the Indian territory.

It was alleged that each complainant was the owner in his own right of not less than 500 head of cattle and horses, of the value of not less than \$15 per head, which were grazing upon land in the Chickasaw Nation, Indian territory, under contracts with individual members of said tribe, holding such [385] lands as their approximate shares *upon allotments to be made. The purpose of the suit was to obtain a decree perpetually enjoining said defendants from seizing, molesting, or removing the cattle and horses of plaintiffs from the Indian territory, as it was averred they threatened to do under the pretended authority of an act of the legislature of the Chickasaw Nation and regulations promulgated by the Secretary of the Interior, which were averred to be repugnant to the 4th and 5th Amendments to the Constitution of the United States. The

statute and regulations referred to are copied in the margin.†

†Regulations (June 3, 1902) Governing the Introduction by Noncitizens of Live Stock in the Chickasaw Nation, Indian Territory.

Section 29 of the act of Congress, approved June 28, 1898 (30 Stat. at L. 495, chap. 517), ratifying the agreement with the Choctaw and Chickasaw Nations, Indian territory, provides in part as follows:

"It is further agreed that no act, ordinance, or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or of the individuals, after allotment, or the moneys or other property of the tribe or citizens thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes), or the rights of any persons to employ any kind of labor; or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions, passed by the council of either of said tribes, shall be approved by the governor thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

"It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight."

Under these provisions, the following act of the Chickasaw national council, approved by the governor on May 3, 1902, was approved by the President of the United States on May 15, 1902, and entitled:

An Act to Prescribe Privilege or Permit Taxes, and Denning the Manner of Their Collection.

Be it Enacted by the Legislature of the Chickasaw Nation:

Sec. 1. That there shall be paid upon live stock owned or held by noncitizens within the limits of the Chickasaw Nation, an annual privilege or permit tax, as follows: On cattle, horses, and mules, 25 cents per head; and on sheep and goats, 5 cents per head: *Provided*, That there shall be exempted from the provisions of this act, when owned and used by the head of a family, two cows and calves, and one team, consisting of two horses or two mules, or one horse and one mule; and the provisions of this act shall also apply to all live stock introduced into the Chickasaw Nation since January 1, 1902, upon which the tribal taxes imposed by the laws of the Chickasaw Nation have not been paid, with like force and effect as if such cattle had been owned and held within the limits of Chickasaw Nation for one

- [386] *The bill of complaint was demurred to upon the grounds following: (a) Want of jurisdiction in equity because of adequate
- [387] *right to relief at law; (b) defect of necessary parties, in that neither the Chickasaw
- [388] Nation or tribe, or any member *or representative thereof, was joined as a defendant; and (c) want of equity.

After argument, the court overruled the first and second grounds of demurrer, and sustained the third ground. The complainants elected to stand upon their bill of complaint, and a decree was consequently entered, dismissing the bill. On appeal, the decree was affirmed by the court of appeals of the District of Columbia. 21 App. D.

year prior to the passage and approval of this act.

Sec. 2. That such privilege or permit taxes shall hereafter be payable to such person or persons, and collected under such rules and regulations, as may be prescribed by the Secretary of the Interior.

Sec. 3. That the expenses of collecting such privilege or permit taxes shall be deducted from the gross collections, and the balance paid quarterly into the treasury of the Chickasaw Nation.

Sec. 4. That such privilege or permit taxes shall be due and payable annually, upon demand, and if such taxes are not paid when demanded, the live stock upon which such taxes are due shall be held to be in the Chickasaw Nation without its consent, and unlawfully upon the lands of the Chickasaws, and the presence of such live stock, and owners or holders thereof, within the limits of said nation, shall be deemed detrimental to the peace and welfare of the Chickasaw Indians.

Sec. 5. That all acts or parts of acts in conflict herewith, be and the same are, hereby repealed; and this act shall take effect from and after its approval by the President of the United States.

In pursuance of the above and foregoing, the following regulations are promulgated:

Regulations Prescribed by the Secretary of the Interior Governing the Introduction or Holding of Live Stock in the Chickasaw Nation by Noncitizens.

Sec. 1. Any person, other than a recognized citizen of the Choctaw or Chickasaw Nations, desiring to introduce or hold stock of any description within the limits of the Chickasaw Nation, Indian territory, shall first make application to the United States Indian Inspector for the Indian territory, Muscogee, Indian territory, and shall pay to the United States Indian agent, Union agency, an annual tax of twenty-five (25) cents per head on all cattle, horses, and mules, and on all sheep and goats five (5) cents per head, provided that these shall be exempted from the provisions of these regulations, when owned and used by the head of a family, two cows and calves, and one team of horses, or two mules, or one horse and one mule.

Sec. 2. Such tax shall be paid January 1st of each year, or prior to the time of the introduction of such stock, and accompanying such remittance there shall be furnished, un-

C. 565. The cause was then brought to this court.

Messrs. Jackson H. Ralston and Frederick L. Siddons submitted the cause for appellants. *Messrs. Davis & Garnett* were with them on the brief.

Assistant Attorney General Campbell and *Mr. A. C. Campbell* submitted the cause for appellees.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

We think the court below was right in holding that the first and second grounds

der oath, a full description of such stock, including the number and brands, together with any other desired information.

Sec. 3. Such taxes shall apply to all stock introduced within the limits of the Chickasaw Nation since January 1, 1902, upon which taxes have not already been paid to the Chickasaw Nation, and for which the owners or holders cannot produce receipts.

Sec. 4. The tax prescribed shall be paid annually, in advance, whether such stock is held the entire succeeding twelve months or for a portion of such time.

Sec. 5. When cattle are held by a citizen, and mortgaged to a noncitizen, not in good faith, but for the purpose of evading the payment of taxes, said cattle shall be considered as owned or held by such noncitizen, and subject to these regulations and taxes.

Sec. 6. Parties who now hold stock within the limits of the Chickasaw Nation should remit the taxes prescribed promptly to the United States Indian agent at Muscogee, Indian territory, and such payments must be made within ten (10) days from the date of receiving notice of these regulations. If such taxes are not paid within this time remittances made thereafter will not be accepted; but such stock and any other stock found within the limits of the Chickasaw Nation after July 1, 1902, upon which taxes have not been paid, will be considered as being within the limits of the Chickasaw Nation unlawfully, and measures will be adopted looking to the removal by the United States Indian agent of such stock, together with the owners or holders thereof, without further notice.

Sec. 7. Authorized agents of the Interior Department will make necessary investigations and reports, and see that proper remittances are forwarded, acting under the direction of the United States Indian Inspector for Indian territory, but will not be authorized to receive or collect any taxes whatsoever, as all payments must be made direct to the United States Indian agent, who will furnish receipts for all payments made.

Sec. 8. These regulations and taxes will apply to all stock as indicated, held within the limits of the Chickasaw Nation by other than recognized citizens of the Choctaw or Chickasaw Nations, whether held upon the public domain or upon lands leased from individual Indians.

Thos. Ryan, Acting Secretary.
Department of the Interior, Washington, D. C.
Approved June 3, 1902.

of demurrer were not well taken, but do not think it necessary to review the subject, as the opinion which we have reached on the merits of the case will dispose of the entire controversy.

The act of Congress approved June 28, 1898, commonly known as the Curtis act (30 Stat. at L. 495, chap. 517), under which the act of the Chickasaw Nation and regulations of the Secretary of the Interior which are assailed were adopted, is entitled "An Act for the Protection of the People of the Indian Territory and for Other Purposes." The question of the validity and construction of that act was under consideration in *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, and *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115, and in view of the rulings in those cases the constitutionality of the statute is not now open to question.

[389] While it is unquestioned that, by the Constitution of the United States, Congress is vested with paramount power to *regulate commerce with the Indian tribes, yet it is also undoubted that in treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned, and the duty of the United States to protect the Indians "from aggression by other Indians and white persons, not subject to their jurisdiction and laws," has also been recognized. Treaty June 22, 1855, arts. 7 and 14 (11 Stat. at L. 611); Treaty April 28, 1866, art. 8 (14 Stat. at L. 769). And it is not disputed that, under the authority of these treaties, the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory.

Legislation of the same general character as that embodied in the act of the legislature of the Chickasaw Nation, here assailed as invalid, had been enacted by the Chickasaw Nation before the passage of the Curtis act. The essential provisions of one such law, passed on October 17, 1876, were recited in a report made to the Senate by the committee on the judiciary, on February 3, 1879, from which we copy the following:

"The law in question seems to have a twofold object,—to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and to raise revenue. By its terms no citizen of any state or territory of the United States can either rent land or procure employment in the Chickasaw country without entering into a contract with a Chickasaw, which contract the

latter is to report to the clerk of the county where he resides, and a permit must be obtained for a time not longer than twelve months, for which the citizen is to pay the sum of \$25.

"Every licensed merchant, trader, and every physician, not a Chickasaw, is required to obtain a permit, for which the sum of \$25 is exacted."

Declaring in substance that under the existing treaties with the tribe the Chickasaws were not prohibited from excluding *from the territory of the nation the persons affected by the act, the committee expressed the opinion that the act which was the subject of the report was not invalid.

Again, on December 14, 1898, the legislature of the Chickasaw Nation passed an act which, in § 2, with some exemptions mentioned in a proviso, imposed the following permit taxes:

"Sec. 2. That any noncitizen who owns horses, jacks, jennets, mules, or other cattle, and who holds them upon the public domain or within the Chickasaw Nation, shall be required to pay an annual permit tax of 25 cents per head for each horse, jack, or jennet, mule, or bovine, and 5 cents per head for each sheep and goat so held within this nation."

By the 9th section of the same act it was provided as follows:

"Sec. 9. That any noncitizen, subject to a permit tax under the provisions of § 1 of this act, and who shall refuse to pay his permit tax, after due notice for thirty days, shall be deemed an intruder by virtue of the intercourse law of the United States of America, and subject to removal; and such intruder shall be reported to the United States Indian agent (or inspector) to the Five Civilized Tribes, and shall forthwith be removed from the Chickasaw Nation, under the direction of the said United States Indian agent or inspector."

The agreement made by the commission to the Five Civilized Tribes with the commissions representing the Choctaw and Chickasaw tribes of Indians on April 23, 1897, as amended by the Curtis act, was, in § 29 of that act, ratified and confirmed, and made operative on December 1, 1898 [30 Stat. at L. 505, chap. 517].

By that agreement certain modifications, not material to be stated, were made in the legislative authority and judicial jurisdiction of the tribal governments, and, so modified, the tribal governments were continued in force, and are to so continue until March 4, 1906. One of the clauses of the agreement reads as follows:

"*It is further agreed that no act, ordinance, or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or

of the individuals, after allotment, or the moneys or other property of the tribe or citizens thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes), or the rights of any persons to employ any kind of labor, or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the governor thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same."

On September 17, 1900, and September 21, 1901, the proper construction of the Curtis act was considered, at the request of the Secretary of the Interior, in opinions of Attorney General Griggs and Attorney General Knox, respectively. In the first of those opinions it was, in substance, held as follows:

"Under the treaties with the Five Civilized Tribes of Indians no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the country occupied by these tribes without their permission; and they have the right to impose the terms upon which such permission will be granted.

"The provisions of the act of June 28, 1898 (30 Stat. at L. 495, chap. 517), for the organization of cities and towns in said Indian country, and the extinguishment of Indian title therein, have not yet been consummated, and it is still Indian country.

[392] This *act does not deprive these Indians of the power to enact laws with regard to licenses or taxes, nor exempt purchasers of town or city lots from the operation of such legislation.

"Purchasers of lots do so with notice of existing Indian treaties, and with full knowledge that they can only occupy them by permission from the Indians. Such lands are sold under the assumption that the purchasers will comply with the local laws.

"Sections 2147 to 2150, inclusive, of the Revised Statutes, expressly confer the right to use the military forces of the United States in ejecting trespassers upon Indian

lands, and the grant of this power carries with it the duty of its exercise.

"It is the duty of the Department of the Interior to remove all classes forbidden by treaty or law, who are within the domain of the Five Civilized Tribes without Indian permission; to close all businesses which require permit or license; and are being conducted without the same; and to remove all cattle which are being pastured on said land without Indian permit or license."

And in the last-mentioned opinion it was, in substance, declared that, under § 16 of the Curtis act, the Secretary of the Interior had authority to collect a tribal tax imposed by the laws of the Cherokee Nation of Indians upon the exportation of prairie hay from that nation, and that the tax was just as applicable to hay raised upon lands occupied by individual members of the nation, as their share of the public domain, pending allotments, as in any other case, and would be so even if the shipper was the absolute owner of the land on which the hay was raised.

Since the rendition of these opinions of the legal advisers of the government, Congress has created an express exception in favor of owners of town lots, prohibiting their being proceeded against as intruders, but has not legislated against the enforcement of the legislation now under review, which was then operative. Thus, on May 27, 1902, in the Indian appropriation act (32 Stat. at L. 259, chap. 888), it was provided "That it shall *hereafter be unlawful [393] to remove or deport any person from the Indian territory who is in lawful possession of any lots or parcels of land in any town or city in the Indian territory which has been designated as a townsite under existing laws and treaties, and no part of this appropriation shall be used for the deportation or removal of any such person from Indian territory."

Viewing the Curtis act in the light of the previous decisions of this court and the dealings between the Chickasaws and the United States, we are of opinion that one of the objects occasioning the adoption of that act by Congress, having in view the peace and welfare of the Chickasaws, was to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation, as a preventive of arbitrary and injudicious action.

The refusal to pay the permit tax in question caused the cattle and horses of the complainants to be wrongfully within the territory, and we cannot decline to recognize such fact because of the hardships which it is alleged must arise if the act and regula-

tions are enforced. Being of opinion that the regulations of the Secretary of the Interior are valid, and that the act of the legislature of the Chickasaw Nation, approved by the governor on May 5, 1902, and sanctioned by the President of the United States on May 15, 1902, was not the exercise of arbitrary power, as claimed, and that neither the act nor the regulations in any respect violate the Constitution of the United States, it follows that *the judgment below is correct, and it must, therefore, be affirmed.*

[394]

*UNITED STATES, Appt.,
v.

FRANK Y. ANDERSON and William J. Cameron, Trustees, etc., and Alabama State Land Company.

(See S. C. Reporter's ed. 394-401.)

Relation—railway land grants—indemnity lands—government cannot retain money recovered as a result of trespass after selection and before approval.

The doctrine of relation precludes the United States from retaining, as against its grantees of lands within the indemnity limits of the grant made by the act of June 3, 1856 (11 Stat. at L. chap. 41, p. 17), in aid of railway construction, a sum which it collected from trespassers thereon for the removal of iron and stone from the land during the period between the selection of such lands to supply in part a large deficiency in the place limits, and the approval of such selection by the Secretary of the Interior.

[No. 560.]

Submitted March 21, 1904. Decided May 16, 1904.

A PPEAL from the Court of Claims to review a judgment denying the right of the United States to retain, as against its grantees of lands within the indemnity limits of a railway land grant, the proceeds recovered by it as the result of a trespass upon the land after the application for its selection to supply deficiencies in the place limits, but before approval of such selection by the Secretary of the Interior. *Affirmed.*

See same case below, 38 Ct. Cl. 759.

Statement by Mr. Justice **White**:

The United States appeals from a judgment condemning it to pay \$15,000. The essential facts stated in the findings are as follows:

In 1856 Congress granted to the state of Alabama public lands to aid in the construction of various railroads referred to in the 1st and 6th sections of the act. Among

these was the Northeast & Southwestern Railroad, "from near Gadsden to some point on the Alabama and Mississippi state line, in the direction of the Mobile & Ohio Railroad, and with a view to connect with said Mobile & Ohio Railroad." The grant of land in place was six odd-numbered sections per mile, and lying within six sections in width on each side of the railroad. The act, in § 1, also contained a provision for indemnity lands, as follows:

"But in case it shall appear that the United States have, *when the lines or routes [395] of said roads are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached, as aforesaid, together with the sections and parts of sections designated by odd numbers, as aforesaid, and appropriated as aforesaid) shall be held by the state of Alabama, for the use and purpose aforesaid: *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads."

The act, in § 6, moreover, contained this proviso:

"That the lands hereby granted to said state for the purpose of constructing a railroad from the northeast to the southwestern portion of said state, lying northwest of Elyton, shall be assigned to such road as may be designated by the legislature of said state."

It was further in substance provided, in § 4, that if any of the authorized roads were not completed within ten years, all right of the state in and to the lands granted should cease, and they should revert to the United States. 11 Stat. at L. chap. 41, pp. 17, 18.

By joint resolution of the legislature of the state of Alabama, approved January 30, 1858, the grant made by the act aforesaid was accepted, and land was granted by the state to the Northeast & Southwestern Alabama Railroad, a body corporate, existing under the laws of Alabama, to be used and applied by said company "upon the terms

and conditions in said act of Congress contained." Laws of Alabama, 1857 to *1858, p. 430. In June, 1856, an order of withdrawal was made by the Land Department of all the lands which were thought to be embraced within both the place and indemnity limits, which withdrawal included the land to which this controversy relates. This order was modified a few days thereafter so as to allow settlements to be made on the lands prior to the time of the definite location of the road. Such definite location was made and accepted by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, in December, 1858.

The Northeast & Southwestern Railroad was reincorporated by the state of Alabama in October, 1868, under the name of the Alabama & Chattanooga Railroad Company. Acts of Alabama, 1868, pp. 207, 345. In April, 1869, the time for the completion of the road was extended by act of Congress for a period of three years from that date. 16 Stat. at L. 45, chap. 24. The road was completed within the extended time, in conformity with the law of Alabama, and in compliance with the act of Congress.

In December, 1887, an agent, duly appointed by the governor of Alabama for that purpose, selected certain lands in the indemnity limits in lieu of lands within the place limits, which had been lost to the grantee by sale or pre-emption. At the time of making the selections there were tendered to the proper land officers all legal fees and charges. The selections were rejected by the local officers, and an appeal was taken to the Commissioner of the General Land Office. This appeal, however, was not acted upon for a considerable period of time; but finally, in April, 1896, the appeal was decided in favor of the selections, which were approved, and the title consequently passed from the United States to the state of Alabama, in trust for its grantees, under the act of Congress. At the time of the definite location of the road there was a deficiency in the place limits of 519,000 acres, and the whole amount of the vacant or odd-numbered sections within the indemnity limits, [397] both approved and unapproved, available *to meet this deficiency, was less than 238,000 acres, leaving, therefore, on the face of the Land Office records, at the time of the definite location of the road, a deficiency of more than 281,000 acres. By various acts of the legislature of the state of Alabama, and conveyances which are recited in the findings, and which it is not necessary to reproduce, the plaintiffs below became the owners of the land patented by the United States, within the indemnity limits, as above stated. During the period, however, which

intervened between the selections of land made by the agent of the state of Alabama and the approval of the selections by the Secretary of the Interior, certain persons went upon the lands selected, and removed therefrom valuable iron ore and lime rock. After the approval of the selections the United States brought a suit to recover from the persons who had thus trespassed upon the lands the value of the product by them removed. The owners of the land, in pursuance of the selections, asserted a claim to the benefit of the recovery which might be made, but assented to a compromise made by the United States with the trespassers by which \$15,000 was paid to the United States as the value of the material taken from the land. The owners of the land at the time of the compromise protested that they alone were entitled to receive the sum paid to the United States, and reserved their right to recover the same from the United States.

It is stated in the findings that a road known as the South & North Alabama Railroad, declared to be one of the roads enumerated in the 6th section of the act of Congress making the grant to the state of Alabama, was definitely located opposite the land in controversy on May 30, 1866, nearly eight years after the definite location of the Northeast & Southwestern Railroad, and was constructed within the time required by law. There is no finding, however, that a grant was ever made to the South & North Alabama Railroad by the state of Alabama, or that that road preferred any claim to the land in question.

Assistant Attorney General Pradt submitted the cause for appellant. *Mr. George H. Walker* was with him on the brief:

The title to lieu or indemnity lands does not vest until the selection has been formally approved by the Secretary of the Interior.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 375, 35 L. ed. 766, 771, 12 Sup. Ct. Rep. 13; *Hewitt v. Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; *Southern P. R. Co. v. Bell*, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232; *Clark v. Herington*, 186 U. S. 206, 46 L. ed. 1128, 22 Sup. Ct. Rep. 872.

Neither priority of grant, nor priority of location, nor priority of construction, gives priority of right, but this right is determined by priority of selection, where the selection is made according to law, and the claim which is entitled to priority cannot be determined until after due examination.

St. Paul & S. C. R. Co. v. Winona & St.
194 U. S.

P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334.

The Secretary's approval of a selection is necessary to make it complete according to law, and is the equivalent of a patent.

Fraser v. O'Connor, 115 U. S. 102, 29 L. ed. 311, 5 Sup. Ct. Rep. 1141.

In *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, it was decided that the title to mineral lands did not pass if the minerals were discovered before the selections had been formally approved by the Secretary of the Interior, although they might have been developed after all preliminary proceedings had been observed, and after the grantee company had done all that was incumbent upon it to be done in earning title to the lands.

If the claimants did not have title to the lands until the indemnity selections were finally approved by the Secretary, then, under the decision of the court in the case of *United States v. Loughrey*, 172 U. S. 206, 211, 212, 43 L. ed. 420, 422, 19 Sup. Ct. Rep. 153, the approval of the Secretary carried with it no right of action for prior trespasses or infringements.

Messrs. M. D. Brainard and J. A. W. Smith submitted the cause for appellees:

Where an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him.

Lytle v. Arkansas, 9 How. 333, 13 L. ed. 160.

The party who took the initiatory step, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which afterwards issues relates back to the date of the initiatory act, and cuts off all intervening claimants. The patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office.

Shepley v. Cowan, 91 U. S. 330, 337, 23 L. ed. 424, 426.

The rights of the Alabama and Chattanooga railroad to this land were in nowise legally impaired by the wrongful act of the local land officers in rejecting the selection of the land when presented by the agent of the state of Alabama, because the commissioner of the General Land Office decided that the selection was legal when presented, and, this decision being the official action of an official invested by law with powers in their nature judicial, such decision of this question was final, and the selection of the

land became thereby a good and valid selection thereof in law from the time it was presented at the local land office.

Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424.

It is true, as a general rule of construction, that the legal title of the grantee company to indemnity lands is not vested in the grantee, and remains in the United States until the lands are selected, and the selection is approved by the Secretary of the Interior.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13.

But the approval of the selections by the Secretary of the Interior had relation to the date of the grant, or at least to the date when the legal claim was asserted to them by their selection by the agent of the state.

Gibson v. Chouteau, 13 Wall. 100, 20 L. ed. 536; *Ross v. Doe ex dem. Barland*, 1 Pet. 655, 7 L. ed. 302; *Landes v. Brant*, 10 How. 348, 13 L. ed. 449; *French v. Spencer*, 21 How. 228, 240, 16 L. ed. 97, 100; *Grisar v. McDowell*, 6 Wall. 363, 18 L. ed. 863; *Beard v. Federy*, 3 Wall. 478, 18 L. ed. 88; *Lynch v. Bernal*, 9 Wall. 315, 19 L. ed. 714; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Heath v. Ross*, 12 Johns. 140; *Musser v. McRea*, 44 Minn. 343, 46 N. W. 673.

If the government held the legal title to these lands after the legal application to select them was made by the agent of the state, and until that selection was approved by the Secretary of the Interior, it held that title in trust for the benefit of the beneficial owners of the land under the grant to the state of Alabama, and it was its duty to protect them from spoliation by the trespassers; for the lawful claim which had then been made for them was afterwards fully sustained by the commissioner of the General Land Office and the Secretary of the Interior. The law is well settled that the trustee's position in such a case is that of agent for the grantee and his privies in estate, as well as for the *cestui que trust*; and, in carrying out his trust, he must avoid all partiality toward either side.

Graham v. King, 50 Mo. 22, 11 Am. Rep. 401; *Bales v. Perry*, 51 Mo. 449; *Sherwood v. Saxton*, 63 Mo. 78; *Meacham v. Steele*, 93 Ill. 135; *Little Rock & Ft. S. R. Co. v. Huntington*, 120 U. S. 160, 30 L. ed. 591, 7 Sup. Ct. Rep. 517; *Adams v. Cowen*, 177 U. S. 471, 484, 44 L. ed. 851, 854, 20 Sup. Ct. Rep. 668.

A trustee cannot claim the trust property adversely to those for whom he acquired and for whom he holds it.

Union P. R. Co. v. Durant, 95 U. S. 576, 24 L. ed. 391.

A trustee cannot lawfully acquire trust property either by purchase or exchange.

Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651.

Generally, for an abuse of his powers, or a neglect to exercise proper diligence, the trustee is personally liable in damages to the party injured.

Murrell v. Scott, 51 Tex. 520; *Sherwood v. Saxton*, 63 Mo. 78.

Owing to the great deficiency of lands required to satisfy this grant, which deficiency existed from the time when the road was definitely located, in both the granted and the indemnity limits thereof, the lands which were trespassed on, and are thereby involved in this action, were legally appropriated from and after the definite location of the railroad for the use and benefit of the state of Alabama and its grantees.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 19, 35 L. ed. 77, 84, 11 Sup. Ct. Rep. 389.

Having no beneficial interest in the land at the time of the trespass, and no title and ownership to the land and the ore and limestone granted as part of it, and wrongfully taken from it, at the time the suits were commenced, the United States had no right to commence or maintain those actions, unless it sued for the benefit of the owner.

It is only the actual owner of the converted property, or one who is in possession of it and will be liable ultimately to the true owner for its value, who can maintain an action for its conversion.

Webb v. Fox, 7 Term Rep. 395, 4 Revised Rep. 472; Bl. Com. 389; 1 Chitty, Pl. 16th Am. ed. 167; *Cooper v. Chitty*, 1 Burr. 20, 1 W. Bl. 65; *Hunt v. Holton*, 13 Pick. 216; 26 Am. & Eng. Enc. Law, pp. 746-748.

The government cannot lawfully take private property for public use without due compensation, and the iron ore and limestone taken from this land were private property because they were granted to the state of Alabama as part of the land.

United States v. Great Falls Mfg. Co. 112 U. S. 656, 28 L. ed. 850, 5 Sup. Ct. Rep. 306.

The United States having in its custody \$15,000 rightfully belonging to the appellees, judgment should be rendered in favor of the latter.

Guines v. Miller, 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426; *Swift & C. & B. Co. v. United States*, 111 U. S. 23, 28 L. ed. 341, 4 Sup. Ct. Rep. 244.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

As there is no finding which tends even

to establish any right at any time to the land in question in favor of the South & North Alabama Railroad, all consideration of that subject may be put out of view. Moreover, the existence of any supposed right in favor of that company is conclusively disposed of on this record by the finding as to the prior selection by the state of Alabama under the grant in aid of the Northeast & Southwestern Railroad, and the approval of such selection by the Secretary of the Interior.

The government makes no contention that if the title of the plaintiffs was of such a character as to entitle them generally to recover against the trespassers, that the cause of action against the United States for the money collected by it from the trespassers is not one which is judicially cognizable. The sole contention of the government is that the plaintiffs, after application for selections, and before approval of the selections, had no such title to the land as would have justified a recovery from the trespassers and, *a fortiori*, therefore, had no such title as would warrant their recovering from the United States the sum of money which it collected from the trespassers for the elements removed from the land during the period between the date of the application for selections and the approval of the same by the Secretary of the Interior. This contention is based upon the proposition that, whilst under the act in question the grant of land within the place limits may have been one *in presenti*, the right to the indemnity lands did not vest in the grantee until approval of the selections by the proper officers of the government; and hence, the legal title was in the United States as to such lands, pending action on the application *for selections, and therefore at the time[399] of the trespass the United States was alone authorized to recover for the depredations committed. Unquestionably the general doctrine is that where approval by the officers of the government of selections of indemnity land has been made a condition precedent to the right to take such lands, the legal title remains in the United States until divested by the approval of the selections. *Oregon & C. R. Co. v. United States*, 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. Rep. 615. In consonance with this doctrine, it has also been decided that, until approval of selections within the indemnity limits, land embraced in applications for selections remains the property of the United States to such an extent that it cannot be taxed as the property of the applicants. *Wisconsin C. R. Co. v. Priece County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341.

But even though it be conceded, *arguendo*, that the doctrine in question would allow

rights to be acquired by third parties, to the injury of the applicant, after the making of the selections, and pending approval thereof by the government, it does not follow that it controls the controversy here presented. This results because, on this record, the rights of third parties are not involved, since the controversy concerns only the right of the United States to retain, as against its grantees, the proceeds recovered by it as the result of a trespass upon land after an application for the selection of such land, and pending action thereon by the proper officers of the government. Under these circumstances the case is one for the application of the fiction of relation, by which, in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land. Many cases illustrating the doctrine in various aspects have been determined in this court.†

[400] Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly *imported that at the time of the application for selections the land in question was rightfully claimed by the applicant. And evidently does this become the case when it is considered that the findings establish that at the time the application for selection was made, on the face of the records of the Land Office, there was an enormous deficiency, both in the place and indemnity lands. *Shepley v. Cowan*, 91 U. S. 330, 337, 23 L. ed. 424, 426.

Nor is the assertion well founded that this case is not a proper one for the application of the doctrine of relation, because coming within the rule announced in *United States v. Loughrey*, 172 U. S. 206, 43 L. ed. 420, 19 Sup. Ct. Rep. 153. At the time of the trespass complained of in that case the United States had taken no step to assert its reversionary rights in and to the land trespassed upon, the legal title to which was in the state of Michigan at the time the trespass was committed. Here, as we have seen, the grantee had exercised his right to apply for selections within the indemnity limits, and had, in legal form, requested the approval of the same by the government. Everything, therefore, which the grantee was required by law to do to obtain the legal title had been performed. These facts

bring this case within the principle decided in *Heath v. Ross*, 12 Johns. 140, and *Musser v. McRae*, 44 Minn. 343, 46 N. W. 673, referred to in the opinion of the court in the *Loughrey Case* (p. 218, L. ed. p. 424, Sup. Ct. Rep. pp. 157, 158) as not being inconsistent with the principle there applied. *Heath v. Ross* was an action of trover for timber cut between the application for and date of a patent from the state, and its sealing and delivery by the secretary of state. The title was held to relate back to the first act, so as to entitle the plaintiff to maintain an action against a mere wrongdoer, for the value of the timber cut and carried away in the meantime. *Musser v. McRae* was an action brought to recover the value of timber cut by trespassers from indemnity lands selected by the agent of certain railroad companies, intermediate the application for selection and the patenting of the lands. To permit a recovery, it was held that the title evidenced by the patent related back at least to the date of the application for selection. *It was declared that [401] the doctrine of relation was properly applied to the case, "for the advancement of justice, and to give the full effect to the grant it was intended to have." Among other cases relied upon by the Minnesota court as sustaining the application made of the doctrine was the decision of this court in *Landes v. Brant*, 10 How. 372, 13 L. ed. 459.

Concluding, as we do, that the money in question belongs to the appellee as the successor in interest of the party for whose benefit the application for selections was made, it results that *the judgment of the Court of Claims must be affirmed.*

HY-YU-TSE-MIL-KIN, *Appt.*,

v.

PHILOMME SMITH.

(See S. C. Reporter's ed. 401-415.)

Statutes—retrospective effect—Indian allotments—effect of absence from reservation—second selection—conclusiveness of findings of fact.

1. An invalid retrospective effect is not given to the provision of the act of August 15, 1894 (28 Stat. at L. 286, 305, chap. 290), authorizing Indians claiming to be entitled to an allotment of land to prosecute, in the proper Federal circuit court, any action in relation to their right thereto, by construing such act to include a suit by an Indian to obtain an allotment to which she claims she

†*Gibson v. Choteau*, 13 Wall. 92, 100, 20 L. ed. 534, 537; *Ross v. Doe ex dem. Barland*, 1 Pet. 665, 7 L. ed. 302; *Landes v. Brant*, 10 How. 348, 13 L. ed. 449; *French v. Spencer*, 21 How. 228, 240, 16 L. ed. 97, 100; *Beard v. Federy*, 23 Wall. 478, 18 L. ed. 88; *Grisar v. McDowell*, 6 Wall. 363, 18 L. ed. 863; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Lynch v. Bernard*, 9 Wall. 315, 19 L. ed. 714; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424.

NOTE.—That statutes are generally prospective in operation—see note to *Stewart v. Vandervort*, 12 L. R. A. 50.

was, at the time of the passage of such act, entitled, under the allotment act of March 3, 1885 (23 Stat. at L. 340, chap. 319), and to have canceled the alleged improper allotment of such land to another.

2. Actual residence on the Umatilla Indian reservation at the time of the passage of the allotment act of March 3, 1885 (23 Stat. at L. 340, chap. 319), cannot be deemed essential to give the right of allotment to a member of one of the confederated Indian tribes mentioned in the act as residing on the reservation, where such condition would exclude from the benefits of the act a majority of the members of the different tribes.
3. The finding of a special examiner as to the fact of membership in an Indian tribe, which has been adopted by the two lower courts, will not be disturbed by the Federal Supreme Court, where not plainly erroneous.
4. The United States cannot be regarded as a necessary party to a suit brought under the act of August 15, 1894 (28 Stat. at L. 286, 305, chap. 290), prior to the amendatory act of February 6, 1901 (31 Stat. at L. 760, chap. 217), to determine the respective rights of two Indians, each claiming under the allotment act of March 3, 1885 (23 Stat. at L. 340, chap. 319), in view of the provision of the act under which the action was brought, that the judgment or decree of the court in favor of any claimant to an allotment, upon being properly certified to the Secretary of the Interior, shall have the same effect as if the allotment had been allowed and approved by the Secretary.
5. The right of a member of one of the confederated Indian tribes residing on the Umatilla reservation, to insist upon her original selection, made under the allotment act of March 3, 1885 (23 Stat. at L. 340, chap. 319), as against a subsequent allottee, where the Land Department has corrected its mistake of law which denied her right to allotment because of her absence from the reservation when the census was taken, is not lost by her selection of other land after the Department had reconsidered her case, when such selection was made after advising with the Indian agent, and upon his statement that it would not affect her claim for the land she had previously selected, and from which she had been ordered by the officers of the government.

[No. 209.]

Submitted April 12, 1904. Decided May 16, 1904.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Oregon in favor of complainant in a suit by a member of the confederated Indian tribes residing on the Umatilla reservation to obtain an allotment of land to which she claimed to be entitled under the allotment act of March 3, 1885 (23 Stat. at L. 340, chap. 319), and to have canceled the alleged improper allotment of such land to another. *Affirmed.*

See same case below, 55 C. C. A. 216, 119 Fed. 114.

Statement by Mr. Justice **Peckham**:

"This is a suit in equity, brought by the [402] appellee, complainant below, in the circuit court of the United States, district of Oregon, against the appellant, to obtain the cancellation of an allotment of land, made by the officers of the government to the appellant, on the Umatilla Indian reservation, in Oregon, in 1891, and to have the land allotted to her (the appellee). Issue being joined in the case, it was referred to a special examiner to ascertain and report the facts, and upon his report the circuit court gave judgment in favor of appellee (110 Fed. 60), which was affirmed by the circuit court of appeals (55 C. C. A. 216, 119 Fed. 114), and the appellant thereupon appealed here.

The action was brought pursuant to the authority of an act of Congress (before amendment) passed in 1894, chapter 290. 28 Stat. at L. 286, 305; amended, 31 Stat. at L. 760, chap. 217. The right to the allotment claimed by the appellee is based on the act of March 3, 1885, chapter 319 (23 Stat. at L. 340), and grows out of the treaty of June 9, 1855, between the United States and the Walla Walla and other Indian tribes, which treaty was ratified by the Senate, March 8, 1859, and proclaimed by the President, April 11, 1859. 12 Stat. at L. 945.

A demurrer to the bill was filed by the defendant on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant then answered, denying many of the material allegations in the bill.

Witnesses were examined before the special examiner, and he made a report and findings of facts, which findings were subsequently adopted by the circuit court and by the circuit court of appeals. Among others the following facts were found: The appellee, Philomme Smith, is a full-blooded Indian woman, and at all times mentioned in the complaint was, and is now, a member of the Walla Walla band or tribe of Indians, and resides upon the Umatilla Indian reservation, in the state of Oregon. The defendant (appellant) is also a full-blooded Indian, residing upon the reservation. Pursuant to the authority granted by the above-mentioned act of March 3, 1885, *the Presi- [403] dent appointed commissioners for the allotment of lands on the Umatilla reservation, and the commissioners carried out the duty devolved upon them by the President under that act, and completed the allotments on or about April 1, 1891, but refused at that time to make any allotment to the appellee,

because of her absence (although but temporary) when the commissioners made a census of the Indians entitled to allotment. At the time the other allotments were made the appellee was the wife of W. A. Smith, a white man, and she was also the real head of the family, which consisted of the husband, his wife, and their eight children. The parties were married January 16, 1861, and the appellee has been recognized by the Interior Department as the head of the family in the sense mentioned in the act of Congress of 1885.

At the time the allotments were made to the other Indians by the commissioners, as above mentioned, appellee was located and actually residing with her family upon the reservation, upon a large tract of land, some 560 acres, including the land in controversy herein, and she and her family at that time were living in a house about twenty steps from the boundary line of this particular 160 acres. The land (including the 160 acres) was inclosed in one body by having a furrow plowed around the same, marking it off from the other adjacent land. The appellee had selected the land in 1888, and, with her family, was then in possession thereof, and retained such possession until the fall of 1896, with the consent of Homily, chief of the Walla Walla Indians, and Show-a-way, chief of the Cayuse Indians, and also with the consent of ——— Coffee, who was at that time acting as Indian agent upon that Indian reservation.

Since 1888, and prior to the time when the allotment to defendant was made, the appellee made valuable improvements upon and around the land in question, by building upon it a small cabin and a barn, and making other improvements, and by putting a wire fence around the whole tract, the whole cost amounting to between \$700 and [404]\$775, and from April, 1888, *until the fall of 1896, long after the allotments were made by the commissioners, the appellee and her family had possession of the land in question with the improvements thereon, and she and her family continued to live during that time in the house, about twenty steps from the boundary line of this land. When the appellee left the land in the fall of 1896, she left it because she was ordered to do so by the then Indian agent, pursuant to a determination by the Interior Department, made in 1893, that she was not entitled to any allotment under the act of 1885.

Before the land was allotted to the defendant, and while the allotting commissioners were engaged in allotting lands in 1891, as above stated, the appellee asked to be allotted the particular 160 acres in controversy in this case by the commissioners, but they declined to do so because her name

was not upon their allotting list. The defendant obtained possession of the 160 acres in October, 1896, and the land was allotted to him at that time, when appellee was ordered off the same by the Indian agent, and the defendant has never paid the appellee any money or in any manner reimbursed her for the improvements which she had made upon the lands in controversy, and the defendant had made no improvements thereon, and was aware of all that had been done by appellee when he made the selection of this land, and when it was allotted to him. There is neither allegation nor proof that appellant has since made any improvements on the land.

In April, 1897, the Department of the Interior reconsidered its former decision, and held that appellee was entitled to an allotment of land upon the reservation, and it directed one G. W. Harper, the then Indian agent of that Indian reservation, to make an allotment to her, and, pursuant to that direction, Harper called upon her to make a selection of lands for her allotment, and she thereupon selected certain lands, which were not the lands in question, the land selected amounting to 146.2 acres in all, and she was recognized by the Department as the head of a family, entitled to make selection and *have an allotment. A [405] part of this land she has since leased to a tenant, and has accepted rental from the tenant, the lease covering only 70 acres.

The land selected by the appellee after she had been forced to relinquish the possession of the 160 acres was not as valuable as the land from which she was ordered, and at the time the selection of this other land was made by her she and her husband came to the office of the Indian agent and asked him if it would affect her rights in the land in question for her to select land as directed by the Indian commissioner. She was told by the agent that he thought it would not; that she was under orders from an officer, and not under her own free will, when she left the land, and it was taken possession of by the defendant; and with that understanding the appellee made the selection of the other and less valuable land.

The particular relief asked by the appellee in her bill was a decree declaring her "to be the allottee upon the said tract of land, and that the allotment thereof to the defendant be canceled and annulled, and that the defendant, his servants, and all persons holding under him, as tenants, lessees, or otherwise, be forever enjoined from interfering with your orator's possession thereof, and that she may have judgment against the defendant for damages," etc.

Mr. John C. Gittings submitted the cause for appellant. *Messrs. Samuel Her- rick and Hailey & Lowell* were with him on the brief:

The act of August 15, 1894, upon which complainant bases her right to bring suit, is not applicable to cases of this kind, where the decision of the Secretary of the Interior denying her allotment was made before the passage of such act. Such act is prospective in character, and confers a special jurisdiction where none existed before, and must be strictly construed; and fixed rights cannot be disturbed by it, nor the prior decision of officers exercising proper powers be set aside. It relates to the future, and is not retrospective in effect.

Endlich, *Interpretation of Statutes*, § 209, p. 392; 6 *Am. & Eng. Enc. Law*, 2d ed. p. 939; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *Smith v. Lyon*, 44 Conn. 175; *Dyer v. Belfast*, 88 Me. 140, 33 Atl. 790; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Vanderpool v. La Crosse & M. R. Co.* 44 Wis. 663.

The act of March 3, 1885, applies only to the Indians residing upon the Umatilla reservation at the time of its passage, and then members of the confederated tribes thereon, and not to persons who came there afterwards seeking allotments, who had never resided there.

Sloan v. United States, 95 Fed. 197, 118 Fed. 287.

The United States is a necessary and indispensable party defendant herein, being the original source of title, the holder of the legal title, a trustee under a special statutory trust, and the allotting power, with the active duty of protecting the possession of the allottee.

United States v. Flournoy Live-Stock & Real-Estate Co. 69 Fed. 886; *United States v. Mullin*, 71 Fed. 682; 22 *Enc. Pl. & Pr.* 161.

Mr. R. J. Slater submitted the cause for appellee. *Mr. J. T. Hinkle* was with him on the brief:

It is a well-founded principle of law that when one person is in the actual and peaceable possession of government land no other can obtain a superior right thereto. This is a principle that has been applied to all classes of public lands under all laws, even to Indian lands.

Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; *Hosmer v. Wallace*, 97 U. S. 575, 24 L. ed. 1130; *Quinby v. Conlan*, 104 U. S. 423, 26 L. ed. 801; *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 62, 43 L. ed. 75, 18 Sup. Ct. Rep. 895;

Tustin v. Adams, 87 Fed. 377; *United States v. La Chappelle*, 81 Fed. 152.

As between two claimants of public lands of any kind or nature 'it has long been an established rule of law that the first in time is the first in right.

Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86; *McCreery v. Haskell*, 119 U. S. 327, 30 L. ed. 408, 7 Sup. Ct. Rep. 176.

The plain reading of the statute gives the appellee superior equities, because it was evidently the intention of Congress to put the Indians in a position whereby they might protect their possessions, their homes, and their families. The heads of families were authorized and empowered to make their selections, and the law in its scope and effect is very like the homestead law, and the allottees are to be regarded very much as homesteaders.

State ex rel. Crawford v. Norris, 37 Neb. 299, 55 N. W. 1086.

Excepting for the act of Congress of August 15, 1894, the demurrer would have been well taken, because prior to that enactment the executive department of the government would certainly have exclusive jurisdiction of all matters concerning the land in question, but the law was passed for the express purpose of changing that state of affairs, and for providing a remedy in the courts for just this class of cases.

Sloan v. United States, 95 Fed. 193.

Being of Indian blood, whole or mixed, and born within the United States, it is of no importance as to what tribe or band appellee sprung from. She might have been a Sioux or Ponca or California Digger Indian, so long as she was an Indian woman in whole or in part, and actually belonged to either of the tribes or bands of Indians located upon the Umatilla Indian reservation. This proposition is fully settled by the authorities.

Sloan v. United States, 95 Fed. 193; *United States v. Higgins*, 103 Fed. 348.

The weight of evidence is clearly with the appellee, and this court must sustain this finding under the rule that, when the evidence is conflicting, the appellate court will sustain the findings of the master or referee in chancery.

Nessley v. Ladd, 29 Or. 354, 45 Pac. 904.

A liberal construction should be given the act in order to effectuate its purpose, which was to encourage the Indians to break up the tribal relations and adopt the habits of civilized life; and persons of mixed blood, who, although not living on the reservation, were recognized by the tribe in council or the equivalent, may properly be given allotments; but, on the question whether they

have been recognized, the courts will follow the ruling of the Land Department.

Sloan v. United States, 118 Fed. 283.

All remedial legislation should be liberally construed; particularly should this be so where new remedies are given, and with reference to the bestowal of jurisdiction on the courts.

Larkin v. Saffarans, 15 Fed. 150; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *United States v. Burchard*, 125 U. S. 176, 31 L. ed. 662, 8 Sup. Ct. Rep. 832; *Pugh v. McCormiek*, 14 Wall. 361, 20 L. ed. 789; *Untermeyer v. Freund*, 7 C. C. A. 183, 20 U. S. App. 32, 58 Fed. 205; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cook v. United States*, 138 U. S. 157, 34 L. ed. 906, 11 Sup. Ct. Rep. 268; *McBurney v. Carson*, 99 U. S. 567, 25 L. ed. 378; *Harvey v. Lord*, 11 Biss. 144, 10 Fed. 238.

Congress had a right to take away the jurisdiction which originally rested with the Secretary of the Interior, and confer it upon some other tribunal.

Emblem v. Lincoln Land Co. 94 Fed. 710; *Gordon v. United States*, 7 Wall. 188, 19 L. ed. 35.

The intention of Congress in passing this law was remedial.

Sloan v. United States, 118 Fed. 283.

And, being remedial, may be retrospective.

1 Kent, Com. 455.

If so, and if the appellant had vested rights, which we do not admit, such vested rights, if any, vested subject to the equity existing against them, and which the statute recognizes and enforces.

1 Kent, Com. 466; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Langdon v. Strong*, 2 Vt. 234; *Watson v. Mereer*, 8 Pet. 88, 8 L. ed. 876.

Remedial statutes, although retroactive, are construed liberally to accomplish the object, correct the evils, and suppress the mischief aimed at.

6 Am. & Eng. Enc. Law, 2d ed. p. 937.

Where a right exists it is in the power of the legislature to provide a remedy.

6 Am. & Eng. Enc. Law, 2d ed. p. 946.

The act of Congress of August 15, 1894, affects the remedy and not the vested rights of either party. There is no vested right in a remedy.

6 Am. & Eng. Enc. Law, 2d ed. p. 947.

Mr. Justice **Péckham**, after making the above statement of facts, delivered the opinion of the court:

The first objection made by counsel for the appellant is that the act of Congress of August 15, 1894 (28 Stat. at L. 286, 194 U. S.

305, chap. 290), under which the complainant instituted this suit, is not applicable to this case, and, therefore, the court has no jurisdiction of the subject-matter. The objection made by the appellant is, that to make the act applicable to the appellee would be to give it a retrospective effect, while its purpose is plainly prospective. The objection is untenable.

The appellee claims that under the act of 1885 she was entitled to an allotment of land in the Umatilla reservation, and that it was improperly refused her. The act provides ([28 Stat. at L. chap. 290] p. 305): "That all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by *Congress, or [408] who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States."

That this act embraces the case of a person situated as was the appellee at the commencement of this suit seems to us so plain as to require no further argument. It is not in any way a retrospective operation which is thus given to the act, except as it applies, by its language, to any one who was then (at the time of the passage of the act of 1894) entitled to an allotment. She claims that she was so entitled to an allotment of the land in question, and that it had been improperly allotted to defendant (appellant), and that the act permits her to assert her claim in the circuit court, as against the appellant, and to have it adjudged between them. We have no doubt she has that right.

The next objection is that the complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege the residence of the complainant (appellee) on the reservation at the time of the passage of the allotment act (1885), and shows upon its face that her claim for this allotment was decided against her by the Secretary of the Interior in 1891, long prior to the passage of the act of 1894, under which she is now suing, and when the sole authority for settling disputes concerning allotments resided with the Secretary of the Interior.

We are of opinion that it was not necessary to allege or prove the residence of the appellee on the reservation at the time of the passage of the act of 1885, called the "allotment act." That act had reference,

as its preamble states, to the "confederated bands of Cayuse, Walla Walla, and Umatilla Indians, residing upon the Umatilla reservation, in the state of Oregon."

[409] It related to the residence of the bands as bands, and not as individual Indians, many of whom were residing off the particular *reservation and yet within the country theretofore ceded to the United States by the treaty of 1855. Under the act mentioned a commission was appointed by the President, the members of which were to go upon the reservation and ascertain as near as might be the number of Indians who would remain on that reservation and who should be entitled to take lands in severalty thereon, and the amount of land required to make the allotment, and the commission was then to determine and set apart so much of their reservation as should be necessary to supply agricultural lands for allotments in severalty. The commission was to report to the Secretary of the Interior the number and classes of persons entitled to allotment as near as they might be able to do so, and if the report were approved by the Secretary of the Interior the tracts selected should thereafter constitute the reservations for those Indians, and within which the allotments provided for in the act should be made.

Under this act a report had been made to the Secretary of the Interior by the commission some time after the conclusion of their labors in the Indian countries in 1891, and an opinion was asked by the Department of the Interior from the Assistant Attorney General regarding the rights of the appellee, among others, to an allotment under that act, which had been refused by the commission. An opinion was delivered on July 1, 1893, by one of the Assistant Attorneys General, in which he held that the appellee was not entitled to an allotment; but upon reviewing that opinion, on June 28, 1895, he held that she was entitled thereto. In his latter opinion he thought that while it was agreed in the treaty of 1855, already mentioned in the statement of facts, that the Indians should remove within one year to the permanent reservation (which, in this case, was the Umatilla reservation), yet there was no penalty affixed to its violation, and the failure of the Indians to so remove and reside would not work a forfeiture of their tribal rights, and that, while the appellee was not residing upon this reservation at the time that the [410] act of 1885 became operative, she was, *so far as that fact was concerned, in the same position as a majority of the Indians belonging to the confederated tribes mentioned in the act; that the record showed that when the agents of the government went on

this reservation they found but few Indians actually residing there, and it was only after weeks of sending out runners and using all the means at their disposal, that the commissioners succeeded in securing the attendance of a majority of the male adults of these tribes. The Assistant Attorney General gave the opinion that that was itself a recognition by the Department that residence upon the reservation was not essential to tribal recognition.

It is plain that the agreement in the treaty of 1855, by which the tribes and bands agreed to remove to, and settle upon, the reservation within one year after the ratification of this treaty, had not been lived up to so far as actual residence upon the reservation of individual Indians was concerned. Thirty years after that time, when the act of 1885 was passed, it is seen that a majority of the Indians were not even then actually residing, in the strict sense of the term, upon this reservation. There existed under the treaty an exclusive right among the Indians of taking fish from the streams running through and bordering upon the reservation, and at all other usual and accustomed stations, in common with the citizens of the United States, and the privilege of erecting suitable buildings for curing such fish, and also the right of pasturing their stock on unclaimed lands in common with the citizens of the United States, was secured to them. The right to roam over so much of the territory as was ceded by them to the government, as they had been accustomed to do, and such as were not settled upon or claimed for individual use by citizens of the United States, seems to have been recognized, or to have been expected by the government, although the residence of the tribe or band as such was to be within the reservation mentioned in the treaty. It was also said in the opinion regarding the facts in this case:

"The trouble with these claimants seems to have arisen out *of their failure to be [411] upon the reservation when the census roll of the tribe was made up. They arrived at said reservation in reply to the communication sent to them by one of the Indians the day after the census takers had left the reservation, to wit, on the 7th day of June, 1887, or rather Mrs. Morissette arrived upon that day and Mrs. Smith shortly afterwards. They were recognized by Homily, chief of the Walla Wallas, and various other head men and members of the confederated tribes, and the Indian agent then in charge assigned each one of them to a parcel of land, after selection, and they have made valuable improvements on and have continued to reside thereon, as far as this record shows, ever since, the value of their

improvements amounting to a considerable sum. They began residence upon the land about the middle of June, and their reasons for not having arrived sooner, that they lived some 200 miles away, and were without money to make the trip."

Pursuant to this opinion of the Assistant Attorney General, the Department of the Interior reconsidered its former decision, and held that the appellee was entitled to an allotment under the act of 1885. We concur with the latter opinion of the Assistant Attorney General, and hold that it was not necessary that the individual Indians of the tribes mentioned in the act of 1885 should be actually residing on the reservation at the time of the passage of that act. If the individual were a member of the tribe or band, recognized as such by his chiefs, it was not necessary that such person should be an actual resident of the reservation when the act was passed. The fact found is that the appellee herein is a full-blooded Indian woman, and was, at all the times mentioned, a member of the Walla Walla band or tribe of Indians, and at the time of the original allotment resided upon the reservation in the state of Oregon. When such a large percentage of allottees upon this reservation resided, as did the appellee, elsewhere than actually upon the reservation at the date of the passage of the act of 1885, it cannot be that the act passed [412] was intended *to limit the right to an allotment to those actually residing on the reservation, to the exclusion of a majority of the members of the different bands or tribes. The fact of such nonresidence is presumed to have been known by Congress, and the act should be construed with reference to that knowledge.

The purpose of the treaty and of the act evidently was to induce the Indians and encourage them so far as possible to break up the tribal relations, and adopt the habits of an agricultural people; and it would seem that those persons who were Indians and members of one or the other bands or tribes of Indians mentioned in the treaty and in the act and recognized by the chief of the tribe should have the right to an allotment, especially if recognized by the Land Department as entitled thereto.

The purpose of the act would fall very far short of accomplishment were the allotments confined exclusively to those actually residing within the limits of the reservation, while those who were absent therefrom, but still within the old limits of the land, and were members of the band, recognized as such, should be held not entitled to the allotments under the act, simply because of residence outside of the described limits of the reservation.

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The appellant further contends that the weight of the evidence shows the appellee is not a member of the Walla Walla tribe of Indians. We are not disposed to review that question of fact, which has been determined by the special examiner, and adopted by the circuit court and the circuit court of appeals. There is evidence upon which the fact as found may be based, and it is not so plainly erroneous as to call upon this court to vary from its usual rule not to review the unanimous finding upon questions of fact of two courts, unless such finding is plainly erroneous. *Stuart v. Hayden*, 169 U. S. 1, 14, 42 L. ed. 639, 644, 18 Sup. Ct. Rep. 274; *Baker v. Cummings*, 169 U. S. 189, 198, 42 L. ed. 711, 716, 18 Sup. Ct. Rep. 367; *The Carib Prince*, 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; *Toussan v. Moore*, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; *Smith v. Burnett*, 173 U. S. 430, 436, 43 L. ed. 756, 759, 19 Sup. Ct. Rep. 442; *Brainard v. Buck*, 184 U. S. 99, 46 L. ed. 449, 22 Sup. Ct. Rep. 458.

Another objection is made that the United States is a necessary *party defend-[413] ant, and, not being before the court, no binding decree can be entered herein.

The contest here is between two Indians, each claiming the same land under an allotment which was made last to the appellant herein. The United States has no interest in the result. Both parties are Indians claiming under the act of 1885.

In our opinion, the claim that the United States must be made a party is without foundation. Under the act of 1894 (*supra*) the circuit courts are given jurisdiction to try and determine any action of this nature, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, "and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him.

. . . *Provided*, That the right of appeal shall be allowed to either party as in other cases." The case at bar was commenced prior to the amendment of the statute of 1894 by the act of February 6, 1901 (31 Stat. at L. 760, chap. 217), wherein it is provided that the United States shall be a party defendant, and the case must be decided without regard to the amendment.

Under this statute there is no provision rendering it necessary, in a private litigation between two claimants for an allotment, to make the United States a party. The statute itself provides that the judgment or decree of the court, upon be-

ing properly certified to the Secretary of the Interior, is to have the same effect as if the allotment had been allowed and approved by the Secretary. This provision assumes that an action may be maintained without the government being made a party, and provides for the filing of a certificate of the judgment and its effect; and the government thereby, in substance and effect, consents to be bound by the judgment, and to issue a patent in accordance therewith. The 1st section of the act of 1885 (*supra*) [414] provides that an allotment made by *or under the direction of the Secretary of the Interior entitles the allottee to a patent for the land allotted to him. And the filing of the certificate of the judgment decreeing an allotment is to have the same effect with the Secretary as if the allotment had been made by him. This is sufficient.

Upon the facts herein found we are also of opinion that the appellee selected the lands in controversy within the meaning of the statute long prior to the selection made by the appellant, and that she is not concluded by the selection she afterwards made of another tract of land. The act of 1885 provided that the selection of land for allotment should be made by heads of families. The appellee was such, and was so recognized by the Land Department. By § 6 of the act the Secretary of the Interior had power to determine all disputes between Indians respecting the allotments. If more than one person claimed the same land, it is, as we think, clear that the dispute should be decided and the allotment made in favor of the one whose priority of selection and residence and whose improvements on the land equitably entitled such person to the land. The government has proceeded upon such principle heretofore (*Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424), and it is a right and eminently just principle. The defendant knew of the prior possession of the appellee, at the time he made his selection, and knew of her improvements upon the land, for they were open and visible, while he had made none, and had obtained possession by direction of the Land Office, only because of the mistake in law which denied the right of allotment to appellee on account of her absence when the census was taken. Defendant, with all this knowledge, selected the land, and never offered to pay a dollar for the improvements, and never has paid anything therefor, nor does he allege in his answer, and there is no proof, that he has since made any improvements on the land, or expended anything thereon. When the Land Department corrected its mistake of law the appellee had the right to insist upon her original selection. Her selection of other land, after the

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Department had reconsidered her case, *does [415] not prevent her from claiming this land from defendant. She selected the other land only after advising with the Indian officer, and upon his statement that it would not affect her claim for the land she had previously selected, and from which she had been ordered by the officers of the government. She has never received any patent from the government for this other land, and nothing further need be done by her in order to authorize the government to cancel the allotment for this other land at the time when patent issues for the original selection.

We find no error in the judgment, and it is affirmed.

JOHN D. HOOKER, *Plff. in Err.*,
v.

JOHN BURR, A. W. Rhodes, and W. A. Hammel. v.

(See S. C. Reporter's ed. 415-427.)

Contracts—impairment of obligation—change of law respecting redemption from foreclosure sale.

No contract right of an independent purchaser at a foreclosure sale, who has no other connection with the mortgage contract than that arising from his purchase for a sum sufficient to pay the mortgage debt, is impaired by changes in the law subsequent to the execution of the mortgage, but prior to the sale, with reference to the time of redemption and the rate of interest payable in order to redeem.

[No. 263.]

Submitted April 26, 1904. Decided May 16, 1904.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of the County of Los Angeles in that State dismissing on the merits a complaint in an action by a purchaser at a foreclosure sale to cancel a deed executed by the sheriff to a judgment creditor of the mortgagor up-

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

That impairing the remedy impairs the obligation of contract—see notes to *Best v. Baumgardner*, 1 L. R. A. 356; *Louisiana ex rel. Ranger v. New Orleans*, 26 L. ed. U. S. 132; and *Phinney v. Phinney*, 4 L. R. A. 348.

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on the payment of the sum required to redeem the land from the foreclosure sale, pursuant to a statute enacted subsequent to the execution of the mortgage, but prior to the sale, and to secure a conveyance of such property to himself as such purchaser. *Affirmed.*

See same case below, 137 Cal. 663, 70 Pac. 778.

Statement by Mr. Justice Peckham:

The plaintiff in error commenced this action in the proper state court to procure a decree canceling a deed of the premises mentioned in the complaint, executed by the defendant Hammel to the defendant Rhodes, and also directing that a deed should be executed to the plaintiff by defendant Hammel [416] or *Burr, or both, conveying the same property to the plaintiff, which had been purchased by him under the sale in foreclosure hereinafter mentioned. Defendant Burr was sheriff at the time of that sale, and conducted the same, and executed the certificate of sale June 13, 1898. His term of office expired in January, 1899, and defendant Hammel became his successor, and, as such, executed the deed to defendant Rhodes, which plaintiff in error asks to have set aside. The two defendants, Burr and Hammel, were made parties herein because it was not certain which one of them should be decreed to execute the deed to plaintiff which he asks for in this suit.

The defendants, by their answer, denied many of the material allegations of the complaint, and the case went to trial before the court, and, a judgment having been entered dismissing the complaint on the merits, an appeal was taken to the supreme court of California, which affirmed the judgment (137 Cal. 663, 70 Pac. 778), and the plaintiff has brought the case here. The material facts are as follows:

On October 16, 1893, Anna P. and Ambrose H. Speneer, then being the owners of the property, mortgaged the same to one Jacob Swiggart, to secure the payment of a promissory note of the same date for \$5,000. This note and mortgage were subsequently assigned by Swiggart to Charles H. Bishop, who afterwards commenced a suit upon the note and mortgage to recover the amount due on the former, and to foreclose the mortgage. On May 14, 1898, a judgment was entered in the case, whereby it was adjudged that there was due to the plaintiff upon the note the sum of \$6,782.49, and that the same was a lien upon the mortgaged premises, and there was also a judgment for the sale of the premises to obtain payment of the sum found due on the note. On May 16, 1898, an execution upon the judgment was issued to the sheriff (Burr) and on

June 13, 1898, he sold to the plaintiff in error, Hooker, the mortgaged premises for the sum of \$9,500, who thereupon paid the amount of his bid to Burr, and Burr then gave a certificate of sale to the plaintiff as the purchaser. Plaintiff alleges that he was *entitled to a deed from the sheriff of date December 13, 1898, that being six months after his purchase at the foreclosure sale. On December 12, 1898, Rhodes, one of the defendants (who was a judgment creditor of Spencer, the mortgagor), issued an execution on his judgment, and assumed to redeem the land from the foreclosure sale by the payment of \$10,070 to the sheriff, to be paid to the purchaser, the plaintiff in error, being the amount of the purchase price paid by the latter at the foreclosure sale, together with interest thereon at the rate of 1 per cent per month. The sum was received by the sheriff as the full amount due to the plaintiff in error on his bid, with interest. The plaintiff in error declined to accept the money, and now contends that the amount delivered to the sheriff for the redemption was not enough; and he also makes the claim that there was never any legal payment to the sheriff, even of the sum mentioned. The sheriff, after receiving the redemption money, executed a deed to the judgment creditor, Rhodes, and it is this deed which plaintiff seeks to have set aside.

At the time when the above-mentioned mortgage was executed, on October 16, 1893, the law in California provided that a judgment debtor or redemptioner might redeem the property from the purchaser at the foreclosure sale, at any time within six months after the sale, on paying the purchaser the amount of his purchase money, with interest at 2 per cent a month thereon in addition, up to the time of redemption. On March 27, 1895, the legislature altered this statute, which was § 702 of the Code of Civil Procedure, by providing that redemption might be made upon the payment of the amount of the purchase money with one per cent a month as interest thereon, and on February 26, 1897, the same section was again amended by the legislature by extending the time for redemption to twelve instead of six months, while keeping the rate of interest at 1 per cent per month on the amount of the purchase price paid at the sale.

It will be noticed that both these amendments had been *enacted, and existed as the [418] law in regard to redemptions, at the time when the sale was made on June 13, 1898, upon the foreclosure of the mortgage.

Mr. J. S. Chapman submitted the cause for plaintiff in error:

The laws existing at the time a contract is made enter into and become a part of it.

Union Bank v. Oxford, 90 Fed. 7; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *Deck v. Whitman*, 96 Fed. 884.

They are the measure of its obligations.

Bronson v. Kinzie, 1 How. 319, 11 L. ed. 146; *McCracken v. Hayward*, 2 How. 613, 11 L. ed. 399.

And they are as completely a part of the contract as though they had been written therein.

White v. Hart, 13 Wall. 653, 20 L. ed. 688; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 301, 33 L. ed. 908, 10 Sup. Ct. Rep. 546; *Central Trust Co. v. Charlotte, O. & A. R. Co.* 65 Fed. 257; *Southern R. Co. v. Bouknight*, 30 L. R. A. 823, 17 C. C. A. 181, 25 U. S. App. 415, 70 Fed. 442.

The law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage.

East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517.

The redemption laws existing at the time of the execution of a mortgage constitute a part of the obligations of the mortgage contract.

See cases above cited; and see, also, 1 Jones, Mortg. § 663; 2 Jones, Mortg. §§ 1051, 1321.

Redemption laws existing at the time of a purchase, whether under execution or at a tax sale, become a part of the contract; and any law impairing the obligation of that contract is in violation of the provision of the Constitution of the United States prohibiting any state from passing a law impairing the obligations of a contract.

Thresher v. Atchison, 117 Cal. 73, 59 Am. St. Rep. 159, 48 Pac. 1020.

The test as to whether a contract has been impaired is whether its value has, by legislation, been diminished.

Heath & M. Mfg. Co. v. Union Oil & Paint Co. 83 Fed. 777.

A law shortening or extending the time of redemption as it existed when a mortgage was made does impair the obligation of the contract, and is void.

Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *San Diego County Sav. Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Hollister v. Donahoe*, 11 S. D. 497, 78 N. W. 960; *State ex rel. German Sav. & L. Soc. v. Sears*, 29 Or. 580, 54 Am. St. Rep. 808, 43 Pac. 482, 46 Pac. 785.

A statute providing for a stay of execution for a year on a decree for a foreclosure of a mortgage made before any such law existed is void.

Swinburne v. Mills, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489.

A statute authorizing redemption from a sale under a foreclosure of a mortgage, when no such right existed when the mortgage was made, impairs the obligation of the mortgage contract.

Paris v. Nordburg, 6 Kan. App. 260, 51 Pac. 799.

A statute providing that, upon the making of an assignment by a debtor within ten days after the levy of an attachment, the attachment and levy shall be dissolved, and the property attached or levied upon turned over to such assignee or receiver,—was held, as to indebtedness contracted before the passage of the act, to impair the obligation of the contract.

Heath & M. Mfg. Co. v. Union Oil & Paint Co. 83 Fed. 776; *State ex rel. Thomas Cruse Sav. Bank v. Gilliam*, 18 Mont. 94, 31 L. R. A. 721, 33 L. R. A. 557, 44 Pac. 394, 45 Pac. 661; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 39 L. R. A. 575, 73 N. W. 31, 37; *Peninsular Lead & Color Works v. Union Oil & Paint Co.* 100 Wis. 488, 42 L. R. A. 331, 69 Am. St. Rep. 934, 76 N. W. 359.

Statutes staying a sale under a foreclosure for a year, and requiring that it be for 80 per cent of the appraised value, impair the obligation of a mortgage contract made prior to its passage.

Bettman v. Cowley, 19 Wash. 207, 40 L. R. A. 819, 53 Pac. 52.

An act providing for the redemption of real property sold on execution, so far as intended to apply to sales on judgments rendered on contracts at and before its passage, is in violation of the contract.

Scobey v. Gibson, 17 Ind. 572, 79 Am. Dec. 490.

A provision of the Constitution, or a legislative act, which substantially changes the remedies, is utterly void.

Gunn v. Barry, 82 U. S. 610, 21 L. ed. 212.

A law fixing the amount of percentage to be paid in order to effect a redemption of land from a sale under execution, in force at the time of the sale, forms an element of the purchase at the sale, and constitutes a term in the contract under which the purchaser paid his money to the officer; and the legislature has no power to impair the obligation of such contract by diminishing the amount subsequent to the sale.

Thresher v. Atchison, 117 Cal. 73, 59 Am. St. Rep. 159, 48 Pac. 1020.

Redemption of land sold to the state for delinquent taxes is governed by the law in force at the date of the sale; and it is beyond the power of the legislature, after the tax sale, to impose more onerous conditions upon the right to redeem than those which

existed when the sale was made. And the retroactive provision of such act is unconstitutional and void in so far as it purports to impair the vested right of redemption, which is a condition of the contract of purchase when made.

Teralta Land & Water Co. v. Shaffer, 116 Cal. 518, 58 Am. St. Rep. 194, 48 Pac. 613.

A mortgage contract is not merged in the judgment, and a purchaser under execution sale under foreclosure decree is in privity with the mortgage contract.

Romig v. Gillett, 187 U. S. 111, 47 L. ed. 97, 23 Sup. Ct. Rep. 40; *Bryan v. Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; 2 Jones, Mortg. § 1654; *Vallejo Land Asso. v. Viera*, 48 Cal. 572; *People's Sav. Bank v. Hodgdon*, 64 Cal. 95, 27 Pac. 938; *Golden State & M. Iron-Works v. Davidson*, 73 Cal. 389, 15 Pac. 20; *Wilson v. White*, 84 Cal. 239, 24 Pac. 114; *Carpentier v. Brenham*, 40 Cal. 221; *Rumpp v. Gerkens*, 59 Cal. 496; *Henderson v. Grammar*, 66 Cal. 335, 5 Pac. 488.

The decisions of the supreme court of the state of California have determined in every way that the laws existing at the time the contract is made enter into the contract, and become a part of it, and cannot be affected by any subsequent legislation.

Allen v. Allen, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213; *San Diego County Sav. Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991; *Malone v. Roy*, 134 Cal. 344, 66 Pac. 313; *Haynes v. Tredway*, 133 Cal. 400, 65 Pac. 892.

An amendment to the law, whereby the amount to be paid is increased or diminished, is a law impairing the obligation of the contract. No distinction can be made between the time of redemption and the amount to be paid for redemption.

Thresher v. Atchison, 117 Cal. 73, 59 Am. St. Rep. 159, 48 Pac. 1020; *Teralta Land & Water Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194, 48 Pac. 613.

Redemption laws are a part of the contract, and, if the statute is silent as to redemption, no right of redemption exists; and the fact that it does not exist is a part and parcel of the contract which the legislature cannot change.

People ex rel. Thorne v. Hays, 4 Cal. 127; *Seale v. Mitchell*, 5 Cal. 401; *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213.

Mr. **W. H. Anderson** submitted the cause for defendant in error. *Messrs. E. C. Bower and Anderson & Anderson* were with him on the brief:

To reduce the percentage to be paid on redemption, by a law passed before the sale, does not impair the obligations of the contract.

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Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515; *Moore v. Martin*, 38 Cal. 428; *Oullahan v. Sweeney*, 79 Cal. 539, 12 Am. St. Rep. 172, 21 Pac. 960; *Teralta Land & Water Co. v. Shaffer*, 116 Cal. 523, 58 Am. St. Rep. 194, 48 Pac. 613; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236; *Robertson v. Van Cleave*, 129 Ind. 217, 15 L. R. A. 68, 26 N. E. 899, 29 N. E. 781.

The obligation of a contract is its binding force on the party who makes it.

McCraeken v. Hayward, 2 How. 608, 11 L. ed. 397.

The law changing the percentage enacted after the execution of the mortgage does not directly control or affect any of the obligations of the mortgage contract. If it affects it at all, it is remote and indirect, depending upon contingencies.

Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236.

The laws which become a part of the contract are those which affect the rights of the parties to the contract.

Brine v. Hartford F. Ins. Co. 96 U. S. 637, 24 L. ed. 862.

The amount to be paid on redemption is measured in the same way,—not by the original contract, but by the contract of the purchaser.

Duff v. Randall, 116 Cal. 230, 58 Am. St. Rep. 158, 48 Pac. 66.

Mr. Justice **Peckham**, after making the above statement of facts, delivered the opinion of the court:

The plaintiff in error contends that the several alterations of the law as it existed at the time when this mortgage was executed, regarding the time of redemption and the amount of interest payable to the purchaser at the foreclosure sale in order to redeem the land sold, impair the obligation of a contract as to all mortgages in existence before the alterations were made.

The first inquiry is, Whose contract was impaired by the alteration of the law? It is seen that the amount due on the mortgage in question at the time of the sale upon foreclosure was \$6,782.49, and that the property sold for \$9,500. That amount was paid by the purchaser to the sheriff, and it resulted in the payment of the mortgage debt, principal and interest, and the release of the land from the lien of the mortgage. Subsequently to that payment the mortgagee had no interest in further proceedings. Neither the mortgagee nor his assignee was the purchaser at the sale, and neither was in any manner injured by the alterations of the law in the respects mentioned. If, therefore, there was by this legislation an impairment of the

obligation of a contract between the mortgagor and the mortgagee, which the latter could have taken advantage of if injured thereby, it is perfectly clear that he is not in the least injured when, by the sale under his mortgage, he realizes the full amount of his debt, principal, interest, and costs.

[419] What *can he complain of under such circumstances, even conceding an abstract impairment of the obligation of his contract? Having realized and been paid in full the entire amount of money called for by his mortgage, he surely cannot be heard to complain that, nevertheless, the obligation of his contract was impaired. If not injured to the extent of a penny thereby, his abstract rights are unimportant.

We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law, before the courts will listen to his complaint. *Tyler v. Registration Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20. If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot, of course, ask the interference of the court. Therefore, if the mortgagee, or his assignee, were himself the plaintiff, and complaining that the obligation of his contract had been impaired by subsequent legislation, it is plain his complaint would be dismissed when it appeared that, notwithstanding the alleged subsequent illegal legislation, he suffered no injury, because he had proceeded with the foreclosure of his mortgage, and had been paid the full amount of his contract debt, interest, and costs. Under such circumstances the question becomes a moot one, and courts do not sit to decide that character of question. *American Book Co. v. Kansas*, 193 U. S. 49, ante, 613, 24 Sup. Ct. Rep. 394; *Jones v. Montague*, decided April 25, 1904, 194 U. S. 147, ante, 913, 24 Sup. Ct. Rep. 611.

The question of the impairment of the mortgage contract, therefore, is not before us as between mortgagor and mortgagee.

We are of opinion that, as to the plaintiff in error, an independent purchaser at the foreclosure sale, having no connection whatever with the original contract between the mortgagor and mortgagee, his rights are to be determined by the law as it existed at the time he became a purchaser, unless, upon action taken by the mortgagee, the property

[420] had been sold *under a decree providing that it should be sold without regard to the subsequent legislation which impaired his contract. The purchaser bought at the time when the law, as altered, was in operation,

and, so far as he was concerned, it was a valid law; his contract was made under that law, and it is no business of his whether the original contract between the mortgagor and mortgagee was impaired or not by the subsequent legislation. He cannot be heard to contend that the original law applies to him, because a subsequent statute might be void as to some one else. The same one else might waive its illegality, or consent to its enforcement, or the question might have no importance because the property sold for enough to pay the debt, even though there was an abstract impairment of the obligation of his contract.

The purchaser must found his rights upon the law as it existed when he purchased. An alteration after he had purchased, to his prejudice, would be a different thing. *Coolcy*, Const. Lim. 4th ed. 356. We agree that the law existing when a mortgage is made enters into, and becomes a part of, the contract; but that contract has nothing to do, so far as this question is concerned, with the contract of a purchaser at a foreclosure sale, having no other connection with the mortgage than that of a purchaser at such sale. His rights regarding matters of redemption are to be determined as we have stated.

It has been so decided in the case of *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236. There the property was sold at foreclosure sale for enough to pay the mortgage debt (page 56, L. ed. p. 652, Sup. Ct. Rep. 241), and the reduction of the rate of interest which was payable to the purchaser at the foreclosure sale, upon a redemption (which reduction was made by the legislature prior to the sale, although subsequently to the mortgage), was held valid. The company, as purchaser at the foreclosure sale, bid enough to pay the principal and interest of its debt, and after the purchase it contended that the attempted redemption was insufficient because the interest upon the amount it *had bid upon the sale had been computed [421] at 8 per cent, the rate of interest allowed by law at the time of the sale, instead of 10 per cent, the rate existing at the time of the execution of the mortgage. It was held that, as to the purchaser, the rate existing at the time of the sale was the legal rate, and the redemption at that rate was valid. The principle of that case decides the one at bar.

It is asserted, however, on the part of the plaintiff in error, that *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042, has in effect overruled the former case, and that upon the principle decided in the *Barnitz Case* the plaintiff in error herein is entitled to a reversal of the judgment. We are not of that opinion.

In the first place, it was distinctly stated in *Barnitz v. Beverly* that it was not inconsistent with, and did not overrule, the former case, and its facts show a clear distinction between the two cases. The sum bid at the foreclosure sale did not pay the amount due on the mortgage, and the whole case shows that, although the mortgagee became purchaser, the debt of the mortgagor was not thereby paid, and it was the mortgagee's rights under her contract, as contained in the mortgage, and not her rights as a purchaser at the foreclosure sale, that were in controversy.

In the *Cushman Case*, on the contrary, the amount bid at the foreclosure sale paid the mortgage debt, and the subsequent position of the mortgagee was as a purchaser only. The *Barnitz Case* was decided distinctly upon the ground that, by the subsequent legislation, there was an impairment of the obligation of the contract between the mortgagor and the mortgagee, and it was her rights as mortgagee that were passed upon and recognized by the court. This is plain from a perusal of the opinion, especially at pages 130 and 131, L. ed. p. 101, Sup. Ct. Rep. pp. 1046, 1047.

Attention is also called by plaintiff in error to a portion of the opinion in which it is stated that, "Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or [422] which *extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage." And it is asserted that such a case is now before the court.

These remarks must be interpreted in the light of the facts of that case, and must be limited in their application to the parties to the mortgage contract whose rights are impaired by subsequent legislation. If the mortgage had been foreclosed, and the mortgagee had thereby realized his debt, principal and interest, in full, upon the sale, there can be no doubt that he would not have been heard to assert the invalidity of the subsequent legislation, nor would an independent purchaser at the sale have been heard to make the same complaint. Of course, this does not include the case of a mortgagee who purchases at the foreclosure sale, and bids a price sufficient to pay his mortgage debt in full with interest, and an action thereafter commenced against him to set aside the sale because it was made in violation of legislation subsequent to the mortgage. In such case we suppose there can be no doubt of the right of the mortgagee to assert, as a defense to the action, the unconstitutionality

of the subsequent legislation as an impairment of his contract contained in the mortgage. But it may be said that where the legal or equitable rights of a party are not in any way touched, and he is in no way injured, he cannot be heard to complain of the impairment of the obligation of his contract, as a mere abstract proposition.

Many of the earlier cases declare the invalidity of subsequent laws in regard to redemption of land sold under execution, which altered the law existing when a mortgage was made, and some of them, it would seem, have declared the laws unconstitutional, even at the suit of a purchaser at the sale. The leading case on the subject of redemption decides nothing as to the rights of a purchaser. It is that of *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143. In that case the subsequent legislation which was held to be invalid gave twelve months after sale in which to redeem, and provided that the property should not be sold *under the fore-[423] closure decree unless two thirds of the amount which had previously been established by appraisers as the value of the property should be bid at the sale. The case came before the court upon a division of opinion. Bronson, the mortgagee, filed his bill to foreclose the mortgage, and asked for a decree that the mortgaged premises should be sold to the highest bidder without being subject to the rule established by the subsequent legislation. The motion was resisted on the part of defendants, who moved that the decree should direct the sale according to the subsequent legislation, and the judges were opposed in opinion as to the sale of the premises without regard to the subsequent law. This court held that the subsequent law was plainly one which impaired the obligation of the contract between the mortgagor and the mortgagee, and, at the request of the mortgagee, and to prevent the impairment of the obligation of his contract, the court decreed that the sale should be made without reference to the law passed subsequently to the time of the execution of the mortgage contract.

McCracken v. Hayward, 2 How. 608, 11 L. ed. 397, arose in the same way and was decided substantially upon the authority of the last case. The mortgagee made the same request, that the marshal should sell the property without regard to the statute of Illinois passed subsequently to the execution of the mortgage, and it was held that his motion should be granted, because the subsequent legislation impaired his contract as mortgagee with the mortgagor.

In *Gantly v. Ewing*, 3 How. 707, 11 L. ed. 794, after the mortgage had been executed, the legislature passed an act which required, on sales upon execution issued upon a judg-

ment, that the property should first be appraised, and should not thereafter be sold on execution for a sum less than one half the appraised value. The mortgagee foreclosed the mortgage, and upon the sale the premises were sold to the defendants for \$76,—not a tenth part of the mortgage debt. The property had not been valued prior to the sale, as required by the statute. An act [424] had, however, been passed prior to the execution of the mortgage, requiring the sheriff on such sales to first offer the rents and profits of the real estate for a term of seven years, and if the same did not bring enough to satisfy the execution, then the fee simple was to be offered for sale, and sold. This offer to sell the rents and profits was not in fact made. There were two questions upon which the judges were opposed: the one as to the effect of the failure to make the offer to sell the rents and profits, and the other regarding the effect of the failure to make the appraisal. A certificate of division of opinion was sent to this court. The action was, as stated in the opinion, one of ejectment; the defendants setting up and claiming under the sheriff's deed, and the plaintiff, the mortgagee, asking the court to instruct the jury that the deed was void because the rents and profits had not been offered for sale before the fee simple was sold, and also because the land had not been valued, as required by the statute, before the sale was made. The mortgagee was thus the party claiming that the sale under his own foreclosure was void because of the failure to comply with the subsequent legislation of Indiana, while the defendants who bid at the sale and became the purchasers of the land insisted that the act (existing when they purchased) was unconstitutional, because it altered the law as it existed when the mortgage was made, and required that the land should not be sold until it had been appraised, and then only after at least one half of the value so appraised had been bid. This court held that the offer to sell the rents and profits for seven years, as provided for by the statute existing prior to the execution of the mortgage, should have been made, and that the sale, such offer not having been made, was void; but it held that the condition provided for in the later statute, of not selling unless the appraisal had taken place and more than one half such appraised value had thereafter been bid, was void as an impairment of the obligation of the contract between the mortgagor and the mortgagee, and the deed of the sheriff could not, so far as that ground was concerned, be [425] avoided, *although no valuation of the property was made before the sale. The case was decided, as the opinion shows, entirely upon the authority of *Bronson v. Kinzie*, 1

How. 311, 11 L. ed. 143, which, as we have seen, was not a case of a purchaser, and was decided upon the prayer of the mortgagee, who contended that his contract contained in his mortgage would be impaired by the subsequent law if the court should permit it to be enforced.

The question again arose in *Howard v. Bugbee*, 24 How. 461, 16 L. ed. 753, and that case was also decided upon the authority of *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143. In the statement of fact by Mr. Justice Nelson, it appears that the mortgage by Parsons to Tait was executed in 1836, and in a subsequent year (1842) the law regarding redemption was altered, and a right was given to a judgment creditor to redeem for two years after a sale under a mortgage. The mortgage was foreclosed in 1848, and Howard, the appellant, became the purchaser of the premises at the sale under the decree of foreclosure, and obtained a deed of the same, duly executed by the proper officer. Bugbee, the appellee, the plaintiff in the court below, recovered judgment against the estate of the mortgagor in 1843, and thereafter, pursuant to the altered law, tendered the purchase money, interest, and charges to Howard, the purchaser, and asked for a deed of the land, which was refused. A bill was filed in the court of chancery in Alabama by Bugbee to compel Howard to receive the money in redemption of the sale, and execute a deed. The defense was that the mortgage from Parsons, under which the defendant derived title as purchaser at the foreclosure sale, having been executed before the passage of the act providing for the redemption, the act, as respects this debt, was inoperative and void, as impairing the obligation of a contract. Now here was a case where the purchase was made at the foreclosure sale six years after the law had been enacted providing for redemption, and the question was raised, not by the mortgagor or the mortgagee, but by the purchaser at the sale. The Alabama court of chancery held that complainant was not entitled to the relief asked, and dismissed the bill; but *the su-[426] preme court of that state, upon appeal, reversed the decree of the court of chancery, and entered a decree for the complainant. Upon writ of error from this court it was here decided that the act of the legislature was invalid as an impairment of the mortgage contract, upon the authority of *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, which had never decided the particular question.

Upon principle, we cannot see how an independent purchaser, having no connection whatever with the mortgage, excepting as he becomes such purchaser at the foreclosure

sale, can raise the question in his own behalf in relation to the validity of legislation as to redemption and rate of interest which existed at the time he made his purchase; and this question, we think, has been clearly determined against the purchaser in the case of *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236.

We have no disposition to revise the decision in that case, which, we think, was correct and stands upon a firm foundation. The later case of *Barnitz v. Beverly*, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042, when the facts therein are regarded, does not militate against the soundness of the views expressed in the *Cushman Case*, and in addition to that it was distinctly so stated in the opinion of the court. If a sale be made under a decree directing that it be without regard to the subsequent legislation, as in *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, then the purchaser, buying under the decree with those specific directions, takes his rights thereunder. But in that case the decree is obtained in the interest, and at the request of, the mortgagee, and to save the impairment of his contract.

In our view this independent purchaser must, under the facts herein, abide by the law as it stood at the time of his purchase.

A further question is made by the plaintiff in error, that there was no proper tender made.

[427] Holding the views we do in regard to the main question, it follows that the amount of the bid made by the purchaser carried interest at the rate of 1 per cent per month only. If that amount, at that rate of interest, was tendered the sheriff, *it was sufficient. The state court has found that such amount was paid to the sheriff by a check which was subsequently paid. Whether the defendant Rhodes fully complied with the requirements of the state statutes in order to make a complete tender is not a Federal question.

The judgment of the Supreme Court of California is affirmed.

JOVITE CAU, *Plff. in Err.*,
v.

TEXAS & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 427-432.)

Carriers — limitation of liability — loss by fire — burden of proof.

1. An exemption of a carrier from liability

for damages caused by fire, expressed in the bill of lading, is valid, although the option or opportunity to ship the goods under the common-law liability was not actually presented to the shipper by the carrier.

2. The lack of an independent consideration for an exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, cannot successfully be urged to avoid such provision, although the carrier may have had but one rate, where the consideration expressed was sufficient to support the entire contract made.
3. The burden of showing that a fire causing the loss of a shipment of cotton was due to the negligence of the carrier or its servants rests on the shipper, where the bill of lading contains a provision exempting the carrier from liability for damages caused by fire.

[No. 57.]

Argued April 8, 1904. Decided May 16, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Louisiana, entered upon a directed verdict for defendant in an action against a common carrier to recover the value of a shipment destroyed by fire. *Affirmed.*

See same case below, 51 C. C. A. 76, 113 Fed. 91.

Statement by Mr. Justice McKenna:

This is an action to recover the value of cotton delivered by plaintiff to defendant, to be transported over its railroad from Texarkana, Texas, to New Orleans. The cotton was destroyed by fire while in the custody of defendant.

The action was originally brought in the civil district court of the parish of Orleans, and removed, on the petition of defendant, to the circuit court of the United States for the eastern district of Louisiana. The case was tried to a jury, *which, under the instructions of the court, rendered a verdict for defendant, upon which judgment was entered dismissing the suit, with costs.

The main question presented by the record is the effect of a provision in the bills of lading delivered by defendant to plaintiff, exempting it from liability for damages caused by fire. Incidentally a question arises as to the burden of proof. At the time of the delivery of the cotton there were four bills of lading issued by defendant,—three exactly alike, and the fourth substantially like the other three in all that is material to this case. They all contain the following

NOTE.—On the validity of agreements to restrict carrier's liability—see notes to *Deming v. Merchants' Cotton-Press & Storage Co.* 13 L. R. A. 518; *Missouri P. R. Co. v. Ivey*, 1 L. R. 194 U. S. U. S., Book 48. 66 1053

provision: "That neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to, or destruction of, said cotton by fire. . . ."

For the purpose of showing the delivery of the cotton to the defendant the plaintiff introduced in evidence the bills of lading, but without prejudice to his claim that the provision quoted was not binding, in the absence of a consideration therefor. The court admitted the bills of lading, with that limitation.

The other evidence in the case was that the bills of lading in blank were obtained from the defendant's agent by plaintiff's agent, and three of them made out by the latter at his office. The record leaves doubtful whether the other bill of lading was prepared by him or by the agent of defendant. The former, however, testified that he did not know the fire clause was in the bills of lading, and further testified as follows:

A. When I applied to the agent of the Texas & Pacific railroad for a rate to New Orleans on the cotton I was going to ship, he told me I could get but one rate, 60 cents per 100 pounds; that that was the rate of the other roads. And I gave them the cotton because it was the most direct line to New Orleans. I simply went there to get the rate, and I simply gave them the cotton at that rate which they gave me, 60 cents per 100 pounds.

He also testified that he did not want to [429] know the lowest rate; that he asked for the correct rate; he knew there was but one rate, all of the roads having the same, and that it was against the law to give other rates.

The following was the testimony as to the fire clause:

Q. What I mean to say is this: Did you tell the agent of whom you asked for the rate that you did not want any fire clause in any bill of lading which he might issue to you?—A. No, sir.

Q. Did you tell him that you wanted to ship your cotton without any fire clause in the bill of lading?—A. No, sir; because I did not know it was in the bill of lading.

Q. Therefore you made no application to

him, then, for a rate based on a bill of lading not containing the fire clause?—A. I made no application that way; I made no inquiries; I just asked for the rate.

Q. Allowing that his reply to you was only one rate, was anything said by him as to the different kinds of contracts you could get?—A. No, sir; he never said anything to me at all.

Q. Were you, or not, informed that you could get a contract under which the company would be liable as insurer, practically, and another kind of contract, under which they would not be liable for loss in case of fire?—A. No, sir.

Q. Did you have any information, or did you know that if you wanted to make a choice between these two, that you could do it?—A. No, sir.

The cotton was in the possession of the Union Compress Company when destroyed, to which company it had been delivered by defendant to be compressed, and that company had obtained insurance on it for the defendant, it being the custom of that company to effect insurance for the benefit, and in the name of, each particular railroad compressing cotton at their press. The testimony of the destruction of the cotton is that the Union Compress Company's building and platforms in Texarkana, Texas, were destroyed by fire September 19, 1900, in which the cotton was destroyed with other cotton.

*Plaintiff requested instructions of the [430] court which embodied the following propositions:

1. A carrier cannot limit his common-law liability without consent of the shipper, for consideration given.

2 The mere contract of shipment is not such a consideration.

3. The condition usually, though not necessarily, is a reduced rate; but in such case both rates must be offered shipper, and be reasonable, and the shipper given a genuine freedom of choice in making his selection; and if the evidence satisfied the jury "there was no fair alternative or choice offered to plaintiff by defendant as between two rates, under one of which defendant would be liable for the loss of said cotton by fire, and under the other of which he would not be

A. 500; *Hartwell v. Northern Pacific Exp. Co.* 3 L. R. A. 342; *Richmond & D. R. Co. v. Payne*, 6 L. R. A. 849; *Adams Exp. Co. v. Harries*, 7 L. R. A. 214; *Duntley v. Boston & M. R. Co.* 9 L. R. A. 452; *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 419; *Pacific Exp. Co. v. Foley*, 12 L. R. A. 799, and *Chicago, M. & St. P. R. Co. v. Solan*, 42 L. ed. U. S. 688.

On the right of a common carrier to limit its common-law liability by contract in the ab-

sence of negligence—see note to *Little Rock & F. S. R. Co. v. Cravens*, 18 L. R. A. 527.

On carrier's power to limit amount of liability in cases of negligence—see note to *Ballou v. Earle*, 14 L. R. A. 433.

As to presumption of negligence against railway companies from happening of fires—see notes to *Barnowski v. Helson*, 15 L. R. A. 40, and *McCullen v. Chicago & N. W. R. Co.* 41 C. C. A. 370.

so liable," the fire clause was not binding upon plaintiff, and the jury might "deal with such bill of lading as though it did not contain such clause or stipulation."

4. The burden of proving the reasonableness of the fire clause, and that plaintiff had a fair opportunity to refuse or accept it, rested upon the defendant.

Mr. W. S. Parkerson argued the cause, and, with **Mr. B. K. Miller**, filed a brief for plaintiff in error:

In order to be binding upon the shipper, a contract limiting the common-law liability of a carrier must be upheld by a valid consideration.

Hutchinson, Carr. § 278; *Wehmann v. Minneapolis, St. P. & S. Ste. M. R. Co.* 58 Minn. 22, 59 N. W. 546.

Contracts limiting the common-law liability of carriers are not favored by the law, and they are not binding on the shipper unless fairly made and freely entered into by him.

Adams Exp. Co. v. Nock, 2 Duv. 562, 87 Am. Dec. 510; *Hance v. Wabash Western R. Co.* 56 Mo. App. 476.

In order to be valid such contract must be the choice of the shipper, and not of the carrier. The shipper must be allowed an option or opportunity to select under which, the common-law or limited liability, he will ship his goods. If such free choice or option is not allowed him the contract is not reasonable, and therefore is void. Both rates,—that for transportation under the common-law liability, and that under the limited liability—must be free to the shipper, in order that he may have real liberty of choice in making the selection between the two; otherwise the contract limiting the liability is not fair or reasonable, and therefore is void.

Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; *Duvenick v. Missouri P. R. Co.* 57 Mo. App. 550; *Lewis v. Great Western R. Co.* L. R. 3 Q. B. Div. 195, 47 L. J. Q. B. N. S. 131; *Carr v. Lancashire & Y. R. Co.* 21 L. J. Exch. N. S. 261, 7 Exch. 707; *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 7 L. R. A. 162, 12 S. W. 1018.

A carrier is not permitted so to limit its liability as to exempt it from the consequences of its own negligence.

New York C. R. Co. v. Lockwood, 17 Wall. 357-384, 21 L. ed. 627-642.

Where there is a clause limiting the liability of a carrier it bears the burden of proof to show, not only that the cause of the loss was within the exemption, but also that it was not due to its negligence or that of its servants.

South & North Ala. R. Co. v. Henlein, 52 194 U. S.

Ala. 606, 23 Am. Rep. 578; *Inman v. South Carolina R. Co.* 129 U. S. 128-139, 32 L. ed. 612-615, 9 Sup. Ct. Rep. 249; *Duvenick v. Missouri P. R. Co.* 57 Mo. App. 550; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Texas & P. R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619; *Texas & P. R. Co. v. Clayton*, 173 U. S. 348, 43 L. ed. 725, 19 Sup. Ct. Rep. 421.

In Louisiana, where the contract exempts the carrier from any loss by fire, he carries the burden of proving, not only the exemption, but also that the loss was not due to the carrier's negligence or omission of duty in any manner causing or contributing thereto.

Maxwell v. Southern P. R. Co. 48 La. Ann. 397, 19 So. 287; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Hunt v. Morris*, 6 Mart. (La.) 680, 12 Am. Dec. 489.

Mr. Charles P. Cocke argued the cause, and, with *Messrs. William Wirt Howe and Walker B. Spencer*, filed a brief for defendant in error:

Cases cited in support of the proposition that fire clauses in the bills of lading sued on are void for want of consideration fall into two distinct classes. The first class of cases does not deal with, or at all decide, the point raised. They decide that, under certain circumstances, it will be held that a fair opportunity to choose between a contract for limited liability and the legal or unlimited liability of the carrier has not been afforded the shipper; that, in the absence of such an opportunity being afforded, the contract will be regarded as extorted by duress; and that, being so extorted, the exemptions from liability will not be enforced.

Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Little Rock & F. S. R. Co. v. Cravens*, 57 Ark. 112, 18 L. R. A. 527, 38 Am. St. Rep. 230, 20 S. W. 803; *St. Louis, I. M. & S. R. Co. v. Spann*, 57 Ark. 127, 20 S. W. 914; *Lewis v. Great Western R. Co.* L. R. 3 Q. B. Div. 195, 47 L. J. Q. B. N. S. 131; *Carr v. Lancashire & Y. R. Co.* 21 L. J. Exch. N. S. 261, 7 Exch. 707.

None of these cases have any application here for the reason that no unfairness in obtaining the contracts on the part of the carrier was averred or proved, and the issue is, therefore, wholly extraneous to this case, and outside of the record.

Cases of the second class, like *Wehmann v. Minneapolis, St. P. & S. Ste. M. R. Co.* 58 Minn. 22, 59 N. W. 546; *Kellerman v. Kansas City, St. J. & C. B. R. Co.* 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *San Antonio*

& *A. P. R. Co. v. Barnett*, 12 Tex. Civ. App. 321, 34 S. W. 139; and *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 7 L. R. A. 162, 12 S. W. 1018,—which lend some color to the contention of plaintiff in error, are in essential conflict with the decisions of this court.

York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 113, 18 L. ed. 172; *Gelpeke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Hutchinson*, Carr. §§ 238, 240.

Not one bill in a thousand is ever signed by the shipper, and such signature has been held not to be necessary to establish his assent to the terms of the bill.

Piedmont Mfg. Co. v. Columbia & G. R. Co. 19 S. C. 353; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391.

The plaintiff in error is concluded by his pleadings.

Washburn Crosby Co. v. Boston & A. R. Co. 180 Mass. 252, 62 N. E. 590.

Messrs. William Wirt Howe, John F. Dillon and Walker B. Spencer also filed a brief for defendant in error:

A common carrier may limit its liability, as it exists at common law, by special contract of shipment assented to by the shipper, except as against its own negligence.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *Clark v. Barnwell*, 12 How. 272, 280, 13 L. ed. 985, 988; *Western Transp. Co. v. Downer*, 11 Wall. 129, 134, 20 L. ed. 160, 161; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176-190, 19 L. ed. 909-913; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 328, 21 L. ed. 302.

Where loss is shown to have been within the terms of exemption stipulated for in the contract of shipment, the burden of showing that the loss resulted from the negligence of the carrier rested with the plaintiff.

Western Transp. Co. v. Downer, 11 Wall. 133, 134, 20 L. ed. 161; *Platt v. Richmond, Y. River & C. R. Co.* 108 N. Y. 361, 15 N. E. 393.

Where the shipment is made under special contract the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire, and it is not necessary that there should be a separate consideration moving from the carrier to the shipper for each provision or stipulation contained in the special contract of shipment. The obligation of the carrier to transport the property shipped is sufficient consideration to support the contract of shipment in its entirety.

York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 113, 18 L. ed. 172; *Nelson v. Hudson River R. Co.* 48 N. Y. 498.

The issuance of a bill of lading by the carrier, and its acceptance by the shipper, create a contract between the shipper and carrier, and each is bound by the terms of the contract, provided the carrier has resorted to no unfair means of deception or coercion.

Hutchinson, Carr. § 240; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 93, 28 Am. Rep. 113.

When it is made to appear that the loss of the goods was caused by one of the perils excepted against, the burden is then shifted on the plaintiff to show, if he can, that it was, nevertheless, caused by the neglect of the carrier.

Clark v. Barnwell, 12 How. 272, 280, 13 L. ed. 985, 988; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 190, 19 L. ed. 909, 913; *Western Transp. Co. v. Downer*, 11 Wall. 129, 134, 20 L. ed. 160, 161.

Berje v. Texas & P. R. Co. 37 La. Ann. 470, does not throw the onus on defendant here on the question of neglect. The supreme court of Louisiana from early times has held consistently the same doctrine laid down by the Supreme Court of the United States, and has quoted the decisions of the latter court in support of that view.

Price v. The Uriel, 10 La. Ann. 413; *Thomas v. The Morning Glory*, 13 La. Ann. 269, 71 Am. Dec. 509; *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.* 20 La. Ann. 303.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

It is well settled that the carrier may limit his common-law liability. *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option *and opportunity must be given to the shipper to select under which, the common-law or limited liability, he will ship his goods." [431]

If this means that a carrier must take no advantage of the shipper, or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper (*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465), and there

can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Bank of Kentucky v. Adams*, 93 U. S. 174, 23 L. ed. 872.

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.

(2) It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170. In response it was said: "The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one [432]*rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common-law liability of the roads.

(3) The carrier cannot contract against the effect of his negligence, and hence it is contended that in the case at bar the burden of proof is upon the defendant to show that the fire was not caused by its negligence or that of its servants. The contention is answered by *Clark v. Barnwell*, 12 How. 272, 13 L. ed. 985. In that case the bill of lading bound the carrier to deliver the goods in like good order in which they were received, dangers and accident of the seas and navigation excepted. It was held that after the damage to the goods had been established, the burden lay upon the carrier to show that it was caused by one of the perils from which the bill of lading exempted the carrier. But it was also held that even if the damage so occurred, yet, if it might have been avoided by skill and diligence at the time, the carrier was liable. "But," it was observed, "in this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him." The doctrine was affirmed in *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160. See also § 218, 2 Greenleaf on Evidence.

Judgment affirmed.

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HENRY CHARNOCK, *Plff. in Err.*,
v.
TEXAS & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 432-440.)

Carriers — negligence — duty to guard against fire.

A carrier is not chargeable with negligence in failing to take precautions to guard against the danger from fire to cotton awaiting transportation in locked box cars on a side track, in the open country, established and maintained for the accommodation of the planters in that neighborhood, where the carrier is merely following a practice which has continued for years without any resulting loss or complaint.

[No. 194.]

Argued April 8, 1904. Decided May 16, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Louisiana, entered on a verdict directed in favor of defendant in an action against a common carrier to recover damages for the loss of a shipment from fire. *Affirmed.*

See same case below, 51 C. C. A. 78, 113 Fed. 92.

The facts are stated in the opinion.

Mr. William S. Parkerson argued the cause, and, with Mr. Branch K. Miller, filed a brief for plaintiff in error:

In Louisiana, where the consideration for a contract limiting the common-law liability of a carrier is denied, and the evidence leaves its existence or reality in doubt, the burden is on the carrier to prove the consideration.

Mossop v. His Creditors, 41 La. Ann. 297, 6 So. 134.

The validity or effect of the exemption is determined by the law of Louisiana.

Liverpool & G. W. Steam Co. v. Phoenix Ins. Co. 129 U. S. 397, 453, 32 L. ed. 788, 796, 9 Sup. Ct. Rep. 469.

Where proof of one of the facts in issue is peculiarly within the knowledge of one of the parties, the burden of proof is shifted to the party who has special knowledge as to the controverted fact, and he must establish it by evidence.

NOTE.—As to presumption of negligence against railway companies from happening of fires—see notes to *Barnowski v. Nelson*, 15 L. R. A. 40, and *McCullen v. Chicago & N. W. R. Co.* 41 C. C. A. 370.

King v. Atkins, 33 La. Ann. 1057; *School Board v. Trimble*, 33 La. Ann. 1073.

Where a bill of lading, or contract limiting the liability of the carrier, contains no statement of the rate paid, the whole limitation is void.

Kellerman v. Kansas City, St. J. & C. R. Co. 68 Mo. App. 255.

Where the contract exempts the carrier from any loss by fire he carries the burden of proving, not only the exemption, but also that the loss was not due to the carrier's negligence or omission of duty in any manner causing or contributing thereto.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 383, 12 L. ed. 482; *Seller v. The Pacific*, 1 Or. 409, Fed. Cas. No. 12,644; *Ormsby v. Union P. R. Co.* 2 McCrary, 48, 4 Fed. 706.

The exemption from loss or damage by fire is not effective, unless the fire be the proximate cause of the loss or damage.

Condict v. Grand Trunk R. Co. 54 N. Y. 500.

The proximate cause of the loss here was not the fire, but defendant's negligence which preceded it, and without which the fire would not have occurred.

The delivery of goods for shipment at a place where the carrier has consented to receive them for transportation is a complete delivery to the carrier, and when this is done its liability for the goods is that of a common carrier.

St. Louis, I. M. & S. R. Co. v. Murphy, 60 Ark. 337, 46 Am. St. Rep. 202, 30 S. W. 419; *Dixon v. Central R. Co.* 110 Ga. 173, 35 S. E. 369; *Illinois C. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *Greenwood v. Cooper*, 10 La. Ann. 796; *Barrett v. Salter*, 10 Rob. (La.) 434; *Fitchburg & W. R. Co. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427.

A special contract exempting the carrier from liability in specified instances is to be used by it against any claim of liability as to which it was designed to furnish protection.

Southern P. Co. v. Arnett, 50 C. C. A. 17, 111 Fed. 849.

Where goods are delivered for shipment at a place designated by the carrier, and before being loaded, and while in such place, they are stolen or destroyed, the carrier is guilty of negligence if it makes no provisions against such theft or destruction, and is liable to the shipper for the value of the goods.

Hutchinson, Carr. § 89; *Fisher v. The Norval*, 8 Mart. N. S. 120; *Barrett v. Salter*, 10 Rob. (La.) 434; *Robt v. Captain Harkson*, 18 La. Ann. 705; *Maxwell v. Southern P. R. Co.* 48 La. Ann. 399, 19 So. 287.

If the carrier negligently leaves goods in

a place of danger, he cannot, by stipulation, exempt himself from liability for loss by fire.

McFadden v. Missouri P. R. Co. 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689.

For other contentions of these counsel, see their brief as reported in *Cau v. Texas & P. R. Co. ante*, 1053.

Mr. Charles P. Cocke argued the cause, and, with *Messrs. William Wirt Howe, Walker B. Speneer*, and *John F. Dillon*, filed a brief for defendant in error:

The evidence adduced fails to show negligence.

South & North Ala. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749.

There must be a causal connection between the negligence and the injury.

Illinois C. R. Co. v. Cathey, 70 Miss. 332, 12 So. 253; *Marande v. Texas & P. R. Co.* 42 C. C. A. 317, 102 Fed. 246; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 189, 19 L. ed. 912; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160; *Clark v. Barnwell*, 12 How. 272, 13 L. ed. 985; *Rich v. Lambert*, 12 How. 347, 13 L. ed. 1017; *Platt v. Richmond, Y. River & C. R. Co.* 108 N. Y. 358, 15 N. E. 393; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* 36 C. C. A. 135, 94 Fed. 181; *Thomas v. Lancaster Mills*, 19 C. C. A. 88, 34 U. S. App. 404, 71 Fed. 481; *Laidlaw v. Sage*, 158 N. Y. 76, 44 L. R. A. 216, 52 N. E. 679; *Patton v. Texas & P. R. Co.* 179 U. S. 663, 45 L. ed. 364, 21 Sup. Ct. Rep. 275.

Messrs. Charles P. Cocke, William Wirt Howe, and *Walker B. Speneer* also filed a brief for defendant in error:

Both parties having asked the court to direct a verdict, their action was a request that the court find the facts, and they are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the trial court, the appellate tribunal is limited, in reviewing its action, to a consideration of the correctness of the finding on the law, and must affirm if such finding be supported by any evidence.

Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *Buettell v. Magone*, 157 U. S. 154, 157, 39 L. ed. 654, 655, 15 Sup. Ct. Rep. 566; *Runkle v. Burnham*, 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. Rep. 837.

The authorities cited by the plaintiff in error cannot prevail against the well-settled jurisprudence of this court, as well as of the supreme court of Louisiana.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 384, 12 L. ed. 482; *Clark v. Barnwell*, 12 How. 272, 13 L. ed. 985; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19

L. ed. 909; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160; *Price v. The Uriel*, 10 La. Ann. 413; *Thomas v. The Morning Glory*, 13 La. Ann. 269, 71 Am. Dec. 509; *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.* 20 La. Ann. 303. See also *Washburn Crosby Co. v. Boston & A. R. Co.* 180 Mass. 252, 62 N. E. 590.

Mr. Justice **McKenna** delivered the opinion of the court:

The case was removed from the civil district court in and for the parish of Orleans to the United States circuit court for the eastern district of Louisiana by defendant, on the ground that it was a corporation organized by an act of Congress of the United States.

The petition alleges that plaintiff delivered to defendant, at a point on the line of its railway called Meekers Switch, to be transported to New Orleans, 52 bales of cotton at a rate of freight then and there agreed upon, and a bill of lading issued to plaintiff. The cotton was loaded upon the cars of defendant, and, while waiting transportation, was destroyed by fire.

The petition charges negligence on the part of defendant in that it failed to take measures of precaution for the safety and protection of the cotton, but left it in the cars on a side track, "in an open country, unguarded and unwatched." The bill of lading contained a provision exempting defendant from liability for damage to, or destruction of, the cotton by fire, but the petition alleges that the provision was null and void, as far as plaintiff is concerned, for the following reasons, among others: He received no consideration therefor; the rate which he agreed to pay was the only rate defendant would give or was offered; on account of the negligence of the defendant.

The value of the cotton was \$2,440.32.

The evidence in the case is that Meekers was a mere switch track running to the Meekers plantation. No agent was maintained at the station. Shippers wanting cars applied for them at the next station. The practice was for shippers to load the cars furnished and to get bills of lading from the agent who furnished the cars. The next [437] train passing after the cars were *loaded took them; that no guard or watchman was placed over freight was well known.

The loading of the cotton in the present case was completed at 2 P. M. The bill of lading was obtained at 5 P. M. The fire was discovered at 10 P. M. The train which was to take the cars was not due until 9 A. M. next morning. There was no evidence of the cause of the fire.

Defendant moved the court to instruct the jury to return a verdict for it. Plaintiff. 194 U. S.

tiff requested the court to submit to the jury the question whether or not the destruction of the cotton was due to, or caused by, the negligence of the defendant. The request was denied, and the motion of the defendant was granted, and a verdict was returned for defendant. From the judgment entered on the verdict error was prosecuted to the circuit court of appeals for the fifth circuit, and the judgment was affirmed. 51 C. C. A. 78, 113 Fed. 92.

This case was argued and submitted with *Cau v. Texas & P. R. Co.* 194 U. S. 427, ante, 1053, 24 Sup. Ct. Rep. 663, and of all of its questions are ruled by that case except one, and that is the effect of leaving the cotton unguarded on the responsibility of the defendant.

In answering the question two elements are to be considered,—the negligence of the defendant, and its connection with the destruction of the cotton. If the evidence established neither, the circuit court rightfully directed a verdict for defendant.

Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. Applying that test in the case at bar, we do not think negligence on the part of defendant was established.

Meekers was not a regular station; indeed, was not a station at all, but a mere switch track. The defendant was not obliged to receive freight there. It was, as said by the court of appeals, "a country or plantation switch," established and maintained for the accommodation of the planters of the neighborhood. There was no agent or employee maintained there for the purpose of receiving or guarding freight, nor was there fire *apparatus kept. Cars were only sent [438] there when ordered, loaded by the shipper, and taken by the first passing freight train to the point of destination. This was the practice for years, and there is not a word of testimony that it was not adequate to the protection of the planters, as it was to their accommodation, or that it was, in their judgment, not a complete fulfilment of the duty of defendant. No circumstance is shown which demanded a change in the practice. There was no demand made by the plaintiff for a change. Whatever risk there was seems to have been accepted as a consideration for the convenience afforded. It is easy to understand that if watchmen had been demanded of the defendant, it would have insisted upon the delivery of freight at its regular station at Le Compte, 2½ miles distant. But the risk seems not to have been great. No loss from any cause is shown to have occurred during the existence of the practice,—nothing shown from

which danger could be apprehended. One of the plaintiff's witnesses testified that tramps passed up and down the road daily; but what can be inferred from that? It is inappreciable. Was danger to be apprehended from their carelessness or malice? During the ten or eleven years of the existence of the station not an instance of either is shown.

It is, however, urged that a place of delivery other than a regular station can be agreed on or established by custom or practice, and at the instant of delivery the full responsibility of a carrier attaches. To bring the case at bar within those principles—*Fisher v. The Norval*, 8 Mart. N. S. 120; *Barrett v. Salter*, 10 Rob. (La.) 434, and *Roth v. Harkson*, 18 La. Ann. 705, are cited. The principles may be assented to; the cases cited are distinguishable from that at bar.

In *Fisher v. The Norval*, 35 bales of cotton were sent to be shipped on the brig *Norval*, and were received by the captain. The cotton was left upon the levee, unguarded, and during the night following delivery it was destroyed by fire. The origin of the fire was [439] not shown, but it was shown *that it was not customary in the city (New Orleans) to put a guard over cotton so placed. The Code of the state made carriers liable for loss or damage to property intrusted to their care, unless they proved that such loss or damage had been occasioned by accidental and uncontrollable events. The defendants in the case were adjudged liable. The supreme court held, approving the decision of the trial court, "there was negligence in the defendants permitting the cotton to be exposed all night on the levee, to theft, fire, and other accidents, without some person to take care of it." It was not the care, the court further observed, that a prudent person would take of his own property, and the custom proved was not a good excuse. The facts in that case are markedly different from those in the pending case. Cotton exposed upon the levees of New Orleans is in a different situation from cotton inclosed in locked box cars on a side track, in the solitude of the country, and demands a different degree of care.

In *Barrett v. Salter*, 40 hogsheads of tobacco were delivered for shipment on the ship *Huron*. It was receipted for by the mate. After it was received a heavy rain came, which lasted about two hours, to which it was suffered to remain exposed. It was testified that the captain was told that if the tobacco should be put on board without being opened and trimmed, it would be found damaged on its arrival at destination. It was so found. The defendants were held liable.

In *Roth v. Harkson*, the question was
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whether cotton put in a place designated by a mate of a ship, and covered by a tarpaulin, by the direction of the officers of the ship, was delivered to the ship, notwithstanding the officers afterwards refused to receipt for it on the ground of the lateness of the hour. It was held to be a delivery.

The question in the case at bar, however, is not whether there was delivery to defendant, nor when its responsibility attached, but assuming delivery at Meekers, and that defendant's responsibility attached at the time the bills of lading were issued, was defendant guilty of negligence? That question *we have answered in the negative; nor [440] could the answer be otherwise, even if it be conceded, as contended by plaintiff, that under the law of Louisiana the burden of proof was upon the defendant to show the absence of negligence. The allegation of the petition was: "That the fire, by which the destruction of said cotton was caused, was due to the negligence of the said company itself, and of its agents, employees and servants; that the said cotton was by it left in two cars of the said company, standing upon its track, in the open country, unguarded and unwatched by the said company, in any particular whatsoever; that it was the duty of the said company to take some measures of precaution to protect said cars and the cotton contained therein, from depredation, loss, or injury by third persons, wrongdoers or those bent upon mischief; that it totally failed and neglected to take any measures of precaution for the safety and protection of the said cotton, but left it in said cars, said track, unguarded and unwatched, in the nighttime, during which it was destroyed by fire; that petitioner believes that the said cotton was set on fire by some malicious person; that petitioner has no actual knowledge as to the origin or cause of said fire." The evidence we have commented on, and, we may only add, it established all that was charged as negligence, and there was nothing for the defendant to explain. The defendant could, as it did, submit the question of its liability upon the evidence adduced.

Judgment affirmed.

*SOLOMON L. SWARTS, Trustee in Bankruptcy of Siegel-Hillman Dry Goods Company, Appt.,

v.

L. F. HAMMER, Jr., Collector of the Revenues of the City of St. Louis, Missouri.

(See S. C. Reporter's ed. 441-444.)

Taxes—state taxation of property in the hands of trustee in bankruptcy.

Property in the hands of a trustee in bank-
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ruptcy is not exempted from liability to state taxation by the bankruptcy act of July 1, 1898 (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3418).

[No. 238.]

Argued April 20, 1904. Decided May 16, 1904.

A PPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Missouri affirming an order of a referee in bankruptcy directing the payment of taxes imposed upon property in the hands of a trustee in bankruptcy. *Affirmed.*

See same case below, 56 C. C. A. 92, 120 Fed. 256.

The facts are stated in the opinion.

Mr. Lee Sale argued the cause, and, with *Messrs. Solomon L. Swarts and Wolf & Cohen*, filed a brief for appellant:

The state has no sovereignty over property in the possession of a trustee in bankruptcy, and therefore cannot tax it.

McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 492, 30 L. ed. 694, 695, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Cooley*, Taxn. 2d ed. chap. 3, p. 83; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. 232, 21 L. ed. 146.

The principle which permits the taxation of property owned by agents of the Federal government has no application to the question we are considering. Such taxation does not necessarily hinder the efficient exercise of the power of those agents to serve the government, and the decisions permitting such taxation were expressly based upon that ground. It has, however, also been held that a tax upon the operation of these agents is a direct obstruction to the exercise of Federal powers.

Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787.

Upon similar principles, a tax upon property over which Congress has lawfully taken supreme and exclusive control, and which it has ordered distributed under prescribed rules, necessarily interferes with, and is a direct obstruction of, the exercise of Federal powers.

The right of a state to demand of the bankruptcy court taxes accruing, even prior to bankruptcy proceedings, must be traceable to the provisions of the bankruptcy act.

Re Stuyvesant Bank, 12 Blatchf. 189, Fed. Cas. No. 13,583.

If it be true of debts which became due to the state prior to the bankruptcy proceed-

ings, that a preference exists as to them simply because the act of Congress so enacts, *a fortiori* it must be true as to state debts accruing after the institution of bankruptcy proceedings.

We concede that a court of bankruptcy should exercise the powers granted it by the act in accordance with the principles of equity; but we submit that the extent of those powers is to be ascertained from, and is limited by, the language of the bankruptcy act.

Collier, Bankruptcy, 3d ed. p. 8.

The changes made by Congress in the language of the act in reference to state taxes are significant of its intention.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175; 20 Sup. Ct. Rep. 1000.

Mr. Herbert R. Marlatt argued the cause, and, with *Messrs. George S. Johnson, Charles A. Houts, and Harry B. Hawes*, filed a brief for appellee:

The principle of immunity from state taxation, which the instrumentalities of government enjoy, is far from an absolute one; indeed, it is a very limited one.

First Nat. Bank v. Kentucky, 9 Wall. 353-362, 19 L. ed. 701-703; 1 *Desty*, Taxn. p. 77; *Cooley*, Taxn. p. 85.

By the same section of the Constitution which gives power to Congress to adopt uniform bankruptcy laws, like powers are conferred upon that body to control interstate commerce, and exemption from state taxation has been sought by corporations engaged in such traffic, the same doctrine being urged as is here invoked. The Supreme Court of the United States has consistently upheld the taxing power of the state.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787; *Central P. R. Co. v. California*, 162 U. S. 91-125, 40 L. ed. 903-914, 16 Sup. Ct. Rep. 766; *Western U. Teleg. Co. v. Missouri*, 190 U. S. 425, 47 L. ed. 1121, 23 Sup. Ct. Rep. 730.

By the Constitution of the United States, treaties are declared the supreme law of the land; yet it has been held in *Prevost v. Greneaux*, 19 How. 1, 15 L. ed. 572, that treaties cannot control the state in its taxation of the subjects of taxation within its jurisdiction.

As taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms. It cannot be taken to have been intended when the language of the statute on which it depends is doubtful and uncertain.

Cooley, Taxn. 3d ed. p. 356.

Taxation is a sovereign right, and it will not be presumed that the legislature intended to divest a state of that right without express words showing the intent.

United States v. Herron, 87 U. S. 251, 263, 22 L. ed. 275, 279; *Re Sims*, 118 Fed. 356.

The United States courts have refused to recognize discharges in bankruptcy as barring certain claims of the state governments on the ground that, not being explicitly mentioned, the sovereign is not included in the bar.

Re Moore, 111 Fed. 145; *Re Baker*, 96 Fed. 954; *Johnson v. The Auditor*, 78 Ky. 282; *Com. v. Hutchinson*, 10 Pa. 466.

The court of bankruptcy should, acting under its general equity powers, recognize the justice of the state's claim to priority. Courts of bankruptcy are, by the bankruptcy law, given equity powers, and it has always been recognized that the general rules of equity are to govern the administration of bankruptcy laws. Indeed, a suit in bankruptcy is considered an action in equity.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

The state's right to priority exists independent of statutory lien.

State use of Phillips v. Rowse, 49 Mo. 586; *Greeley v. Provident Sav. Bank*, 98 Mo. 458, 11 S. W. 980; *State ex rel. Ziegenhein v. Tittmann*, 103 Mo. 553, 15 S. W. 941.

It is in the exercise of this equity power that, where title is vested in receivers, courts order payment of state taxes upon property held by the receiver.

Ex parte Chamberlain, 55 Fed. 704; *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 250, 1 L. R. A. 260, 18 N. E. 92.

With one exception,—a decision by a referee under the law of 1867,—all of the decisions sustain the power of the state to impose the tax.

Re Mitchell, 16 Nat. Bankr. Reg. 535, Fed. Cas. No. 9,658; *Re Booth*, 14 Nat. Bankr. Reg. 232, Fed. Cas. No. 1,645; *Re Conhaim*, 100 Fed. 268; *Re Keller*, 109 Fed. 131; *Re Pease*, 4 Am. Bankr. Rep. 578; *Re Burka*, 104 Fed. 326, 5 Am. Bankr. Rep. 12; *Re Sims*, 118 Fed. 356.

Mr. Justice **McKenna** delivered the opinion of the court:

The case involves the validity of taxes imposed upon property in the hands of a trustee in bankruptcy.

The appellant was duly elected and qualified as trustee of the estate of Siegel-Hillman Dry Goods Company, which had been adjudged a bankrupt. The appellant, as such trustee, had in his hands and on deposit in the designated depository the sum of \$68,320, belonging to the estate. The ap-

pellee, as collector of the revenue of the city of St. Louis, Missouri, filed before the referee a petition alleging state, school, and city taxes for the year 1901 had been regularly assessed against said sum on the first of June, 1900, and that a bill for said taxes, properly certified, had been delivered to him for collection, and *prayed[444] for an order directing the taxes to be paid. The trustee filed an answer denying the liability of the property to the taxes. After hearing, the referee made an order directing the appellant to pay to appellee the sum of \$1,298.08, the amount of the tax bill for the year 1901, "together with the accrued penalties and fees provided by law."

The order was affirmed by the district court as to the amount of taxes, but disapproved as to accrued penalties and fees. A decree was duly entered, which was affirmed by the circuit court of appeals. 56 C. C. A. 92, 120 Fed. 256.

The argument of appellant has taken somewhat wide range. The case, however, is in narrow compass. The question is not the extent of the power of Congress over the subject of bankruptcy, but what Congress intended by the act of 1898. [30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3418.] By § 7 of that act the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the state and municipality or which should exempt it from its obligations to either. If Congress has the power to declare otherwise, and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt. Though the opinion of the circuit court of appeals is brief, it is difficult to add anything to its conclusiveness. But, as showing the trend of judicial opinion, we may refer to *Re Conhaim*, 100 Fed. 268; *Re Keller*, 109 Fed. 131; *Re Sims*, 118 Fed. 356.

Decree affirmed.

*STATE OF OHIO on the Relation of JOHN LLOYD, Plff. in Err.,
v.

JOSEPH B. DOLLISON, Sheriff of Guernsey County, Ohio.

(See S. C. Reporter's ed. 445-451.)

Constitutional law—validity of state local

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, 194 U. S.

option law—equal protection of the laws—due process of law.

1. A state local option law does not deny a retail liquor dealer the equal protection of the laws because it excepts from its operation druggists, manufacturers, persons who give away liquors in their private dwellings, and railway corporations dispensing liquors in dining and buffet cars under state license.
2. The equal protection of the laws is not denied by a state local option law under which the traffic in intoxicating liquors may be made a crime in certain territory and permitted elsewhere.
3. An objection that the equal protection of the laws is denied to alleged violators of a state local option law because the selection of the jurors for the trial of such offenses is not restricted, as in other cases, to the district in which they are committed, cannot be raised in advance of the trial.
4. A state local option law does not violate the due process of law clause of the Federal Constitution by vesting legislative powers in the judiciary, because it fails to define the words "wholesale" and "retail," as used in that act, and commits to the courts the power to fix the punishment for third and subsequent offenses by imposing a fine of not less than \$200 and imprisonment of not more than sixty and not less than ten days.

[No. 262.]

Argued April 28, 29, 1904. Decided May 16, 1904.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Guernsey County in that State remanding to custody the petitioner in a writ of habeas corpus to test the constitutionality of the Ohio local option law. *Affirmed.*

See same case below, 68 Ohio St. 688, 70 N. E. 1131.

The facts are stated in the opinion.

Mr. Frank S. Monnett argued the cause, and, with *Messrs. D. F. Pugh* and *R. M. Nevin*, filed a brief for plaintiff in error:

This statute does not afford the equal protection of the laws.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 301, 42 L. ed. 1037, 1045, 18 Sup. Ct. Rep. 594; *Missouri v. Louis*, 101 U. S. 23, *sub nom. Bowman v. Lewis*, 25 L. ed. 989; *Connolly v. Union Sewer Pipe*

Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

If the relator is to have the equal protection of the laws, he cannot be punished under a liquor local option law, nor under a license law, made criminal by its provision as a method of enforcement.

Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; *State v. Hipp*, 38 Ohio St. 199; *Butzman v. Whitbeck*, 42 Ohio St. 223.

Where particular persons are excepted from the operation of a general law, it destroys the uniformity of its operation, and of its equal protection and equal benefits. The legislature cannot discriminate, or grant an indulgence, or grant immunity to, or permit an act to be done with impunity by, one person, which is not accorded another. Every general law must have a uniform operation; that is to say, it must operate equally upon all persons and upon all things upon which it acts at all.

Omnibus R. Co. v. Baldwin, 57 Cal. 165; *French v. Teschemaker*, 24 Cal. 544; *State v. Ellet*, 47 Ohio St. 90, 21 Am. St. Rep. 772, 23 N. E. 931; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 23, 29 L. R. A. 386, 53 Am. St. Rep. 622, 41 N. E. 263; *Wheeling Bridge & Terminal R. Co. v. Gilmore*, 8 Ohio C. C. 658.

The relator was not on equal terms with all others accused of crime, in that every other criminal under every other criminal law, and every other one charged with crime, is guaranteed an impartial jury of the county or district in which the offense is alleged to have been committed.

Cooper v. State, 16 Ohio St. 328.

Under the equality clause, this court has a right to enforce this inviolate right that is accorded to every other person accused except persons charged with the violation of this Beal law; and, therefore, the Federal courts will not suffer the unequal operation of the state law in this behalf.

If the court was construing a purely Federal act, it would enforce these important provisions, and invalidate any law infringing these rights. An offense against the United States, committed within the territorial jurisdiction thereof, must be tried within the state and district where committed.

United States v. Bird, 1 Sprague, 299, Fed. Cas. No. 14,597.

and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note, and *Gillman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note; and *State v. Loomis*, 21 L. R. A. 789, and note.

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As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

On the validity of local option laws—see notes to *State ex rel. Paul v. Circuit Court Judge*, 1 L. R. A. 86, and *Tragesser v. Gray*, 9 L. R. A. 780.

The constitutional requirement that the district shall have been previously ascertained by law means that it shall be so ascertained before the commission of the offense upon which a party is held for trial in such district.

United States v. Maxon, 5 Blatchf. 360, Fed. Cas. No. 15,748.

The right of trial by jury should be preserved inviolate.

Story, Const. §§ 1779, 1789; Rawle, Const. chap. 10, pp. 128, 129; *Re McDonald*, 19 Mo. App. Rep. 370; *Hill v. People*, 16 Mich. 357; *Doyle v. State*, 17 Ohio, 223; *Work v. State*, 2 Ohio St. 297, 59 Am. Dec. 671.

The Ohio statute deprives relator of due process of law in that the general assembly did not define "wholesale" and "retail," and wholly failed to limit the amount of the fine or penalty to be imposed by the court in case the accused is found guilty.

Cooley, Const. Lim. 6th ed. pp. 401-403; *Robison v. Haug*, 68 Mich. 549, 37 N. W. 21.

Mr. **W. B. Wheeler** argued the cause, and, with Mr. A. V. Taylor, filed a brief for defendant in error:

So far as the assignments of error in this case relate to any conflict between the act and the Constitution of the state of Ohio, this court will follow the judgment of the state court upon such point.

Gut v. Minnesota, 9 Wall. 35, 19 L. ed. 573; *Rippey v. Texas*, 193 U. S. 504, ante, 767, 24 Sup. Ct. Rep. 516.

There is no inherent right in the citizen to engage in the sale of intoxicating liquors as a beverage or at retail. This court has repeatedly held that such theory is entirely erroneous, that there is no right to engage in such traffic, that the states may prohibit such traffic at will, or may regulate it even though such regulations discriminate against the retail dealer.

Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Cronin v. Adams*, 192 U. S. 108, ante, 365, 24 Sup. Ct. Rep. 219; *Bartemeyer v. Iowa*, 18 Wall. 129-133, 21 L. ed. 929, 930; *Vance v. W. A. Vandercook Co.* 170 U. S. 438-444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; *Giozza v. Tiernan*, 148 U. S. 657, 661, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; *Slaughter-House Cases*, 16 Wall. 37, 21 L. ed. 394.

The overwhelming preponderance of authority is to the effect that a local option law, if it is a complete enactment in itself, such as the one in this case, requiring nothing further to give validity, and depending upon the popular vote for nothing but a determination of the territorial limits for its operation, is a valid and constitutional exercise of the legislative power.

Weil v. Calhoun, 25 Fed. 865; *State v. Parker*, 26 Vt. 357; *Com. v. Bennett*, 108

Mass. 27; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536; *Gloversville v. Howell*, 70 N. Y. 287; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *State ex rel. Sandford v. Common Pleas Court*, 36 N. J. L. 72, 13 Am. Rep. 422; *State, Paul, Prosecutor, v. Circuit Judge*, 50 N. J. L. 585, 1 L. R. A. 86, 15 Atl. 272; *Hammond v. Haines*, 25 Md. 541, 90 Am. Dec. 77; *Fell v. State*, 42 Md. 72, 20 Am. Rep. 83; *Savage v. Com.* 84 Va. 619, 5 S. E. 565; *Caldwell v. Barrett*, 73 Ga. 604; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 So. 201; *Lemon v. Peyton*, 64 Miss. 161, 8 So. 235; *Holley v. State*, 14 Tex. App. 505; *Ex parte Lynn*, 19 Tex. App. 293; *Anderson v. Com.* 13 Bush, 485; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469; *Feek v. Bloomingdale Twp.* 82 Mich. 393, 10 L. R. A. 69, 47 N. W. 37; *Territory ex rel. McMahon v. O'Connor*, 5 Dak. 397, 3 L. R. A. 355, 41 N. W. 746; *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344; Cooley, Const. Lim. 195; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Blackwell v. State*, 36 Ark. 178; *Trammell v. Bradley*, 37 Ark. 374; *People ex rel. Blanding v. Burr*, 13 Cal. 343; *Hobart v. Butte County*, 17 Cal. 23; *Robinson v. Bidwell*, 22 Cal. 379; *People ex rel. Central P. R. Co. v. Coon*, 25 Cal. 635; *People ex rel. Graves v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851; *Powers v. Interior Ct.* 23 Ga. 65; *Mathis v. Jones*, 84 Ga. 804, 11 S. E. 1018; *People ex rel. Caldwell v. Reynolds*, 10 Ill. 1; *People ex rel. Wilson v. Salomon*, 51 Ill. 37; *Erlinger v. Boneau*, 51 Ill. 94; *State v. Forkner*, 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772; *Com. v. Weller*, 14 Bush, 218, 29 Am. Rep. 407; *Clarke v. Rogers*, 81 Ky. 43; *Baltimore v. Clunet*, 23 Md. 449; *St. Louis v. Alexander*, 23 Mo. 483; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *State v. Moore*, 107 Mo. 78, 16 S. W. 937; *State v. Searcy*, 111 Mo. 236, 20 S. W. 186; *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; *State v. Dugan*, 110 Mo. 138, 19 S. W. 195; *State v. Watts*, 111 Mo. 553, 20 S. W. 237; *Grant v. Courter*, 24 Barb. 232; *Corning v. Greene*, 23 Barb. 33; *Manly v. Raleigh*, 57 N. C. (4 Jones Eq.) 370; *Cain v. Davie County*, 86 N. C. 8; *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Walton v. Greenwood*, 60 Me. 356; *State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37 N. W. 782; *Lothrop v. Stedman*, 42 Conn. 583; *Trammell v. Bradley*, 37 Ark. 374; *Black, Intoxicating Liquors*, § 45; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Weaver v. Cherry*, 8 Ohio St. 564; *Gordon v. State*, 46 Ohio St. 607, 6 L. R. A. 749, 23 N. E. 63; *Stevens v. State*, 61 Ohio St. 597, 56 N. E. 478; *State v. Messenger*, 63 Ohio St. 398,

59 N. E. 105; *Ripley v. Texas*, 193 U. S. 504, *ante*, 767, 24 Sup. Ct. Rep. 516.

The 6th Amendment to the Federal Constitution is not a restriction upon the several states, but upon the Federal government.

Eilenbecker v. District Court, 134 U. S. 34, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223.

A trial by jury in suits at common law pending in the state courts is not a privilege or immunity of national citizenship which the states are forbidden by the 14th Amendment of the Constitution of the United States to abridge.

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678.

It does not appear from the record that the defendant has been denied a jury trial. It is time enough to try that question when proper demand shall have been made and denied. The presumption is that the officers of the state courts will do their duty, and that, if the plaintiff in error is entitled to a jury, he will be given it.

Eilenbecker v. District Court, 134 U. S. 40, 33 L. ed. 805, 10 Sup. Ct. Rep. 424.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

The plaintiff in error was committed to custody upon a warrant for violating the law of Ohio called the "Beal Local Option Law." He petitioned in habeas corpus for his discharge to one of the judges of the state, having jurisdiction. On hearing he was remitted to custody, and the judgment was affirmed by the supreme court of the state. This writ of error was then sued out. The question involved is the constitutionality of the law.

The facts constituting the violation of the law were alleged to be the unlawful selling and furnishing to one E. L. Scott, a resident of the city of Cambridge, six pints of beer, and with keeping a place where intoxicating [446] liquors are kept for sale, *given away, and furnished for beverage purposes. The sale was not within any of the exceptions of the law.

In the petition for habeas corpus it was alleged that plaintiff in error was arrested by a constable of the township of Cambridge, upon a warrant issued by a justice of the peace in and for the township of Center, Guernsey county, Ohio, which township is outside of the geographical boundaries of the city of Cambridge, where the violation of the law was claimed to have occurred.

That, by virtue of the arrest, plaintiff in error was committed to jail in the county of Guernsey, and there imprisoned by J. B. Dollison, the sheriff of the county.

The petition alleged that the law violated

the Constitution of the state in certain particulars. We omit the allegations, as the supreme court of the state decided against their sufficiency, and its judgment is not open to our review.

Wherein the law offends the Constitution of the United States was expressed as follows:

"It contravenes § 1, article 14, of the Constitution of the United States, in that it denies to this defendant and other persons within its jurisdiction the equal protection of the law; it deprives said defendant and other citizens of their liberty and property without due process of law; it contravenes article 5 of the Constitution of the United States; it contravenes article 6 of the Constitution of the United States, in that the accused cannot enjoy the right to a speedy and public trial *by an impartial jury of the [447] state and district wherein the crime is and shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, in this, to wit: that said jury cannot be selected by any previously enacted law from the territorial district, to wit, of the city of Cambridge, which district, and within which district alone, said crime, if any, is, was, and could have been committed."

All of these objections, however, are not open to the plaintiff in error to make. It is well established that the first eight articles of the amendments to the Constitution of the United States have reference to powers exercised by the government of the United States, and not to those of the states. *Eilenbecker v. District Court*, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424. Our consideration, therefore, must be confined to the contentions under the 14th Amendment. Those contentions are that the Ohio statute denies plaintiff in error the equal protection of the law, and deprives him of liberty and property without due process of law.

The first contention can only be sustained if the statute treat plaintiff in error differently from what it does others who are in the same situation as he,—that is, in the same relation to the purpose of the statute. The statute is too long to quote at length. It is a local option law. It permits the municipal corporations of the state to prohibit "the selling, furnishing, and giving away of intoxicating liquors as a beverage, or the keeping of a place where such liquors are sold, kept for sale, given away, or furnished." It excepts druggists in certain cases, and manufacturers when selling in wholesale quantities to "bona fide dealers trafficking in intoxicating liquors, or in wholesale quantities to any party residing outside of the limits of said municipality."

What constitutes a "giving away" is expressed in the statute as follows: "The words, 'giving away,' where they occur in this act, shall not apply to the giving away of intoxicating liquors by a person in his private dwelling, unless such private dwelling is a place of *public resort." By a subsequent statute it was enacted that each railway corporation which shall maintain or conduct dining or buffet cars upon any one of its trains, and shall desire to dispense intoxicating liquors on such cars, may do so by obtaining a license from the state, upon the payment of \$300 or \$700, accordingly as the corporation operates either 200 or 700 miles of railway within the state. It is not clear whether plaintiff in error relies on that act as a part of the other, and an addition to its discriminations. Assuming him to do so, the exceptions in the statute are druggists, manufacturers, persons who give away liquors in their private dwellings, and railway corporations dispensing liquors in dining and buffet cars, under state license.

These exceptions constitute the inequalities of the statute upon which plaintiff in error bases his contention. He is not one of the excepted classes. He is a retail dealer of liquor; maybe a saloon keeper, but of that the record does not clearly inform us. If, between his occupation and the excepted occupation, there is such difference as to justify a difference of legislation, necessarily he cannot complain; and, we think, there is a manifest difference. It is equally manifest if we should regard him as "giving away" his liquor. That act may not have the same objectionable consequences when done in a private dwelling as when done in a saloon or other place of business. The state may look beyond the mere physical passing of liquor from one person to another, and regard and constitute the place where it is done the essence of the offense. But even if the discriminations of the statute were less obviously justifiable, we might not be able to condemn them. *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, *ante*, 971, 24 Sup. Ct. Rep. 638.

[448] Plaintiff in error further urges that to make an act a crime in certain territory and permit it outside of such territory is to deny to the citizens of the state the equal operation of the criminal laws; and this he charges against, and makes a ground of objection to, the Ohio statute. This objection goes to the power of the state to pass a local option law; which, we think, *is not an open question. The power of the state over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, the sale of liquor by retail may be absolutely prohibited by a state. *Cronin v.*

Adams, 192 U. S. 108, *ante*, 365, 24 Sup. Ct. Rep. 219. That being so, the power to prohibit it conditionally was asserted, and the local option law of the state of Texas was sustained. *Ripsey v. Texas*, 193 U. S. 504, *ante*, 767, 24 Sup. Ct. Rep. 516.

The next contention of plaintiff in error is that under the statute he is not on equal terms with all others accused of crime. He attempts to support this contention by a provision of the Constitution of Ohio, and a decision of the supreme court of that state. By the Constitution of the state those charged with crimes are guaranteed "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The supreme court, considering this provision, said in *Cooper v. State*, 16 Ohio St. 328:

"The right of the accused to an impartial jury cannot be abridged. To secure this right it is necessary that the body of triers should be composed of men indifferent between the parties, and otherwise capable of discharging their duty as jurors. . . . This duty is enjoined by the Constitution, and, it is true, cannot be impaired, or the right abridged by legislative action."

Applying the Constitution and the decision, plaintiff in error asserts that the district in which his offense was committed was necessarily the area of the operation of the statute, and it is only jurors selected from such district that will be indifferent between the state and him. It is only such jurors, he urges, that are his peers; and he defines a peer to be one "capable of committing a like crime, and suffering a like punishment, and liable to a like disgrace."

There are two answers to the contention. First, it must be inferred from the decision of the supreme court in the case at bar that plaintiff in error does not construe correctly either the Constitution of the state or the opinion he cites. Second, *plaintiff in error [450] has not yet been tried. What the courts of the state may decide as to juries we do not wish to anticipate; and plaintiff in error cannot complain until he is made to suffer.

The final contention of plaintiff in error is that the statute of Ohio deprives him of due process of law. The only additional argument advanced on this contention is that the statute does not define the words "wholesale" and "retail," and fails to limit the amount of the fine or penalty to be imposed by the court. This omission of the general assembly, it is said, vests legislative power in the judiciary, which cannot be done in a republican form of government.

Of this contention we need only observe that if a case can exist in which the kind or degree of power given by a state to its tri-

bunals may become an element of due process under the 14th Amendment, it would have to be a more extreme example than the Ohio statute. Wholesale and retail are pretty well known terms, and present less uncertainties than many terms submitted to courts for interpretation. Besides, would it not be strange to hold that a statute unaccompanied by a glossary of its terms leaves unfulfilled the legislative power?

The statute declares a person guilty of a violation of its provisions to be guilty of a misdemeanor, and imposes a penalty for a first and second offense, a maximum and minimum fine, and for any subsequent offense a fine of not less than \$200 and imprisonment of not more than sixty days and not less than ten days. Ohio Rev. Stat. §§ 4364-20b. As we understand the argument of plaintiff in error, his objection is directed to the penalty for the third and subsequent offenses. We might dispose of the objection by saying it anticipates the future too much. He is not now concerned with that penalty. He has not yet been convicted of a first offense, as far as the record shows. Indeed, the charge against him presumably is based on his first offense. But considering him entitled to make the objection, we may

[451] answer *it and close the discussion by observing that it is not an extreme discretion to commit to the judgment of a court, in the manner provided by the Ohio statute, the amount of punishment to fix for illegal liquor selling.

Judgment affirmed.

ANDREW J. DAVIS

v.

HIRAM R. MILLS and Clarence C. Frost.

(See S. C. Reporter's ed. 451-457.)

Conflict of laws as to limitation of actions—action on directors' liability incurred prior to enactment—validity of statute as applicable to foreign actions.

1. The three-years' limitation prescribed by Mont. Code Civ. Proc. § 554, for actions against corporate directors to recover a penalty or forfeiture imposed, or to enforce a liability created by law, must be deemed so far to qualify the right to enforce a liability for corporate debts already incurred under an earlier act re-enacted as Mont. Civ. Code, § 451, by the directors of a corporation which had failed to make its annual report, as to make such limitation available as a defense in any jurisdiction, in view of

NOTE.—On conflict of laws as to limitation of actions to enforce liability of stockholders—see notes to Brunswick Terminal Co. v. National Bank, 48 L. R. A. 625, and Platt v. Wilmot, ante, 809.

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Code Civ. Proc. § 3456, the language of which imports that the limitations in such Code are to apply to existing obligations upon which the previous limitation had already begun to run, although by the section immediately preceding no action commenced before the Code took effect, and no accrued right, were to be affected by its provisions.

2. The new limitation prescribed by Mont. Code Civ. Proc. § 554, for the enforcement of a liability for corporate debts against the directors of a corporation which has failed to make its annual report, is not unconstitutional as applied to actions outside of the state on a liability incurred prior to the enactment, on the theory that, since remedies outside the state cannot be affected by statutes of limitation, this statute can only be applicable because it qualifies the right to enforce such liability, and therefore would destroy an existing right without due process of law.

[No. 235.]

Argued April 19, 20, 1904. Decided May 16, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question whether the Montana statute of limitations for actions against corporate directors is available as a defense to an action in another state on a liability incurred prior to its enactment by the directors of a corporation which has failed to make its annual report. *Answered in the affirmative.*

Statement by Mr. Justice **Holmes**:

This case came here on a certificate of which the following is the material portion:

"The plaintiff is a citizen of Montana, and the owner by assignment of three causes of action (for goods sold and on a promissory note) against the Obelisk Mining & Concentrating Company, a Montana corporation. The indebtedness of the company upon these causes of action accrued July 31, 1892, July 1, 1892, and December 12, 1892, respectively. The defendants are and always have been citizens and residents of Connecticut, and at all the times mentioned in the complaint were trustees of the said Obelisk Mining Company. The statutes of Montana provide that within twenty days from the 1st day of September every such company shall annually file a specified report, and if it 'shall fail to do so, all the trustees of the company shall be jointly and severally liable *for all of the debts of the [452] company then existing, and for all that shall be contracted before such report shall be made.' Section 460 of chapter 25 of the 5th division, Compiled Statutes of Montana, which was in force when the cause of action arose. Re-enacted as § 451 of the Civil Code of Montana, which went into effect July 1, 1895.

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"The Obelisk Company failed to file certain of the required reports, and the causes of action sued upon here, against the defendants as trustees, to recover debts of the company, accrued September 22, 1893, or prior thereto. This action was brought to enforce the joint and several liability of the defendants under the statute on July 30, 1897.

"When the cause of action accrued the Compiled Statutes of Montana contained these sections:

"Sec. 45. 1. In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory, except where the statute imposing it prescribes a different limitation; 2, an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process shall be commenced within one year.'

"Sec. 50. If, when the cause of action shall accrue against a person, he is out of the territory, the action may be commenced within the time herein limited, after his return to the territory; and if, after the cause of action shall have accrued, he depart from this territory, the time of his absence shall not be a part of the time limited for the commencement of the action.'

"Both of those sections were repealed by the Code of Civil Procedure, § 3482, which went into effect July 1, 1895. On the last-named date the Civil Code of Montana went into effect, containing § 451, above cited. The Code of Civil Procedure contains a separate title, numbered II., and containing four chapters (§§ 470 to 559), which deals exhaustively with 'the time of commencing actions.' It contains these sections:

"Sec. 515. Within two years:

[453] "'1. An action upon a statute for a penalty or forfeiture, "when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

"Sec. 541. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.'

"Sec. 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created (*sic*).'

"Upon the facts above set forth, the ques-

tion of law concerning which this court desires the instruction of the Supreme Court, for its proper decision, is:

"May a defendant, in an action of the kind specified in § 554 of the Code of Civil Procedure of Montana, avail of the limitation therein prescribed, when the action is brought against him in the court of another state?"

Mr. John A. Shelton argued the cause, and, with Mr. T. J. Walsh, filed a brief for Andrew J. Davis:

The rule in the courts of the United States in respect to pleas of the statutes of limitation has always been that they strictly affect the remedy, and not the merits.

Townsend v. Jemison, 9 How. 407, 13 L. ed. 194; *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 32 L. ed. 1080, 9 Sup. Ct. Rep. 690; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Whitman v. Citizens' Bank*, 49 C. C. A. 122, 110 Fed. 503; *Dexter v. Edmands*, 89 Fed. 467; *Schiffer v. Columbia College*, 87 Fed. 166.

Since Mont. Code Civ. Proc. § 554, was never at any time a part of the act creating the liability, and was not in existence when the liability statute was enacted, but was a subsequent enactment, appearing long after the accrual of the cause of action sued upon, the assertion that it forms a part of the right plainly appears to be unsupported, either by reason or authority.

Boyd v. Clark, 8 Fed. 849; *Hamilton v. Hannibal & St. J. R. Co.* 39 Kan. 56, 18 Pac. 57; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *Laidlaw v. Oregon R. & Nav. Co.* 26 C. C. A. 665, 48 U. S. App. 430, 81 Fed. 876; *Munos v. Southern P. Co.* 2 C. C. A. 163, 2 U. S. App. 222, 51 Fed. 188; *Pittsburg, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629; *Taylor v. Cranberry Iron & Coal Co.* 94 N. C. 525; *Lambert v. Ensign Mfg. Co.* 42 W. Va. 813, 26 S. E. 431; *O'Shields v. Georgia P. R. Co.* 83 Ga. 621, 6 L. R. A. 152, 10 S. E. 268; *Selma, R. & D. R. Co. v. Laeey*, 49 Ga. 107; *Theroux v. Northern P. R. Co.* 12 C. C. A. 52, 27 U. S. App. 508, 64 Fed. 85; *Stern v. La Compagnie Générale Transatlantique*, 110 Fed. 996; *Boston & M. R. Co. v. Hurd*, 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. 116; *Walsh v. Mayer*, 111 U. S. 31, 28 L. ed. 338, 4 Sup. Ct. Rep. 260; *Dexter v. Edmands*, 89 Fed. 467; *Schiffer v. Columbia College*, 87 Fed. 166; *Hobbs v. National Bank*, 41 C. C. A. 205, 101 Fed. 75; *Whitman v. Citizens' Bank*, 49 C. C. A. 122, 110 Fed. 503; *Brunswick Terminal Co. v. National Bank*, 48 L. R. A. 625, 40 C. C. A. 22, 99 Fed. 635; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921;

Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603.

In *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603, an action was brought in the state of Massachusetts upon the Kansas statute. It was held that, though the Kansas statute should be considered as applying to the case, the action was not barred by reason of the fact that the Kansas statute of limitations appealed to was a provision of the general statutes of limitation of that state, which provided that the time during which a defendant was absent from the state should not be counted, it appearing that the defendants had not been in Kansas since the cause of action accrued.

Of course Mont. Code Civ. Proc. § 541, under the uniform rulings of the courts, applies equally to persons who have once been in the state, and to those who have never been, notwithstanding the use of the word "return" in the statute.

Hanchett v. Blair, 41 C. C. A. 76, 100 Fed. 817; *Olcott v. Tioga R. Co.* 20 N. Y. 210, 75 Am. Dec. 393; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 333; *Hatch v. Spofford*, 24 Conn. 432.

A construction which makes a statute an absurdity or insensible is to be avoided.

Johnson v. Heald, 33 Md. 352; *Hooper v. Creager*, 84 Md. 195, 35 L. R. A. 202, 35 Atl. 967, 1103, 36 Atl. 359.

If the limitation is of such a character as that it travels with the right, and is enforceable beyond the jurisdiction of the state, a part of whose law it is, it becomes a part of the right itself, and is governed by the same law that regulates the right in other respects. If it became a part of the right then the legislature changed the rights of the parties,—an act confessedly beyond its power.

Theroux v. Northern P. R. Co. 12 C. C. A. 52, 27 U. S. App. 508, 64 Fed. 84; *Benson v. New York*, 10 Barb. 223; *Kavanagh v. Police Pension Fund Comrs.* 134 Cal. 50, 66 Pac. 36; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628; Wade, *Retroactive Laws*, 143, 172, 194; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Tiffany, Death by Wrongful Act*, 31; *Osborne v. Detroit*, 32 Fed. 36.

Every right of action not penal in the strict sense—that is in the sense of a prosecution for the punishment of a crime, a public wrong—is saved by the 14th Amendment against adverse legislation by a state.

Tinker v. Van Dyke, 1 Flipp. 521, Fed. Cas. No. 14,058.

This action is not penal.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

Messrs. William Waldo Hyde and 194 U. S. U. S., Book 48.

Charles E. Perkins argued the cause and filed a brief for Hiram R. Mills:

A cause of action not grounded on contract, or existing at common law, but founded entirely on a statute, takes the statute of limitations with it.

Wood, *Limitation of Actions*, 2d ed. p. 35; Buswell, *Limitations*, § 351; *Boyd v. Clark*, 8 Fed. 849; *Theroux v. Northern P. R. Co.* 12 C. C. A. 52, 27 U. S. App. 508, 64 Fed. 85; *The Harrisburg*, 119 U. S. 199, 214, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140; *Denwick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439.

Prior to the decision of the Supreme Court of the United States in the case of *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, the consensus of opinion throughout the courts of the United States had been that statutes enforcing upon directors or trustees of corporations liability for the debts of a corporation on account of failure to file reports provided by law were penal.

Merchants' Bank v. Bliss, 35 N. Y. 412; *Veeder v. Baker*, 83 N. Y. 160; *Stokes v. Stickney*, 96 N. Y. 323; *Providence Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. ed. 786; *Chase v. Curtis*, 113 U. S. 452, 28 L. ed. 1038, 5 Sup. Ct. Rep. 554; *Lawler v. Burt*, 7 Ohio St. 341; *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582; *Knob v. Baldwin*, 80 N. Y. 610; 3 Thomp. Corp. §§ 4361 *et seq.*

Clearly it was not intended in that case to hold that the statute was not penal in any sense whatever.

Huntington v. Attrill, 146 U. S. 676, 36 L. ed. 1130, 13 Sup. Ct. Rep. 224; *Brady v. Daly*, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62; *Patterson v. Thompson*, 86 Fed. 85; *National Park Bank v. Remsen*, 158 U. S. 337, 39 L. ed. 1008, 15 Sup. Ct. Rep. 891; *Chase v. Curtis*, 113 U. S. 453, 28 L. ed. 1038, 5 Sup. Ct. Rep. 554.

The statute of the state of Montana, under which the suit is brought,—at least so far as the application of the statute of limitations is concerned, under the decisions of the highest courts of that state,—is penal.

State Sav. Bank v. Johnson, 18 Mont. 440, 33 L. R. A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; *Wethey v. Kemper*, 17 Mont. 491, 43 Pac. 716; *Manhattan Trust Co. v. Davis*, 23 Mont. 273, 58 Pac. 718.

The construction of this statute by the Montana court of last resort will be followed everywhere until changed at home.

Flash v. Conn. 109 U. S. 371, 378, 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

When the courts of a state have interpreted one of the statutes of that state, and given to that statute a construction, if that statute is subsequently re-enacted or

amended in any way which does not manifest an intent to change the construction, the re-enactment carries with it the judicial construction which it had previously received, and makes that construction a part of the new statute, which must be thereafter read into it.

Barrett's Appeal, 73 Conn. 288, 47 Atl. 243.

Aside from the construction placed upon this Montana statute by the supreme court of that state and by its legislature, we maintain that, while such statute may not be held to be penal in the international sense as laid down in *Huntington v. Attrill*, 146 U. S. 676, 36 L. ed. 1130, 13 Sup. Ct. Rep. 224, yet it must, in reason, be held to be penal in many other respects.

Gregory v. German Bank, 3 Colo. 332, 25 Am. Rep. 760; *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146; *Patterson v. Thompson*, 86 Fed. 85; *Jones v. Barlow*, 62 N. Y. 202.

Some confusion has arisen by confounding the liability of trustees, imposed by statute for failure to make returns, with the liability imposed upon stockholders for debts of the corporation. This distinction between the two classes of liabilities is clearly brought out in the cases of *Whitman v. National Bank*, 176 U. S. 559, 563, 44 L. ed. 587, 590, 20 Sup. Ct. Rep. 477, and *Whitman v. Citizens' Bank*, 49 C. C. A. 122, 110 Fed. 503.

Section 554 of the Code of Civil Procedure of Montana, having superseded § 515, and made the same inapplicable to such a cause of action as is set out in the complaint, while not a part of the section of the statute which creates the liability, refers to that section in terms, and is as much a part of it as if it had been contained in the same section; and, when suit is brought to enforce the liability created by that statute, it must be brought within the time limited in § 554.

Brunswick Terminal Co. v. National Bank, 48 L. R. A. 625, 40 C. C. A. 22, 99 Fed. 635; *Hobbs v. National Bank*, 30 N. Y. Civ. Proc. Rep. 24, 37 C. C. A. 513, 96 Fed. 396, 101 Fed. 75; *Eastwood v. Kennedy*, 44 Md. 563; *Stern v. La Compagnie Générale Transatlantique*, 110 Fed. 996.

The plaintiff can claim no vested interest by reason of the provisions of the statute with reference to the absence of the defendant from the state.

Union Iron Co. v. Pierce, 4 Biss. 327, Fed. Cas. No. 14,367; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Sea Grove Bldg. & L. Asso. v. Stockton*, 148 Pa. 146, 23 Atl. 1063.

Mr. Justice **Holmes** delivered the opinion of the court:

The general theory on which an action is

maintained upon a cause which accrued in another jurisdiction is that the liability is an *obligatio*, which, having been attached to the person by the law then having that person within its power, will be *treated by [454] other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater v. Mexican Nat. R. Co.* 194 U. S. 120, ante, 900, 24 Sup. Ct. Rep. 581. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

If, then, the only question were one of construction and as to liabilities subsequently incurred, it would be a comparatively easy matter to say that § 554 of the Montana Code of Civil Procedure qualifies the liability imposed upon directors by § 451 of the Civil Code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought. But the question certified raises greater difficulties both as to construction and as to power. We have first to consider whether § 554 purports to qualify, or to impose a condition upon, liabilities already incurred under the earlier act taken up into § 451. In doing so we assume that the *word "directors" in the [455] later act means the same as "trustees" in the earlier one. The contrary was not suggested. At the argument we were pressed with § 3455 of the Code of Civil Procedure: "No action or proceeding commenced before
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this Code takes effect, and no right accrued, is affected by its provisions." But the trouble made by this is more seeming than real. The following section deals specifically with limitations, and must be taken to override a merely general precaution against the disturbance of vested rights.

By § 3456: "When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code." The language clearly imports that the limitations in the Code are to apply to existing obligations upon which the previous limitation already had begun to run. The result is that § 554 purports to substitute a three years' limitation for the one year previously in force, assuming that the previous one year limitation applied to this case, as, under the decisions, it did. *State Sav. Bank v. Johnson*, 18 Mont. 440, 33 L. R. A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; *National Park Bank v. Remsen*, 158 U. S. 337, 342, 39 L. ed. 1008, 1009, 15 Sup. Ct. Rep. 891. But if § 554 purported to make this substitution, it purported to introduce important changes. It lengthened the time on the one hand, but it took away the exception in case of absence from the state on the other. This last is disputed, but it seems to us a part of the meaning of the words "This title does not affect actions against directors," etc. The section as to absence from the state is a part of the title, and whatever necessary exceptions may be made from the generality of the words quoted, this is not one of them.

A further difference is that, while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, this section is so specific that it hardly can mean anything else. We express no opinion as to the earlier act, but we think that this § 554 so [456] definitely deals with the liability sought to be enforced that, upon the principles heretofore established, it must be taken to effect its substance so far as it can, although passed at a different time from the statute by which that liability first was created. We do not go beyond the case before us. Different considerations might apply to the ordinary statutes as to stockholders. We express no opinion with regard to that.

We come, then, to the question of power. It is said that a statute of limitations cannot take away an existing right, but only remedies, and therefore that, whatever the effect of § 554 on subsequently accruing lia-

bilities, it cannot bar the plaintiff in this suit. Before considering this it is to be observed in the first place that, so far as the state of Montana was concerned, the only practical difference made by the statute was to take away the allowance for absence from the state, while giving over a year for the prosecution of the action within it. The cause of action accrued on September 22, 1893, and the new statute went into effect on July 1, 1895, so that the plaintiffs had at least until September 22, 1896, in which to sue there. As to action within the state, it could not be contended that the change took away constitutional rights. It did not shorten liability unreasonably. *Wheeler v. Jackson*, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76. The only way in which it could be made out that the attempt to take away a remedy outside the state after the same lapse of time was unconstitutional is through the theoretical proposition which we have stated. It is said that remedies outside the state can be affected only by destroying the right, and that no statute of limitations can do that.

It is quite incredible that such an unsubstantial distinction should find a place in constitutional law. Prescription which applies to easement the analogy of the statute of limitations unquestionably vests a title. There is no such thing as a merely possessory easement. A disseisor of a dominant estate may get an easement which already is attached to it, but the easement is attached to the land by title, or not at all. Again, as to land the distinction amounts to nothing, because to deny *all [457] remedy, direct or indirect, within the state, is practically to deny the right. "The lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder." *Leffingwell v. Warren*, 2 Black, 599, 605, 17 L. ed. 261, 263. So far as we have observed, the cases which have had occasion to deal with the matter generally hold that the title to chattels, even, passes where the statute has run. *Campbell v. Holt*, 115 U. S. 620, 623, 29 L. ed. 483, 485, 6 Sup. Ct. Rep. 209; *Chapin v. Freeland*, 142 Mass. 383, 386, 8 N. E. 128, 58 Am. Rep. 701. Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight. But that demand is not founded more certainly by creation or discovery than it is by the lapse of time, which gradually shapes the mind to expect and demand the continuance of what it actually and long has enjoyed, even if without right, and dissociates it from a like demand of even a right which long has been denied. *Dunbar v. Boston & P. R. Corp.* 181 Mass.

383, 385, 63 N. E. 916. Constitutions are intended to preserve practical and substantial rights, not to maintain theories. It is pretty safe to assume that when the law may deprive a man of all the benefits of what once was his, it may deprive him of technical title as well. That it may do so is shown sufficiently by the cases which we have cited and many others.

In the case at bar the question comes up in the most attenuated form. The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is a more or less accidental incident. If the laws of Montana can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right is cut down. We can see no constitutional obstacle in the way, and we are of opinion that they have purported to do it and have done it.

The question is answered in the affirmative, and it will be so certified.

[458]*IN THE MATTER OF the Petition of the
CHRISTENSEN ENGINEERING COM-
PANY for a Writ of Mandamus.

(See S. C. Reporter's ed. 458-461.)

Error in contempt proceedings.

A writ of error lies from the appropriate circuit court of appeals to review an order of a circuit court, adjudging the defendant in a suit for the infringement of a patent guilty of contempt in disobeying a preliminary injunction, and ordering him to pay a fine of \$1,000, one half to the United States and the other half to the complainant.

[No. 15, Original.]

Submitted April 25, 1904. Decided May 31, 1904.

PETITION for a Writ of Mandamus to compel the Circuit Court of Appeals for the Second Circuit to reinstate and take jurisdiction of a writ of error to review an order of the Circuit Court for the Southern District of New York, adjudging the defendant in a suit for infringement of a patent guilty of contempt in disobeying a preliminary injunction, and ordering him to pay a fine, one half to the United States and the other half to the complainant. *Granted.*

NOTE.—On review in contempt proceedings—see note to *New Orleans v. New York Mail S. S. Co.* 22 L. ed. U. S. 354.

Statement by Mr. Chief Justice Fuller:

This is a petition for a writ of mandamus commanding the circuit court of appeals for the second circuit to reinstate and take jurisdiction of a writ of error filed by the petitioner in that court, by which it sought to have reviewed an order of the circuit court for the southern district of New York, adjudging the petitioner guilty of contempt. The facts are, that on August 13, 1900, the Westinghouse Airbrake Company filed in the circuit court its bill of complaint, alleging the ownership of certain letters patent, an infringement by this petitioner, and praying an injunction restraining such infringement, and an accounting of profits and damages. A preliminary injunction was ordered on October 18, 1901. On February 21, 1903, the petitioner was adjudged guilty of contempt in disobeying that injunction, and ordered to pay a fine of \$1,000; one half to the United States and the other half to the complainant. On March 23, 1903, a writ of error to revise this order was allowed by the circuit court, and a full transcript of the proceedings in that court duly certified to the circuit court of appeals. On March 18, 1903, the circuit court entered a decree sustaining the validity of the patent, *directing a permanent in-[459]junction, and an accounting of profits and damages. On April 16, 1903, an appeal was taken from this decree. A hearing on the writ of error was had before the circuit court of appeals, and, on February 13, 1904, that court dismissed the writ of error.

Mr. William A. Jenner submitted the cause for petitioner:

A contempt proceeding is a misdemeanor. *Re Acker*, 66 Fed. 291.

The same rules prevail which govern in the trial of indictments.

Accumulator Co. v. Consolidated Electric Storage Co. 53 Fed. 793.

As a general rule the grade of the offense is determined by the nature of the punishment prescribed.

People v. Lyon, 99 N. Y. 216, 1 N. E. 763.

This court has repeatedly held contempt to be a crime.

Ex parte Kearney, 7 Wheat. 38, 43, 5 L. ed. 391, 392; *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354; *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95; *Re Swan*, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225.

The case at bar seems to lack that distinguishing feature which would bring it within the rule of *Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814, and that exclusion leaves it within the rule of *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354.

The decisions in the circuit courts of appeals are conflicting.

Sessions v. Gould, 11 C. C. A. 546, 26 U. S. App. 358, 63 Fed. 1001; *Gould v. Sessions*, 14 C. C. A. 366, 35 U. S. App. 281, 67 Fed. 163; *Nassau Electric R. Co. v. Sprague Electric & Motor Co.* 37 C. C. A. 146, 95 Fed. 415; *Cary Mfg. Co. v. Acme Flexible Clasp Co.* 48 C. C. A. 118, 108 Fed. 873; *Re Paquet*, 52 C. C. A. 239, 114 Fed. 441; *Re Nevitt*, 54 C. C. A. 622, 117 Fed. 448; *Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co.* 129 Fed. 105.

Mr. **Frederic H. Betts** submitted the cause for respondent:

The power of every superior court of record to punish as for contempt any disobedience of its orders, judgments, or decrees is, in the nature of things, inherent, and essential and necessary to the exercise and enforcement of all its other powers.

United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Re Debs*, 158 U. S. 594, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900.

This power exists irrespective of statute, though the manner in which it may be exercised may be limited and regulated by statute.

Ex parte Robinson, 19 Wall. 506, 22 L. ed. 205.

At common law a superior court of competent jurisdiction, whose authority was violated, or whose orders, judgments, or decrees were disobeyed, was the exclusive judge of the contempt; and the exercise of its power to punish, therefore, if it had jurisdiction of the person and the offense, could not be reviewed on appeal or writ of error.

Rapalje, Contempt, § 141; *Yates's Case*, 4 Johns. 315; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354. See also *Re Savin*, 131 U. S. 275, 33 L. ed. 150, 9 Sup. Ct. Rep. 699; *Re Cuddy*, 131 U. S. 284, 33 L. ed. 156, 9 Sup. Ct. Rep. 703.

In *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785, this court held that it had no jurisdiction to review, on petition for habeas corpus, an order of the circuit court imposing on a party a fine for contempt for violating an interlocutory injunction, and committing him until it was paid, unless the order was utterly void for want of power to grant it.

The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to in-

quire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.

Re Debs, 158 U. S. 594, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900.

That there may be an abuse of power forms no solid objection against its exercise.

Ex parte Kearney, 7 Wheat. 38, 5 L. ed. 391; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77.

The object and policy of the acts of Congress in limiting appeals and writs of error to final decisions were to have all matters which were the subject of dispute decided by a single appeal, so as to avoid delays and to save expense of successive appeals on different questions which might be all determined by a single appeal.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

In almost every case of contempt of court the court's directions or orders are disobeyed and violated, and in every case the punishment, whatever it may be, and even though it is for the benefit of a party to the action, is to vindicate the court's authority.

Re Chiles, 22 Wall. 157, 22 L. ed. 819.

The violation of the order in question was not a crime or criminal offense, the proceeding was not a criminal prosecution, and the means or manner the court adopted to enforce its directions and vindicate its authority was not a final decision or judgment (independent of the suit) in a criminal case.

Re Debs, 158 U. S. 596, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900.

An order punishing as for contempt the violation of a preliminary injunction cannot, at least apart from the final decree, be reviewed by writ of error or appeal.

Hayes v. Fischer, 102 U. S. 121, 26 L. ed. 95.

In *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385, and *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805, this court did not hold that contempts were crimes, nor that proceedings to punish therefor were criminal prosecutions, and the order a judgment in a criminal case; but it did hold that such proceedings were not reviewable in this court by appeal or writ of error, saying in the latter case: "They may be reached by certiorari in the absence of any other adequate remedy."

In *Re McKenzie*, 180 U. S. 546, 45 L. ed. 662, 21 Sup. Ct. Rep. 468, this court held that the writ of habeas corpus could not be used as a writ of error, and, when applied for to relieve a party from restraint in punishment for contempt for violating an order of the court, it would not be issued, unless

the order violated was absolutely void for want of jurisdiction.

In *Re Watts*, 190 U. S. 1, 47 L. ed. 933, 23 Sup. Ct. Rep. 718, a petition for habeas corpus and certiorari, this court examined proceedings sentencing the petitioners to imprisonment for contempt of court.

But in neither of these cases has the court held that an order entered in a civil suit fining a party for contempt of a previous order of the court of which it has jurisdiction was a judgment in a criminal case independent of the civil suit.

In the *Debs Case*, 158 U. S. 564, 573, 39 L. ed. 1092, 1095, 15 Sup. Ct. Rep. 900, 159 U. S. 251, 15 Sup. Ct. Rep. 1039, this court dismissed a writ of error from an order adjudging Debs in contempt of an *ex parte* and preliminary injunction, on the ground that the order was not a final judgment or decree.

Such an order as the present one, based on a mere preliminary injunction *pendente lite*, is not in any proper sense a final decision or decree or judgment of the circuit court, and hence is not reviewable as such.

Nassau Electric R. Co. v. Sprague Electric & Motor Co. 37 C. C. A. 146, 95 Fed. 415; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Fourniquet v. Perkins*, 16 How. 82, 14 L. ed. 854; *Spill v. Celluloid Co.* 22 Blatchf. 441, 21 Fed. 631, 22 Fed. 94; *Brown v. Swann*, 9 Pet. 1, 9 L. ed. 29; *For-gay v. Conrad*, 6 How. 201, 12 L. ed. 404; *Carr v. Hoxie*, 13 Pet. 462, 10 L. ed. 247; *Pulliam v. Christian*, 6 How. 209, 12 L. ed. 409; *Lodge v. Twell*, 135 U. S. 232, 34 L. ed. 153, 10 Sup. Ct. Rep. 745; *McCollum v. Eager*, 2 How. 61, 11 L. ed. 179; *McMicken v. Perin*, 20 How. 133, 15 L. ed. 857.

An order, judgment, or decree for the purpose of review by appeal or writ of error must terminate the suit or litigation between the parties on the merits of the case; so that the whole purpose of the suit has been accomplished, and there is nothing left for the lower court to do in the case, except to execute the judgment or decree.

Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Independent School Dist. v. Hall*, 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 417; *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.* 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6; *Meyer v. Fletcher*, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The examination in *Bessette v. W. B. Conkey Co.* just decided (194 U. S. 324, ante, 997, 24 Sup. Ct. Rep. 665), of the right of review in contempt cases, precludes the necessity of extended discussion.

In that case Bessette was not a party to the suit, and the controversy had been settled by a final decree, from which, so far as appeared, no appeal had been taken. He was found guilty of contempt of court, and a fine of \$250 imposed, payable to the United States, with costs.

In this case the Christensen Engineering Company was a party. The contempt was disobedience of preliminary injunction, and the judgment in contempt was intermediate the preliminary injunction and the decree making it permanent. The fine was payable, one half to the United States, and the other half to the complainant.

The distinction between a proceeding in which a fine is imposed by way of compensation to the party injured by the disobedience, and where it is by way of punishment for an act done in contempt of the power and authority of the court, is pointed out in *Bessette's Case*, and disclosed by some of the cases referred to in the opinion.

In *New Orleans v. New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354, the act in contempt was by one not then a party to the suit. No order was entered against him until the final decree in the case, *and [460] then he was punished for the act of disobedience, purely as an act of a criminal nature, and without compensation to the plaintiff in whose favor the injunction was originally ordered. No review under the then-existing law was allowable. In *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95, the contempt proceeding was remedial and compensatory, and the entire amount of the fine was ordered paid to the plaintiff in reimbursement. It was held that, if the remedial feature was alone to be considered, and the proceeding regarded as a part of the suit, it could not be brought to this court by writ of error, but could only be corrected on appeal from the final decree; if to be regarded as a criminal action, then it was one of which this court had no jurisdiction, either by writ of error or appeal. In *Ex parte Debs*, 159 U. S. 251, 15 Sup. Ct. Rep. 1039, there was nothing of a remedial or compensatory nature. No fine was imposed, but only a sentence of imprisonment. This court had no jurisdiction of a writ of error in such a case. And see *O'Neal v. United States*, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776. In *Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814, the proceeding was remedial and compensatory, in that for violations of a preliminary injunction the defendants were ordered to pay the plaintiff \$250 "as a fine for said violation," by one order, and, by another order, to pay a fine of \$1,182 to the clerk, to be paid over by him to the plaintiff for

"damages and costs," the \$1,182 being made up of \$682 profits made by the infringement, and \$500 expenses of plaintiff in the contempt proceedings. These interlocutory orders were reviewed by this court on appeal from the final decree, and as that decree was reversed, the orders were also set aside, this being done "without prejudice to the power and right of the circuit court to punish the contempt referred to in those orders, by a proper proceeding." It was also said "that, though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to him his expenses."

These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse [461] *the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.

In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such, it dominates the proceeding, and fixes its character. Considered in that aspect, the writ of error was justified, and the Circuit Court of Appeals should have taken jurisdiction.

Petitioner entitled to mandamus.

HAROLD CROWLEY, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 461-476.)

Error to Federal district court for Porto Rico—denial of right claimed under Federal statute—qualifications of grand jurors—applicability of local laws—objection of disqualification may be raised by plea in abatement—disqualification not a mere formal defect—necessity of indictment in criminal prosecutions.

1. A case in which "an act of Congress is brought in question and the right claimed thereunder is denied," within the meaning of the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 35, providing for a review in the Federal Supreme Court of final decisions of the district court of the United States for the district of Porto Rico, is presented by an unsuccessful contention by an accused, that, pursuant to that act, the trial court, in the matter of the qualifications of grand jurors, should have been controlled by the provisions

of the local law relating to jurors, in connection with the statutes of the United States relating to the organization of grand juries, and the trial and disposition of criminal causes.

2. The competency of grand jurors summoned by the district court of the United States for the district of Porto Rico after a valid local statute relating to the qualification of jurors went into effect must be tested by that statute, in view of the provision of the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 14, that the statutory laws of the United States not locally inapplicable, except as otherwise provided, shall have the same force and effect in Porto Rico as in the United States, and of § 34, that, in addition to the ordinary jurisdiction of Federal district courts, the district court of the United States for Porto Rico shall have jurisdiction "in all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court," read in connection with U. S. Rev. Stat. § 800 (U. S. Comp. Stat. 1901, p. 623), which declares that jurors to serve in Federal courts, in each state respectively, shall have the same qualifications as jurors of the highest court of law in that state at the time when such jurors are summoned.
3. An objection to the personal qualifications of grand jurors may be taken by plea in abatement, filed after the return of the indictment, but prior to arraignment, and as soon as the facts on which the objection was based were ascertained.
4. Statutory disqualification of grand jurors cannot be regarded as a mere defect or imperfection in form, within the meaning of the provision of U. S. Rev. Stat. § 1025 (U. S. Comp. Stat. 1901, p. 720), that no indictment shall be deemed insufficient, or the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.
5. Criminal prosecutions for an infamous crime against the United States cannot be commenced in the district court of the United States for the district of Porto Rico except on presentment or indictment of a grand jury, in view of the provision of the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 34, that such court shall proceed in the same manner as a Federal circuit court.

[No. 205.]

Submitted April 12, 1904. Decided May 31, 1904.

IN ERROR to the District Court of the United States for the District of Porto Rico, to review a conviction upon an indictment to which the accused had unsuccessfully filed a plea in abatement, questioning the competency of certain jurors who participated in the finding of the indictment. *Reversed* and remanded, with directions to overrule the demurrer to the plea in abatement.

The facts are stated in the opinion.

NOTE.—As to how and when objections to grand jurors may be taken—see note to United States v. Gale, 27 L. ed. U. S. 857.

Mr. Richard Crowley submitted the cause for plaintiff in error:

It was necessary to plead in abatement because a plea in bar would estop the defendant by an issue. The proper time to plead in abatement is before a plea in bar, or "not guilty."

Chitty, Crim. Law, pp. 445-447.

If a grand juror is disqualified he may be challenged by the defendant before the bill is presented, and, if it be discovered after the finding, the defendant may plead it in avoidance.

Id. p. 307.

The plea, under the English practice, should be verified by affidavit that it is true, and should pray for judgment.

Id. p. 448.

The objection that unqualified persons were placed upon the grand jury by which the indictment was found may be raised by the defendant by a plea in abatement. The sufficiency of such plea in the Federal courts, in the absence of legislation by Congress, must be decided by the principles of the common law.

United States v. Williams, 1 Dill. 485, Fed. Cas. No. 16,716. See also *United States v. Hammond*, 2 Woods, 197, Fed. Cas. No. 15,294; *United States v. Reeves*, 3 Woods, 199, Fed. Cas. No. 16,139.

Prejudice to the defendant must be alleged.

United States v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16,550.

Further, as to pleas in abatement, see *Tarrance v. Florida*, 188 U. S. 519, 47 L. ed. 572, 23 Sup. Ct. Rep. 402; *Smith v. Mississippi*, 162 U. S. 592, 40 L. ed. 1082, 16 Sup. Ct. Rep. 900; *Brownfield v. South Carolina*, 189 U. S. 427, 47 L. ed. 883, 23 Sup. Ct. Rep. 513; *Clinton v. Englebrecht*, 13 Wall. 437, 20 L. ed. 659.

Assistant Attorney General McReynolds submitted the cause for defendant in error:

Such causes as might have been reviewed under act of March 3, 1885, when decided by the supreme court of a territory can be now reviewed when coming from Porto Rico.

Royal Ins. Co. v. Martin, 192 U. S. 149, ante, 385, 24 Sup. Ct. Rep. 247.

This court has repeatedly decided that under that act it had no jurisdiction in criminal cases.

Gonzales v. Cunningham, 164 U. S. 617, 41 L. ed. 574, 17 Sup. Ct. Rep. 182.

The Constitution has never been expressly extended to Porto Rico, and the cession of the island did not render its provisions applicable therein.

Hawaii v. Mankichi, 190 U. S. 218, 220, 47 L. ed. 1023, 23 Sup. Ct. Rep. 787.

The district court for Porto Rico is not a constitutional court, and the provisions of

the Revised Statutes applicable to courts of the United States or "district or circuit courts of the United States" do not apply thereto.

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 546, 7 L. ed. 242, 256; *United States v. McMillan*, 165 U. S. 504, 510, 41 L. ed. 805, 807, 17 Sup. Ct. Rep. 395.

The provisions of the Revised Statutes relating to empaneling of grand juries for district and circuit courts do not apply to the district court of Porto Rico because it is not a district or circuit court of the United States.

Re Mills, 135 U. S. 263, 267, 34 L. ed. 107, 108, 10 Sup. Ct. Rep. 762; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Ex parte Farley*, 40 Fed. 66.

The sections of the Revised Statutes prescribing the qualifications of jurors relate to laws of the state wherein they are to serve, and are inapplicable to Porto Rico.

Clinton v. Englebrecht, 13 Wall. 424, 445, 20 L. ed. 659, 662.

In harmony with the rules governing writs of error to state courts, to give this court jurisdiction in any view it was necessary that a right claimed under an act of Congress should have been specially set up at the proper time and in the proper way, the attention of the court called thereto, and that there should have been a decision against the right.

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

This court declined, in *Watts v. Washington*, 91 U. S. 580, 23 L. ed. 328, to review a criminal case from Washington territory under a law giving it the power so to do where the Constitution, a treaty, or statute, was drawn in question, because it did not appear that question had been made as to any of these.

The established rule is that on writs of error to a state court no Federal question will be examined, except one which was directly raised and passed upon below, and no question of general law will be considered, except to sustain the action of the state court.

Murdock v. Memphis, 20 Wall. 591, 22 L. ed. 429; *McLaughlin v. Fowler*, 154 U. S. 663, 26 L. ed. 176, 14 Sup. Ct. Rep. 1192.

Is there reason for adopting a rule in reference to causes from Porto Rico less strict than the one which applies to causes from state courts?

The objections specified in the plea were made too late; they related to defects or imperfections in the matters of form, and, moreover, did not tend to prejudice the accused.

1 Bishop, Crim. Proc. 3d ed. §§ 327, 877, 878; Wharton, Crim. Pl. & Pr. §§ 344, 345;

Agnew v. United States, 165 U. S. 36, 44, 41 L. ed. 624, 627, 17 Sup. Ct. Rep. 235; *Lewis v. State*, 1 Head, 329; *State v. Newer*, 7 Blackf. 307; *People v. Lauder*, 82 Mich. 114, 46 N. W. 956; *Com. v. Smith*, 9 Mass. 107; *People v. Jewett*, 3 Wend. 314, 6 Wend. 386; *Dowling v. State*, 5 Smedes & M. 664; *State v. Riekey*, 10 N. J. L. 83; *United States v. Benson*, 31 Fed. 896; *United States v. Ewan*, 40 Fed. 451; *United States v. Molloy*, 31 Fed. 19; *Wolfson v. United States*, 41 C. C. A. 422, 101 Fed. 430; *Thompson & M. Juries*, §§ 554, 564.

An information in its general structure is similar to an indictment, and both are tested by the same rules in so far as the description of the offense is concerned.

King v. State, 17 Fla. 183; *Merwin v. People*, 26 Mich. 299, 12 Am. Rep. 314; *Donnelly v. People*, 11 Ill. 552, 52 Am. Dec. 459; *State v. Miles*, 4 Ind. 577.

In the courts of the United States in the absence of statute it is not necessary to swear to informations.

United States v. Polite, 35 Fed. 58; *Long v. People*, 135 Ill. 435, 10 L. R. A. 48, 25 N. E. 851; *State v. Brooks*, 33 Kan. 708, 7 Pac. 591; *United States v. Hoskins*, 5 Mackey, 478.

The right to demand presentment or indictment by a grand jury and trial by petit jury constituted as at common law is not fundamental, and does not necessarily exist in all places subject to jurisdiction of the United States.

Hawaii v. Mankiehi, 190 U. S. 218, 47 L. ed. 1023, 23 Sup. Ct. Rep. 787; *Re Mills*, 135 U. S. 263, 267, 34 L. ed. 107, 10 Sup. Ct. Rep. 762.

The district court of Porto Rico is not, in a constitutional sense, a court of the United States, and the provisions relating to jurors for such courts do not apply to it.

Re Mills, 135 U. S. 263, 34 L. ed. 107, 10 Sup. Ct. Rep. 762.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error was indicted in the district court of the United States for the district of Porto Rico, as constituted by the act of Congress of April 12th, 1900, entitled "An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes." 31 Stat. at L. 85, chap. 191.

The indictment was based upon certain sections of the Revised Statutes of the United States relating to crimes committed by persons employed in the postal service. Rev. Stat. §§ 5467, 5468, and 5469 (U. S. Comp. Stat. 1901, pp. 3691, 3692). The punishment for the offense here charged

was imprisonment at hard labor for one year, and not exceeding five years.

After the return of the indictment, the accused filed a plea in abatement, which questioned the competency of certain jurors who participated in the finding of the indictment.

As the action of the court on that plea constitutes the controlling question in the case, the plea is given in full, as follows:

"Now comes the defendant, Harold Crowley, and pleads in abatement to the indictment returned herein, and says that on Monday, the 8th day of April, 1901, there appeared in this court at San Juan, it being the first day of said term, the following-named persons: Manuel Romero Haxthausen, Pedro Fernandez, Alex. Nones, John D. H. Luce, Antonio Blanco, Manuel Andino Pacheco, E. L. Arnold, Henry V. Dooley, J. Ramon Latimer, Miguel Olmedo, Ramon Gandie, Charles H. Post, numbering twelve in all, which said persons were then and there, by the direction of the court and the marshal, *placed in the jury box, to con-[463]stitute the panel for the grand jury of this said April term, 1901, of this court.

"Whereupon the court then ordered the marshal to summon other persons to fill up the panel of the said grand jury, and immediately the marshal of the court sent his deputy out of the court room and into the city of San Juan to summon other jurors for such grand jury. Within a few minutes thereafter the marshal brought into court Frank Antonsanti (returned as Antonio Santi and Frank Santi, as appears by the minutes of this court), Hugo Stern, and William Bowen, the said persons not having been then and there bystanders in the court. The said panel then being incomplete, the marshal placed W. H. Holt, Jr., in the box, he being at the time a bystander in said court.

"Defendant says that thereupon the grand jury was constituted from the persons above named, and, after being sworn, proceeded to render a true bill against the defendant, which said alleged true bill on indictment was, by the said grand jury, constituted as aforesaid, returned and presented to this court on Wednesday, April 10th, 1901.

"Defendant says that by an act of the legislative assembly of Porto Rico, which took effect January 31st, 1901, it was provided (§ 3) that jurors shall have the following qualifications, among others:

"1st. A male citizen of the United States or of Porto Rico, of the age of twenty-one years, and not more than sixty years, who shall have been a resident of the island one year, and of the district or county ninety days before being selected and returned.

"4th. Assessed on the last assessment roll

of the district or county on property of the value of at least \$200, belonging to him.

"Sec. 4. A person is not competent to act as a juror (1st) who does not possess the qualifications prescribed by the preceding section"—which said provisions were in full force and effect at and before the time that [464] all of the persons were summoned *and impaneled, and returned said indictment as aforesaid.

"That by the law of Porto Rico, as aforesaid, causes of challenge to jurors are and were at said time last above mentioned, a want of any of the qualifications prescribed by law to render a person a competent juror. Defendant [states] that Manuel Adino is, and was, at the time above mentioned, a citizen of the Republic of Venezuela. That W. H. Holt, Jr., has not been a citizen of Porto Rico for one year prior to the dates and time above mentioned when said jury was so summoned, impaneled, and returned, and when said alleged indictment was returned.

"Defendant says that at the same time last above mentioned the following persons, composing and constituting the said grand jury, were not assessed on the last assessment roll of any of the districts of Porto Rico on property of the value of \$200, belonging to him: Antonio Blanco, Manuel Andino Paeheo, Miguel Olmedo, Charles H. Post, Frank Antonsanti, or Frank Santi, or Antonio Santi, W. H. Holt, Jr., William Bowen.

"Defendant further says that the following persons, composing and constituting said grand jury, were not, at the time above mentioned, publicly drawn from the box, containing at the time of each drawing the names of not less than three hundred persons, possessing the qualifications prescribed in § 800 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 623), and which said names (hereinafter set out) had not been placed therein by the clerk of this court and a jury commissioner, as provided by act of June 30th, 1879 [21 Stat. at L. 43, chap. 52, U. S. Comp. Stat. 1901, p. 624].

"Such persons whose names were not in said box and selected and summoned in the manner as aforesaid at the dates and times aforesaid were Hugo Stern, W. H. Holt, Jr., Frank Antonsanti, alias Frank Santi, alias Antonio Santi, William Bowen.

"Defendant says that no writs of venire facias were directed by the court against [465] the said last above named persons from *the clerk's office, signed by the clerk or his deputy, nor returned in the manner provided by Revised Statutes, § 803 (U. S. Comp. Stat. 1901, p. 625). Defendant says that he was not present in court at the time of the selection, summoning, and impaneling of

the jury aforesaid, and has had no opportunity to make any challenges to the same as the members thereof, because he did not know of said action, and was not at the time represented by counsel, but that he has this day learned of the aforesaid acts for the first time, and therefore immediately presents this plea.

"Defendant says that he has been and would be greatly prejudiced by the improper and illegal selection and impaneling of such grand jury as aforesaid, as it was composed at the time aforesaid of persons disqualified to act, and who were not residents or taxpayers of Porto Rico, as required by law, and because of their unfamiliarities with the island and the conditions and circumstances,—material matters in this case, and relevant thereto,—some of said jurors as aforesaid having been but a few months in the island, and temporarily sojourning herein.

"In addition to W. H. Holt, Jr., and William Baun, the following gentlemen of the grand jury were American citizens: John D. H. Luee, E. L. Arnold, Henry W. Dooly, J. Ramon Latimer, foreman thereof, Charles H. Post, Frank Antonsanti; by reason of which and their supposed knowledge of such practices by grand juries in the courts of the United States, might, and, as defendant believes, did, *contend* the deliberations of said jury so as to induce a finding of indictment where the Porto Rican citizens thereof might not have otherwise done."

The United States demurred to the plea upon the ground that the matters set forth in it, so far as they controlled or were applicable to the summoning and impaneling of a grand jury in the court below, disclosed no illegality therein, and constituted no reason why the accused should not be required to plead to the indictment.

The demurrer to the plea was sustained, and the plea overruled. The defendant then demurred to the indictment, and, the demurrer being overruled, he pleaded to the jurisdiction *of the court upon the ground [466] that it had no authority to proceed at its then special term, but could only proceed at a regular term. That plea was also overruled. The accused was then arraigned and pleaded not guilty, and a trial was had, resulting in a verdict of guilty, and a sentence to four years' imprisonment in the penitentiary.

The first question is one of the jurisdiction of this court; the government insisting that, under existing statutes, we are without authority to review the judgment in this case.

By the 35th section of the Foraker act of April 12th, 1900 (31 Stat. at L. 85, chap. 191), it is provided, among other things,

that writs of error and appeals to this court from the final decisions of the district court of the United States shall be allowed in all cases where "an act of Congress is brought in question, and the right claimed thereunder is denied." In this case that act was brought in question by the contention of the parties,—the contention of the accused being, in substance, that, pursuant to that act of Congress, the court below, in the matter of the qualifications of grand jurors, should have been controlled by the provisions of the local law relating to jurors, in connection with the statutes of the United States relating to the organization of grand juries, and the trial and disposition of criminal causes; and the court below deciding that, notwithstanding the Foraker act, the local act of January 31st, 1901 referred to in the plea, was not applicable to this prosecution, and that the grand jury finding the indictment, if a grand jury was necessary, was organized consistently with the laws of the United States [467] under which the court proceeded. It thus appears that the accused claimed a right under the act of Congress and under the Revised Statutes of the United States, which, it is alleged, was denied to him in the court below. This court has, therefore, jurisdiction to inquire whether there is anything of substance in that claim.

The question presented by the opposing views of the parties is not free from difficulty. By § 14 of the Foraker act it is provided that the statutory laws of the United States, not locally inapplicable, except as otherwise provided, shall have the same force and effect in Porto Rico as in the United States. § 14. And by § 34 it is provided that, in addition to the ordinary jurisdiction of district courts of the United States, the district court of the United States for Porto Rico shall have jurisdiction "in all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." § 34.

Turning to the statutes of the United States, we find that "jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications" (subject to certain provisions and exceptions not material to be mentioned here) "as jurors of the highest court of law in that state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned." § 800 (U. S. Comp. Stat. 1901, p. 623).

Taking these statutory provisions all together, and having regard to the general scope of the Foraker act, it is manifest that Congress intended that criminal prosecutions

in the district court of the United States in Porto Rico, for offenses against the United States, should be conducted in the same manner as like prosecutions in the circuit courts of the United States; the court in Porto Rico recognizing any valid existing local statute relating to the qualifications for jurors, just as a circuit court of the United States, in criminal prosecutions, would be controlled (Rev. Stat. § 800, U. S. Comp. Stat. 1901, p. 623) in respect of the qualifications of jurors, by the applicable statutes of the state in which it was sitting.

*So that we must inquire whether there [468] was in existence any local statute relating to the qualifications of jurors by which the court below should have been controlled.

The plea in abatement, referring to certain provisions in a statute of Porto Rico prescribing the qualifications of jurors, states that it took effect January 31st, 1901. That is a mistake. It is true that the statute was passed on that day, but it did not take effect until April 1st, 1901. Rev. Stat. & Codes of Porto Rico, 1902, pp. 172, 210, § 160.

The plea correctly states that by that statute—the authority of the legislature of Porto Rico to pass it not being questioned—it was provided that a person was not competent to act as a juror who was not a male citizen of the United States or of Porto Rico, of the age of twenty-one years, and not more than sixty years; who had not been a resident of the island one year and of the district or county ninety days before being selected and returned; or who was not assessed on the last assessment roll of the district or county on property of the value of at least \$200, belonging to him. § 3.

In a brief opinion, made part of the record, the court below referred to the date on which the local statute took effect,—April 1st, 1901,—and stated that the record showed that the venire of grand jurors for the term was executed, and the jurors summoned, prior to that date. This must be construed as applying only to those jurors who were summoned under the regular venire; for it is distinctly shown by the record that the court convened April 8th, 1901, after the local statute went into effect, and that of those participating in the finding of the indictment, four—Antonsanti, Stern, Bowen, and Holt—were summoned by the marshal after that date, under the order of the court, to complete the panel of the grand jury. And the demurrer to the plea admits that Antonsanti, Bowen, and Holt were of those thus specially summoned after the court convened, and were not, when selected as jurors, assessed on the

last assessment as owners of property of the required value; and that Holt had not been
 [469] a resident of the island for one *year prior to his being summoned to serve on the grand jury. It thus appears that after the local statute took effect three persons were summoned by the marshal and put on the grand jury who were disqualified by that statute to serve. We perceive no reason why the district court of the United States for Porto Rico should not have followed that statute when organizing the grand jury. It was then the law of Porto Rico. There was no difficulty in applying its provisions prescribing the qualifications of jurors to pending criminal prosecutions in the court below. One of the functions of that court was to enforce the laws of Porto Rico. If the court had given effect to the above act, and held those to be disqualified as jurors who were declared by its provisions to be incompetent, then it would have proceeded—as it was required by the Revised Statutes of the United States and by the Foraker act to proceed—"in the same manner as a circuit court" of the United States, sitting in a state, would proceed under the law of such state prescribing the qualifications of jurors. But it did not proceed in that manner. It refused to follow the local statute.

It remains now to inquire whether the objection to the jurors above named was taken in the proper way, and in due time. Can such an objection be made, as was done here, by plea in abatement after the return of the indictment? Upon this point the authorities are not in harmony. The question is not controlled by any statute, and must depend on principles of general law applicable to criminal proceedings in civilized countries.

Some of the cases have gone so far as to hold that an objection to the personal qualifications of grand jurors is not available for the accused unless made before the indictment is returned in court. Such a rule would, in many cases, operate to deny altogether the right of an accused to question the qualifications of those who found the indictment against him; for he may not know, indeed, is not entitled, of right, to know, that his acts are the subject of examination by the *grand jury. In *Com. v. Smith*, 9 Mass. 107, 109, a case often referred to, the court said that "objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found." But the court took care to observe that the decision was not rested on that ground. And in the later case of *Com. v. Parker*, 2 Pick. 550, 563, Chief Justice Parker, referring to *Com. v. Smith*, remarked: "It is there said that objections to the personal qualifications of

the grand jurors, or to the legality of the returns, are to be made before the indictment is found. It is not necessary to apply the remark here, and we have some doubts as to the correctness of it in all cases; and the case in which it was made was determined on another point."

One of the earliest cases in this country in which the question arose was that of *Com. v. Cherry*, 2 Va. Cas. 20, decided in 1815. It was then held that if a grand juror was disqualified, the indictment or presentment, after being found, could be avoided by plea in abatement.

With rare exceptions this rule is recognized and followed in the different states. It will be appropriate to refer to some of the cases.

In *State v. Symonds*, 36 Me. 128, 132, an objection that the indictment was not found by the required number of legal grand jurors being taken on motion in writing, in the nature of a plea of abatement at the arraignment of the accused, was held to be in season and available. Later, in *State v. Carver*, 49 Me. 588, 594, 77 Am. Dec. 275, it was said that objections to the competency of grand jurors by whom an indictment was found came too late if made after verdict, but must be pleaded in abatement. See also *State v. Clough*, 49 Me. 577. In *State v. Herndon*, 5 Blackf. 75, it was ruled that if a grand juror was disqualified for any reason, the accused may, before issue joined, plead the objection in avoidance. In *Doyle v. State*, 17 Ohio, 222, an objection, by special plea, that one of the grand jurors by whom the indictment was found was disqualified to act, was held not to come too late—the court saying that "no objection can come too late which discloses the fact that a person has been put to answer a crime in a mode violating his legal and constitutional rights."

In *McQuillen v. State*, 8 Smedes & M. 587, 598, the high court of errors and appeals of Mississippi fully considered the question. Chief Justice Sharkey, delivering the judgment of the court, after observing that no one can be called to answer a charge against him unless it has been preferred according to the forms of law, and that anyone indicted by a grand jury can deny their power, said: "The question is, how is this to be done? A prisoner who is in court, and against whom an indictment is about to be preferred, may undoubtedly challenge for cause; this is not questioned. But the grand jury may find an indictment against a person who is not in court; how is he to avail himself of a defective organization of the grand jury? If he cannot do it by plea, he cannot do it in any way; and the law works unequally by allowing one class of persons

to object to the competency of the grand jury, whilst another class has no such privilege. This cannot be. The law furnishes the same security to all, and the same principle which gives to a prisoner in court the right to challenge gives to one who is not in court the right to accomplish the same end by plea; and the current of authorities sustains such a plea. True, some may be found the other way, but it is believed that a large majority of the decisions are in favor of the plea. To the list of authorities cited by counsel may be added the name of Sir Matthew Hale, which would seem to be sufficient to put the question at rest. 2 Hale P. C. 155. *Vide also Withpole's Case*, Cro. Car. 134, 147." See also *Rawls v. State*, 8 Smedes & M. 609.

The same court, in a later case, sustaining the right of accused to challenge, by plea in abatement, the competency of the grand jury by which he is indicted, said: "This privilege arises not alone from the legal principles, that indictments not found by twelve good and lawful men at the [472] least are void and *erroneous at common law, and, therefore, some mode must be left open for ascertaining the fact, but is well sustained as a method of insuring to accused persons a fair and impartial trial. Such persons are not present when the grand jurors are impaneled, perhaps have not been made subjects of complaint or even suspicion. It certainly would not be right to estop a party from pleading a matter to which he could not otherwise except. The interest of an accused person under indictment with the grand jury commences at the time of the finding of the indictment. This is the point of time when, as to him, the legal number of qualified men must exist upon the grand inquest. Indictments not found by at least twelve good and lawful men are void at common law. [*Olyneard's Case*] 2 Cro. Eliz. 654; [*Robinson v. Bland*] 2 Burr. 1088, 2 Hawk. P. C. 307. It is said by 2 Hawkins, P. C. chap. 25, § 28, p. 312, that if any one of the grand jury, who find an indictment, be within any one of the exceptions in the statute, he vitiates the whole, though ever so many unexceptional persons joined with him in finding it." *Barney v. State*, 12 Smedes & M. 68, 72.

In *State v. Seaborn*, 15 N. C. (4 Dev. L.) 305, 311, and again in *State v. Martin*, 24 N. C. (2 Ired. L.) 101, 120, the supreme court of North Carolina, speaking in each case by Chief Justice Ruffin, held that a plea in abatement, filed at the time of arraignment, was an appropriate mode of raising the question of the validity of an indictment as affected by the disqualification of a grand juror.

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A leading case upon the question is *Vanhook v. State*, 12 Tex. 252, 268. The court there said: "The better opinion, to be deduced from the authorities to which we have access, seems to be that irregularities in selecting and impanelling a grand jury, which do not relate to the competency of individual jurors, can, in general, only be objected by a challenge to the array. But that the incompetency, or want of the requisite qualifications, of the jurors, may be pleaded in abatement to the indictment. And this doctrine and distinction *seems founded [473] on principle. It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment. It is his right, in the first place, to have the accusation passed upon, before he can be called upon to answer to the charge of crime, by a grand jury composed of good and lawful men. If the jury be not composed of such men as possess the requisite qualifications, he ought not to be put upon his trial upon a charge preferred by them, but should be permitted to plead their incompetency to prefer the charge and put him upon his trial, in avoidance of the indictment. Otherwise he may be compelled to answer to a criminal charge preferred by men who are infamous, or unworthy to be his accusers."

In *State v. Duncan*, 7 Yerg. 271, 275, the accused pleaded in abatement that one of the grand jurors who participated in the finding of the indictment was disqualified. The supreme court of Tennessee, speaking by Chief Justice Catron, afterwards a member of this court, said: "Suppose an indictment was found by a grand jury, no person composing which was qualified? All will admit the indictment would be merely void in fact, and ought not to be answered if the fact was made legally to appear. So, if any one be incompetent, it is equally void, because the proper number to constitute the grand inquest is wanting; and because he who is incompetent shall not be one of the triers of the offense at any stage of the prosecution. There seems, at some early stage of the proceeding by indictment, to have been some doubt whether the indictment was void because of the incompetency of one of the grand jurors, to set which at rest the 2 Henry IV., chap. 9, enacted 'that any indictment taken by a jury, one of whom is unqualified, shall be altogether void and of no effect.'" See also *Mann v. Fairlee*, 44 Vt. 672; *State v. Williams*, 3 Stew. (Ala.) 454; *State v. Bryant*, 10 Yerg. 527; *State v. Cole*, 17 Wis. 674; *State v. Brooks*, 9 Ala. 10; *Jackson v. State*, 11 Tex. 261; *State v. Freeman*, 6 Blackf. 248; 1 Bishop, Crim. Proc. § 883, and authorities cited; 1 Am. Crim Law, § 472, *and authorities cited; 1 [474]

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Chitty, *Crim. Law*, 307; Bacon, *Abr. Indictment*, C. Bouvier's ed. p. 53; 2 Hale P. C. 155; 3 Inst. 34; 2 Hawk. P. C. chap. 35, §§ 18, 26, 29, 30.

We are of opinion that the objection here, that grand jurors were disqualified by the statute of Porto Rico, was made in the proper way and in due time. The accused was not in court when the grand jurors were selected and the grand jury impaneled. So far as appears from the record, he was not aware that his case would be taken up by the grand jury. It does not appear he had, prior to the assembling of the grand jury, been arrested for the offenses for which he was indicted. But upon the return of the indictment he was brought to the bar of the court, and gave bond for his appearance and trial. His objection to the qualifications of the grand jurors was made promptly,—three days after the indictment was returned,—before he was arraigned, and as soon as he learned of the facts upon which the objection was based. All this was admitted by the demurrer to the plea in abatement. If the objection in this case was not sufficient, then an objection made by plea in abatement prior to arraignment, that a majority or even all of the grand jurors returning an indictment against the accused were disqualified by law, would have been equally unavailing. Such a result is not to be thought of.

In this connection the government calls attention to § 1025 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 720), providing that "No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This section can have no bearing on the present case, for the disqualification of a grand juror is prescribed by statute, and cannot be regarded as a mere defect or imperfection in form; it is matter of substance, which cannot be disregarded without prejudice to an accused.

It is said that under the Spanish law, prior [475] to the cession *of Porto Rico, indictments and grand juries were unknown; that it was allowable under the law to proceed against an accused by a criminal information; and that the legislative assembly of Porto Rico had not made any alteration of the Spanish law in this particular when the grand jurors in this case were summoned. The contention in this view is that the indictment in question, having been signed by the United States attorney, can be treated as an in-

formation. The indictment embodies charges made by grand jurors, and the signature of the United States attorney merely attests the action of the grand jury, whereas an information rests upon the responsibility of the attorney representing the government, and imports an investigation of the facts by him in his official capacity. But, apart from these considerations, we cannot treat the indictment as an information, for the reason, if there were no other, that, as the defendant was accused of an infamous crime against the United States, this prosecution could not have been commenced in a circuit court of the United States except on presentment or indictment of a grand jury; and the positive command of the act of Congress relating to the district court of the United States for Porto Rico, that the court below "shall proceed in the same manner as a circuit court" of the United States, precluded the prosecution of the accused in the latter court except by presentment or indictment.

We have seen that some of the grand jurors alleged in the plea of abatement to be disqualified were summoned prior to the date on which the local statute went into effect; and if the local statute were applied to them, they would have been held incompetent to act as jurors. But there is some ground to hold, under § 800 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 623), that if they were qualified when summoned, then they did not become disqualified by reason of anything in the local statute which went into operation after they were summoned. By what law the qualifications of those particular jurors were to be tested we need not determine; for what has been said *as to disqualified [476] jurors summoned after the court convened, and after the local statute went into operation, and who were nevertheless permitted to participate in the finding of the indictment, is sufficient to dispose of the case.

For the reasons stated, and without considering other questions arising upon the plea in abatement as well as upon the record, we adjudge only that the presence on the grand jury of persons summoned after the local statute took effect, and who were disqualified by that statute,—those facts having been seasonably brought to the attention of the court by a plea in abatement filed before arraignment,—vitiates the indictment.

The judgment is reversed, and the case is remanded with directions to overrule the demurrer to the plea in abatement, and for such further proceedings as may be consistent with law.

Reversed.

ELMIRA KNEPPER

v.

JOHN A. SANDS.

(See S. C. Reporter's ed. 476-486.)

Railway land grants—bona fide purchaser under adjustment act.

The protection afforded by the adjustment act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 4, to bona fide purchasers from any grantee railway company to whom lands had been erroneously certified or patented, does not extend to one who purchased, after the date of that act, certain unearned lands included in the grant made by the act of May 12, 1864 (13 Stat. at L. 72, chap. 84, §§ 1, 2, 3), to the state of Iowa, in aid of railway construction, the title to which the state, before the passage of the adjustment act, had first resumed by legislative enactment, upon the railway company's default, and then relinquished to the United States.

[No. 233.]

Argued and submitted April 19, 1904. Decided May 31, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting the question whether a purchaser from a railway company came within the protection afforded by the adjustment act to purchasers in good faith from any grantee railway company to whom lands had been erroneously certified or patented. *Answered in the negative.*

The facts are stated in the opinion.

Mr. I. S. Struble submitted the cause for Knepper.

Mr. John H. King argued the cause, and, with Mr. M. B. Davis and Messrs. King & Stearns, filed a brief for Sands.

Mr. Justice Harlan delivered the opinion of the court:

This cause is before us upon questions certified by the circuit court of appeals pursuant to the judiciary act of March 3d, 1891, chap. 517 (26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488).

The controlling facts in the extended statement sent up by the judges of the circuit court of appeals, as the basis of the questions propounded, are these:

By an act approved May 12th, 1864, chap. 84, Congress made a grant of lands to the state of Iowa for the purpose of aiding in the construction of a railroad from Sioux City to the south line of Minnesota, at such

point as the state might select; the lands to be held subject to the disposal of its legislature, for that purpose only. Upon the completion of each section of ten consecutive miles of road it became the duty of the Secretary of the Interior to issue to the state patents for one hundred sections for the benefit of the constructing company; and so on, until the road was completed, when the whole of the lands granted were to be patented "to the state for the uses aforesaid, and none other." 13 Stat. at L. 72, §§ 1, 2, 3.

If the road was not completed within ten years from the acceptance of the grant by the constructing company, then the lands granted and not patented were to "revert to the state" for the purpose of securing the completion of the road within such time, not exceeding five years, and upon such terms as the state should determine,—the[478] lands not in any manner to be disposed of or encumbered except as the same were patented under the provisions of the act, and upon the failure of the state to complete the road within five years after the above ten years, then the lands undisposed of were to "revert to the United States." § 4.

The state accepted the grant, April 3d, 1866, upon the conditions prescribed by Congress, and authorized the Sioux City & St. Paul Railroad Company, a Minnesota corporation, to construct the road. The company entered upon the work of construction, and completed only five sections of ten miles each, receiving the full amount of land to which it was entitled by reason of such construction.

In consequence of the failure of the railroad company to complete the construction of the road, the state declared, by an act approved March 16th, 1882, that, in respect of all lands and rights to land granted or intended to be granted to that company, they "are hereby absolutely and entirely resumed by the state of Iowa, and that the same be and are absolutely vested in said state as if the same had never been granted to said company." Before the passage of that act the state, through its executive officers, ascertained by computation that the railroad company had received conveyances for all lands it was entitled to receive under the terms of the grant, and that the state then held legal title to 85,457.41 acres, pertaining to the grant, no part of which had then or ever since been earned by the company. The land in question here was a part of those unearned lands.

Subsequently, by an act which took effect April 2d, 1884, the state relinquished to the United States all its right, title, and interest in the lands which, by the above act of 1882, were declared vested in the state.

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

The land here in dispute, being section 9, township 95, north of range 42, west of the fifth principal meridian, in O'Brien county, Iowa, was open and unoccupied when the above act of April 2d, 1884, was passed. [479] In 1885 Sands settled *upon it, erected thereon a house, and made improvements with a view of establishing a homestead, in accordance with the laws of the United States. He has continuously since resided upon the land, claiming it as a homestead. Shortly after he settled upon it he made application to enter it as a homestead, but his application was rejected; for what reason rejected, does not appear.

Later, by an act approved March 3d, 1887, Congress provided for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands. 24 Stat. at L. 556, chap. 376 (U. S. Comp. Stat. 1901, p. 1595).

The 1st section of that act provided for the immediate adjustment, in accordance with the decisions of this court, of each of the railroad land grants which then remained unadjusted. The second section provided for the recovery by the United States of the title to lands erroneously certified or patented by the United States to, or for the use or benefit of, any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad. That section made it the duty of the Secretary of the Interior to demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits, and, if the demand was not complied with, then it became the duty of the Attorney General to institute suit against the company. The third section provided that homestead or pre-emption entries of bona fide settlers, which were found to have been erroneously canceled, may be perfected upon compliance with the public land laws and certain conditions, and the settler reinstated in his rights. If the settler did not renew his application within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands were to be disposed of under the public land laws,—according to a priority of right to bona fide purchasers of the unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

[480] *The 4th section, upon the construction of which the present case mainly depends, is in these words: “§ 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented, as aforesaid, and which have been sold, by the grantee company, to citizens of the United States, or to persons

who have declared their intention to become such citizens, *the person or persons, so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased,* upon making proof of the fact of such purchase, at the proper land office, within such time, and under such rules, as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company, which has so disposed of such lands, of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment, as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: *Provided, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented, as aforesaid, from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company, as by this act required. . . .*” 24 Stat. at L. 556, chap. 376 (U. S. Comp. Stat. 1901, p. 1595).

As showing the nature of the title of the state under the act of 1864, reference may here be made to a suit brought by the United States against the Sioux City & St. Paul Railroad Company, under which company, as will presently appear, the appellant claims. By the final decree in that case the title of the United States was quieted as to certain lands situated in Dickinson and O'Brien counties, and claimed by the railroad company under the act of 1864. In the *opinion in that case, which was decided [481] here October 21st, 1895, the court said: “Another contention is, that upon the issuing of the patents of 1872 and 1873 to the state for the use and benefit of the railroad company, the title vested absolutely in the company, and the lands were thereby freed from restraints of alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 674, 676, 677, 35 L. ed. 305, 307, 308, 11 Sup. Ct. Rep. 641; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 6, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389. But these are

cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the state, for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issued to the state for the benefit of the company. So that, until the state disposed of the lands, the title was in it, as trustee, and not in the railroad company. *Schulenberg v. Harriman*, 21 Wall. 44, 59, 22 L. ed. 551, 554; *Lake Superior Ship Canal, R. & Iron Co. v. Cunningham*, 155 U. S. 372, 39 L. ed. 189, 15 Sup. Ct. Rep. 103. See also *McGregor & M. R. Co. v. Brown*, 39 Iowa, 655; *Sioux City & St. P. R. Co. v. Osceola County*, 43 Iowa, 318, 321. In the case last named the Sioux City Company was relieved from the payment of taxes upon some of the lands patented to the state for its benefit, upon the ground that the legal title was in the state, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents for these lands had been issued, or if the state had conveyed them directly to that company." *Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 363, 40 L. ed. 177, 182, 16 Sup. Ct. Rep. 17. It was there adjudged that the railroad company had received 2,004.89 acres more than, in any view of its rights, should have been awarded to it.

[482] After the decision of that case the Secretary of the Interior, *under date of November 18th, 1895, published a circular, in which he declared the land here in controversy and other like land subject to disposal by the Land Department. This was after the above application by Sands to enter this land as a homestead.

Subsequently, on the 10th of March, 1896, Sands renewed his application for the land in question as a homestead. That application was contested in the local land office by the present appellant, who asserted a right to the land in virtue of a purchase of it from the *Sioux City & St. Paul Railroad Company* on June 21st, 1887, and in virtue of the provisions of the 4th section of the above adjustment act of March 3d, 1887. She had never resided upon the land in controversy, or cultivated the same, or in any manner attempted to comply with the homestead laws of the United States for the purpose of obtaining a title under them. This contest was determined at the local office in favor of Sands,—that office finding that he had, by virtue of his settlement of, and continued residence upon, and cultivation of, the land, and by full compliance with the homestead laws of the United States, be-

come entitled to a patent. That decision was confirmed by the Commissioner of the Land Office. But, upon appeal to the Secretary of the Interior, the decisions of the local land office and of the Commissioner were reversed, and Sands's application to enter the land as a homestead was rejected. Thereupon the present suit was commenced by Sands, charging that the officers of the General Land Office, proceeding under the decision of the Secretary, were about to issue, or had issued, a patent to the present appellant solely in virtue of her alleged purchase on June 21st, 1887, from the *Sioux City & St. Paul Railroad Company*, after the passage of the adjustment act of March 3d, 1887, and in virtue of its 4th section. Sands, alleging that such action, if taken, would be unlawful and contrary to law, prayed that the Commissioner be required to accept his proof showing settlement upon and continuous cultivation of the land for the period of five years or more, and that the patent to *appellant Knepper be either de-[483] clared null and void, or for a decree declaring that she holds the legal title in trust for him.

Such is the case made by the statement by the judges of the circuit court of appeals, who propound to this court the following questions:

"First. In view of the provisions of the act of Congress of May 12th, 1864, by virtue of which the land in controversy was granted to the state of Iowa, did the action which was subsequently taken in manner and form aforesaid by the governor and legislature of the state of Iowa operate as a final adjustment of the grant, so far as the *Sioux City & St. Paul Railroad Company* was concerned, and, by virtue of its being so adjusted, exempt or except the grant in question from the provisions of the adjustment act of March 3d, 1887?

"Second. In view of the terms of the granting act of May 12th, 1864, and the action subsequently taken in manner and form aforesaid by the state of Iowa, acting through its governor and legislature, can *Elmira Knepper*, the appellant, be esteemed a purchaser in good faith or a bona fide purchaser of the land in controversy, within the meaning of the 4th section of the adjustment act of March 3d, 1887, as against *John A. Sands*, the appellee, who was in the open possession of the land in controversy, and had erected valuable improvements thereon, in manner and form aforesaid, when said purchase was made?"

We have seen that the appellant claims an interest in the lands here in question in virtue of a purchase made by her from the railroad company, June 21st, 1887, after the passage of the adjustment act of March 3d,

1887. But what interest had the company at that time in these particular lands constituting a part of the 85,457.41 acres of unearned lands, no part of which the company earned or could have earned except on account of road actually constructed by it? For such road as the company had constructed, lands had been conveyed to it, and there never was a moment according to the record, when the company could have rightfully demanded from the state *a conveyance or patent for the lands here in dispute or for any of the unearned lands. The legal title to the lands granted by the act of 1864 was, first in the United States, next in the state (*Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17), but never in the company until a conveyance to it by the state. The state could only have conveyed lands to the company in consideration of constructed road; and subject to that condition the company undertook to construct the road. When it abandoned the work of construction it lost the right to claim lands except for such road as it had previously constructed. The state, therefore, properly resumed, as by the act of 1882 it did resume, after the company's default, such title to the unearned lands as it had before authorizing the company to construct the road. The state, after thus resuming the title, could have used the unearned lands to aid in the construction of that portion of the road which the railroad company failed to construct. But it did not do so, and hence, by the act of April 2d, 1884,—eighteen years after it accepted, in 1866, the grant of 1864, and the completion of the road having been abandoned,—the state, by statute, formally relinquished to the United States all its right, title, and interest in the unearned lands pertaining to the Sioux City & St. Paul Railroad Company. This statute was, perhaps, unnecessary, as, by the act of 1864, the title to the unearned lands granted by that act was to revert to the United States after the expiration of fifteen years from the acceptance of the grant without the completion of the road. But the relinquishment by the state saved the necessity, if there was a necessity, of formal proceedings, legislative or judicial, by the United States, to reinvest itself with full title. Thus, the title to the unearned lands was put back into the United States. So that, when the adjustment act of 1887 was passed, the title of the United States to the unearned lands, including the particular lands here in dispute, was complete and perfect. No interest then remained in the state or in the railroad company requiring an adjustment; for, [485] as stated, the state had *relinquished all its claim, and the railroad company had re-

ceived all the lands it was entitled to demand for constructed road. When, therefore, Congress made provision in the 4th section of the act of 1887 for the protection of those who, in good faith, had purchased from any "grantee company," to whom lands had been erroneously certified or patented, it could not have intended to refer to purchases made from the railroad company, after that act took effect, of lands originally certified or patented to the state, and not to the railroad company, and the legal title to which was in the United States at the date of the passage of the act. A chief purpose of the act of 1887 was to declare forfeited unearned lands, and restore them to the public domain; and not to give third parties and speculators an opportunity to purchase such lands from companies which had defaulted in the work of construction, and to whom the state had never conveyed, and thereby obtain a preference over actual settlers in possession. The policy of the government has always been favorable to actual settlers. As late as *Arđ v. Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406, it was said that "the law deals tenderly with one who, in good faith, goes upon the public land with a view of making a home thereon." See also *North-ern P. R. Co. v. Amacker*, 175 U. S. 564, 44 L. ed. 274, 20 Sup. Ct. Rep. 236; *Moss v. Dowman*, 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429; *Rector v. Gibbon*, 111 U. S. 276, 28 L. ed. 427, 4 Sup. Ct. Rep. 605; *Nelson v. Northern P. R. Co.* 188 U. S. 108, 123, 47 L. ed. 406, 412, 23 Sup. Ct. Rep. 302.

We are of opinion that the 4th section of the adjustment act of 1887 has no reference to any unearned lands purchased after the date of that act from a company to whom they had never been certified or patented, although, if it had kept its engagement with the state, and completed the road in due time, it could have acquired an interest in them; and that, as the state, by legislative enactment, had resumed the title it acquired from the United States, and afterwards relinquished its interest to the United States,—all before the passage of the adjustment act,—the appellant could not, within the meaning of the act, and after its passage, have become a purchaser in good faith of the lands here in dispute. The sale by the railroad *company to the appellant was a [486] sale of something it did not possess; a mere device to bring its purchaser within the provisions of the adjustment act of 1887, when that act was never intended to apply to such a case.

We, therefore, answer the second question in the negative, and omit, as unnecessary, any answer to the first one.

It will be so certified.

JOSEPH R. BINNS, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 486-496.)

*Constitutional law—uniformity in taxation
—license fees in Alaska not excises.*

License fees imposed on certain lines of business by Alaska Pen. Code (30 Stat. at L. 1253, 1337, chap. 429), tit. 2, § 460, as amended by the act of June 6, 1900 (31 Stat. at L. 321, 330, chap. 786), are not "excises" levied "to pay the debts and provide for the common defense and general welfare" which, under U. S. Const. art. 1, § 8, must be uniform throughout the United States, although the proceeds are, by § 463 of such Code, to be paid into the Treasury of the United States, and are not specifically appropriated to the expenses of the territory; but such fees must be deemed local taxes, imposed under the plenary power of Congress over the territories, for the purpose of defraying the expense of the territorial government, where the total sum derived from these and all other revenues of the territory does not equal the cost of maintaining such government.

[No. 196.]

Submitted April 6, 1904. Decided May 31, 1904.

IN ERROR to the District Court of the United States for the District of Alaska, Second Division, to review a conviction for attempting to do business in Alaska without having first paid the required license fee. *Affirmed.*

Statement by Mr. Justice **Brewer**:

[487] *Section 460 of title II. of the Alaska Penal Code (act of March 3, 1899, 30 Stat. at L. 1253, 1337, chap. 429), as amended by the act of June 6, 1900, entitled "An Act Making Further Provision for a Civil Government for Alaska, and for Other Purposes" (31 Stat. at L. 321, 330, chap. 786), reads "that any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska shall first apply for and obtain license so to do from a district court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade, as follows, to wit: . . . Transfer companies, fifty dollars per annum."

Section 461 provides: "That any person, corporation, or company doing or attempting to do business in violation of the provisions of the foregoing section, or without having first paid the license therein required,

shall be deemed guilty of a misdemeanor," etc.

Section 463: "That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof . . . duly made and entered: . . . Provided, That . . . all moneys received for licenses by him . . . under this act shall, except as otherwise provided by law, be covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe."

Under this statute, plaintiff in error was prosecuted and convicted in the district court for the district of Alaska, second division. This conviction has been brought to this court on writ of error, and the question presented is whether the statute is in conflict with § 8 of article 1 of the Constitution of the United States, which reads: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Messrs. **J. C. Campbell** and **W. H. Metson** submitted the cause for plaintiff in error:

This license tax is an excise.

Cooley, Taxn. p. 4.

Alaska is one of the territories of the United States.

The Coquitlam v. United States, 163 U. S. 346, 352, 41 L. ed. 184, 186, 16 Sup. Ct. Rep. 1117; *Downes v. Bidwell*, 182 U. S. 244, 335, 45 L. ed. 1088, 1125, 21 Sup. Ct. Rep. 770.

The Constitution, having once been extended to a territory, cannot be withdrawn, nor its provisions modified by subsequent legislation inconsistent therewith. It becomes the supreme law, and operates as a restriction upon the power of Congress to legislate in regard to such territory identically as it operates to restrict legislation in regard to states.

Downes v. Bidwell, 182 U. S. 244, 270, 271, 341, 45 L. ed. 1088, 1100, 1127, 21 Sup. Ct. Rep. 770.

Assistant Attorney General **Purdy** submitted the cause for defendant in error:

Congress has plenary powers, national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition.

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 542, 7 L. ed. 242, 255; *Cross v. Harrison*, 16 How. 164, 193, 14 L. ed. 889, 901; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. ed. 1046, 1047;

NOTE.—On the power of Congress over the territories—see note to *First Nat. Bank v. Yankton County*, 25 L. ed. U. S. 1046.
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Murphy v. Ramsey, 114 U. S. 15, 44, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747; *Church of Jesus Christ v. United States*, 136 U. S. 1, 42, 43, 34 L. ed. 481, 490, 491, 10 Sup. Ct. Rep. 792; *McAllister v. United States*, 141 U. S. 174, 181, 35 L. ed. 693, 695, 11 Sup. Ct. Rep. 949; *Shively v. Bowlby*, 152 U. S. 1, 48, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787; *Benner v. Porter*, 9 How. 235, 242, 13 L. ed. 119, 122.

The power to license is a police power, although it may also be exercised for the purpose of raising revenue.

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.

It is true that in this case the constitutionality of a state statute was under consideration; but in legislating for Alaska Congress has all the powers, both of the Federal government with respect to the states, and of the state governments with respect to their domestic concerns.

Picklen v. Shelby County Taxing Dist. 145 U. S. 1, 23, 36 L. ed. 601, 607, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

The licensing of persons to sell liquor is not an exercise of the taxing power of the state to raise revenue, but of the police power for the regulation and restriction of a dangerous business; it follows that the adjustment of fees for the license is not governed by the constitutional provisions requiring equality and uniformity of taxation.

Black, Intoxicating Liquors, § 108; *Thomasson v. State*, 15 Ind. 449; *Lovington v. Board of Trustees*, 99 Ill. 564.

The distinction between a license which grants authority to engage in a particular business, and thus confers a privilege, and a tax which grants no such authority, and therefore confers no privilege, was clearly drawn in the *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497, wherein the court held that the so-called license tax imposed by the United States upon the liquor business did not provide a license, but merely a tax collected in the form of a license.

The mere fact that revenue is derived as an incident to the exercise of the power to license various trades and occupations will not operate to characterize the license fee as a tax.

Baker v. Cincinnati, 11 Ohio St. 534; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463.

If taxes at all, these license fees are local taxes imposed by Congress as the legislature of Alaska, and paid into the treasury of the United States as the only treasury of

Alaska, and obviously intended to meet the expenses of governing that territory.

Downes v. Bidwell, 182 U. S. 292, 45 L. ed. 1108, 21 Sup. Ct. Rep. 770; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427.

Admitting, for the purpose of the argument, that these license fees are local taxes imposed by Congress in the territory of Alaska, and appropriated by Congress to the support of the general government, we assert that such a law would be constitutional under the plenary power of Congress to govern the territories.

Downes v. Bidwell, 182 U. S. 244, 299, 45 L. ed. 1088, 1111, 21 Sup. Ct. Rep. 770.

Mr. Justice **Brewer** delivered the opinion of the court:

The contention of plaintiff in error is that the license tax is an excise, that it is laid and collected "to pay the debts and provide for the common defense and general welfare of the United States," because, by § 463, it is provided that "all moneys received for licenses . . . under this act shall . . . be covered into the Treasury of the United States;" that it is imposed only in Alaska; and is not "uniform throughout the United States."

It is unnecessary to consider the decisions in the *Insular Cases*, for, as said by Mr. Justice White in his concurring opinion in *Downes v. Bidwell*, 182 U. S. 244, 335, 45 L. ed. 1088, 1125, 21 Sup. Ct. Rep. 770: "Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon;" and by Mr. Justice Gray, in his concurring opinion (p. 345, L. ed. 1128, Sup. Ct. Rep. p. 809): "The cases now before the court do not touch the authority of the United States over the territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific oceans, the Dominion of Canada, and the Republic of Mexico, and the territories of Alaska and Hawaii; but they relate to territory, in the broader sense, acquired by the United States by war with a foreign state."

It had been theretofore held by this court in *The Coquitlam v. United States*, 163 U. S. 346, 352, 41 L. ed. 184, 186, 16 Sup. Ct. Rep. 1117, that "Alaska is *one of the territories[491] of the United States. It was so designated in that order [the order assigning the territory to the ninth judicial circuit], and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that territory." Nor can it be doubted that it is an organized territory, for the act of May 17,

1884 (23 Stat. at L. 24, chap. 53), entitled "An Act Providing a Civil Government for Alaska," provided: "That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided." [15 Stat. at L. 539]. See also 31 Stat. at L. 321, chap. 786, § 1.

We shall assume that the purpose of the license fees required by § 460 is the collection of revenue, and that the license fees are exises within the constitutional sense of the term. Nevertheless, we are of opinion that they are to be regarded as local taxes, imposed for the purpose of raising funds to support the administration of local government in Alaska.

It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a quasi state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a legislature elected by the citizens of the territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may intrust to them a large volume of legislative

[492] *power, or it may, by direct legislation, create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes.

In reference to the power of Congress, reference may be had to *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427, in which it was held that "it is within the constitutional power

of Congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District at different rates;" and further, after referring to the case of *Loughborough v. Blake*, 5 Wheat. 317, 5 L. ed. 98, it was said (pp. 407, 408, L. ed. p. 681, Sup. Ct. Rep. p. 429):

"The power of Congress, legislating as a local legislature for the District, to levy taxes for District purposes only, in like manner as the legislature of a state may tax the people of a state for state purposes, was expressly admitted, and has never since been doubted. 5 Wheat. 318, 5 L. ed. 98; *Welch v. Cook*, 97 U. S. 541, 24 L. ed. 1112; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098. In the exercise of this power Congress, like any state legislature unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In view of this decision it would not be open to doubt that, if the act had provided for a local treasurer to whom these local taxes should be paid, and directed that the proceeds be used solely in payment of the necessary expenses of the government of Alaska, its constitutionality would be clear; but the contention is that the statute requires that the proceeds of these licenses shall be paid into the Treasury of the United States, from which, of course, they can only be taken under "an act of Congress[493] making specific appropriation. In fact, all the expenses of the territory are, in pursuance of statute, paid directly out of the United States Treasury. Act of June 6, 1900, title I., §§ 2 and 10 (31 Stat. at L. 322, 325, chap. 786); act of March 3, 1901 (31 Stat. at L. 960, 987, chap. 830, U. S. Comp. Stat. 1901, p. 41); April 28, 1902 (32 Stat. at L. 120, 147, chap. 594); and February 25, 1903 (32 Stat. at L. 854, 882, chap. 755). True, there are some special provisions for revenues and their application. Thus, the fees for issuing certificates of admission to the bar, and for commissions to notaries public, are to be retained by the secretary of the district, and "kept in a fund to be known as the District Historical Library Fund," and designed for "establishing and maintaining the district historical library and museum" (act of June 6, 1900, title I., § 32, 31 Stat. at L. 333, chap. 786), and municipal corporations are authorized to impose certain taxes for local purposes. Title III., § 201, 31 Stat. at L. 521, chap. 786. By § 203, 50 per cent of all the license moneys collected within the limits of such corporations are to be paid to their treasurers, to be used for

school purposes. By subsequent legislation (31 Stat. at L. 1438, chap. 859), it is provided that if the amount thus paid is not all required for school purposes, the district court may authorize the expenditure of the surplus for any municipal purpose. And by the same statute it is also provided that 50 per cent of all license moneys collected outside municipal corporations, and covered into the Treasury of the United States, shall be set aside, to be expended for school purposes outside the municipalities. By still later legislation,—although that was enacted after the commencement of this prosecution (32 Stat. at L. 946, chap. 978),—the entire proceeds of license taxes within the limits of municipal corporations are to be paid to the treasurer of the corporation, for school and municipal purposes.

But outside of these special matters there are no provisions for collecting revenue within the territory for the expenses of the territorial government other than these license taxes and charges of a similar nature. According to the information furnished by [494] the officers of the Treasury Department, *as shown in the brief of counsel for the government, all the revenues of every kind and nature which can be considered as coming from Alaska are not equal to the cost and expense of administering its territorial government. How far we are at liberty to rely upon this information, which was not presented upon the trial of this case, or how far we can take judicial notice of the facts as shown by the records of the Treasury Department, need not be determined, for if an excess of revenue above the cost and expense of administering the territorial government must be shown to establish the unconstitutionality of the license taxes, the fact should have been shown by the plaintiff in error. The presumptions are that the act imposing those taxes is constitutional, and anything essential to establish its invalidity which does not appear of record or from matters of which we can take judicial notice must be shown by the party asserting the unconstitutionality.

The question may, then, be stated in this form: Congress has undoubtedly the power, by direct legislation, to impose these license taxes upon the residents of Alaska, providing that, when collected, they are paid to a treasurer of the territory, and disbursed by him solely for the needs of the territory. Does the fact that they are ordered to be paid into the Treasury of the United States, and not specifically appropriated to the expenses of the territory, when the sum total of these and all other revenues from the territory does not equal the cost and expense of maintaining its government, make them

unconstitutional? In other words, if, under any circumstances, Congress has the power to levy and collect these taxes for the expenses of the territorial government, is it essential to their validity that the proceeds therefrom be kept constantly separate from all other moneys, and specifically and solely appropriated to the interests of the territory? We do not think that the constitutional power of Congress in this respect depends entirely on the mode of its exercise. If it satisfactorily appears that the purpose of these license taxes is to raise revenue for use in Alaska, and that the total revenues *derived from Alaska are inadequate [495] to the expenses of the territory, so that Congress has to draw upon the general funds of the nation, the taxes must be held valid. That the purpose of these taxes was to raise revenue in Alaska for Alaska is obvious. They were authorized in statutes dealing solely with Alaska. There is no provision for a direct property tax to be collected in Alaska for the general expenses of the territory. The entire moneys collected from these license taxes and otherwise from Alaska are inadequate for the expenses of that territory. So far as we may properly refer to the proceedings in Congress, they affirm that these license taxes are charges upon the citizens of Alaska for the support of its government. While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body (*United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540), yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports. *Church of Holy Trinity v. United States*, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511. When §§ 461 and 462 were under consideration in the Senate, the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

"The Committee on Territories have thoroughly investigated the condition of affairs in Alaska, and have prepared certain licenses which, in their judgment, will create a revenue sufficient to defray all the expenses of the government of the territory of Alaska. . . . They are licenses peculiar to the condition of affairs in the territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised

on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the territory of Alaska, including the governor *and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions, and upon the information of the committee, derived from conversing with them." Vol. 32, Congressional Record, Part III, p. 2235.

While, of course, it would have simplified the matter and removed all doubt if the statute had provided that those taxes be paid directly to some local treasurer, and by him disbursed in payment of territorial expenses, yet it seems to us it would be sacrificing substance to form to hold that the method pursued, when the intent of Congress is obvious, is sufficient to invalidate the taxes.

In order to avoid any misapprehension we may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a territory of the United States revenue for the benefit of the nation, as distinguished from that necessary for the support of the territorial government.

We see no error in the record, and the judgment is affirmed.

Mr. Justice Harlan took no part in the decision of this case.

C. E. WYNN-JOHNSON, *Plff. in Err.*,
v.

JAMES M. SHOUP, United States Marshal
for the District of Alaska.

(See S. C. Reporter's ed. 496, 497.)

*Constitutional law—uniformity in taxation
—license fees in Alaska not excises.*

This case is governed by the decision in *Binns v. United States*, ante, 1087.

[No. 266.]

Submitted April 28, 1904. Decided May 31,
1904.

IN ERROR to the District Court of the United States for the District of Alaska, First Division, to review a conviction for attempting to do business in Alaska without having first paid the required license fee Affirmed.

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Messrs. S. M. Stockslager and George C. Heard submitted the cause for plaintiff in error:

The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.

Edye v. Robertson, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

A license can be required under the police power only in cases when the calling is dangerous to the public, either directly or incidentally. Hence, in the case at bar, which does not fall within such class, it must be exercised, if at all, under the power of taxation.

Tiedeman, *State & Federal Control of Persons & Property*, § 119, p. 482.

In order to justify a restrictive license the business must itself be of such a nature that its prosecution will do damage to the public, whatever may be the character of the qualification of those who engage in it. The power of license, as a police regulation, involves the power to prohibit, under pain or penalty, without a license, and, hence, can not apply to harmless callings.

Tiedeman, *State & Federal Control of Persons and Property*, pp. 487, 493.

The police power includes everything essential to the public safety, health, and morals. But the legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The right to use property in the prosecution of any business which is not injurious or offensive to the community at large or to persons within its vicinity is one of the legal attributes of ownership of property of which the owner cannot be deprived by any state law or municipal ordinance.

8 Cyc. Law & Proc. p. 873; *People ex rel. Valentine v. Berrien Circuit Judge*, 124 Mich. 664, 50 L. R. A. 493, 83 Am. St. Rep. 352, 83 N. W. 594; *Re Hong Wah*, 82 Fed. 623.

When the license fee charged is in excess of the cost of issuing the license, and a necessary regulation of the business, it is a tax.

Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 Sup. Ct. Rep. 510; *Cooley*, Const. Lim. §§ 201, 495, 587; *Cooley*, Taxn. §§ 531, 592.

As to the distinction between tax and license for regulation, we refer to *Dill. Mun. Corp.* §§ 358, 359, 368, and authorities there cited.

As to the police power, we refer to *Cooley*, Taxn. pp. 75, 586, 587, 605; *Burroughs*, Taxn. p. 509.

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An unlimited power in the legislature to make any and every thing lawful which it might see fit to call taxation would, when plainly stated, be an unlimited power to plunder the citizen.

Cooley, Taxn. 7th ed. p. 183; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416.

Assistant Attorney General Purdy, submitted the cause for defendant in error. For his contentions, see his brief as reported in *Binns v. United States*, ante, 1087.

Mr. Justice Brewer delivered the opinion of the court:

This case is similar to the one just decided, and, for the reasons given in that opinion, the judgment of the District Court of Alaska is affirmed.

Mr. Justice Harlan took no part in the decision of this case.

PUBLIC CLEARING HOUSE, Appt.,

v.

FREDERICK E. COYNE, Postmaster, etc.

(See S. C. Reporter's ed. 497-516.)

Constitutional law — validity of legislation restricting the use of the mails—due process of law—when judicial hearing unnecessary — interference with private mail matter—confiscation—lottery schemes.

1. The lack of any provision for a judicial hearing on the question of illegality does not render repugnant to the due process of law clause of the Federal Constitution the provisions of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), and of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, empowering the Postmaster General to direct the seizure and return to the sender of all letters addressed to persons conducting certain prohibited enterprises, since his action is subject to revision by the courts in case he has exceeded his authority under such legislation.
2. The interference with purely private or domestic mail matter of individuals, which may be caused by the seizure and return of let-

ters directed to persons engaged in certain prohibited enterprises, under a "fraud order" issued by the Postmaster General under the authority of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), and of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, does not render such legislation repugnant to the Federal Constitution.

3. An objection to the constitutionality of the provisions of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), and of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, empowering the Postmaster General to direct the seizure and return to the sender of all mail matter addressed to persons conducting certain prohibited enterprises, on the ground that such legislation authorizes an interference with the purely domestic and private mail matter of individuals, cannot be successfully urged to invalidate a "fraud order" of the Postmaster General which only directs the return of all mail matter directed to the alleged fraudulent concerns or their officers or agents as such.
4. A change of title of the property of the addressee of registered letters is not so effected by the seizure and return to the sender, under a "fraud order" issued by the Postmaster General under the authority of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), and of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, as to render such legislation repugnant to the Federal Constitution, as authorizing confiscation.
5. A financial co-operative scheme which contemplates the creation of a fund out of enrolment fees and monthly dues, to be returned to the members at the end of a fixed period of membership in the shape of "realizations," the amount of which will depend upon the growth in membership, the plan being certain to involve a loss to everyone interested as soon as the number of members ceases to increase, because of the absence of any provision for a reserve fund, is a lottery, or scheme for the distribution of money by lot or chance, within the meaning of the provisions of U. S. Rev. Stat. § 3929 (U. S. Comp. Stat. 1901, p. 2686), as amended by the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), and of § 4041 (U. S. Comp. Stat. 1901, p. 2749), and of the act of March 2, 1895 (28 Stat. at L. 964,

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Uiman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*

tion, 2 L. R. A. 657; *Chauvin v. Valiton*, 3 L. R. A. 194; and *Uiman v. Baltimore*, 11 L. R. A. 225.

For definitions of lottery schemes—see notes to *People v. Elliott*, 3 L. R. A. 403; *Yellowstone Kit v. State*, 7 L. R. A. 599; *Ballock v. State*, 8 L. R. A. 671; and *MacDonald v. United States*, 12 C. C. A. 346.

On nonmailable matter—see note to *Timmons v. United States*, 30 C. C. A. 79.

chap. 191, U. S. Comp. Stat. 1901, p. 2688), § 4, empowering the Postmaster General to deny the privileges of the mails and the money order and registered-letter service to persons engaged in certain prohibited enterprises.

[No. 224.]

Argued April 18, 1904. Decided May 31, 1904.

A PPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a judgment dismissing, for want of equity, a bill to enjoin the postmaster of the city of Chicago from denying the privileges of the mails and of the money order and registered-letter system to the complainant by virtue of a "fraud order" issued by the Postmaster General. *Affirmed.*

See same case below, 121 Fed. 927.

Statement by Mr. Justice **Brown**:

This was a bill in equity by the Public Clearing House against the postmaster of the city of Chicago, praying for an injunction to restrain him from seizing and detaining appellant's mail, stamping it "fraudulent," and returning it to the senders thereof, and from denying to appellant the use of the money order and registered-letter system of the Postoffice Department.

An answer and replication were filed, and the cause referred to a master in chancery to take the testimony, and report the same with his conclusions thereon.

The following contains the substance of the master's report:

"1. The complainant is a corporation organized under the laws of the state of Illinois, for the purpose, as stated by its charter, of doing a general brokerage and commission business, collecting and disbursing money, and conducting an exchange or information bureau for the benefit of patrons. The evidence shows that the said complainant had made a beginning of several different kinds of business, and its managers had opened negotiations with different laundry proprietors, preparing to place laundries on a co-operative basis; also to handle fruits and poultry in the same manner, and also to purchase and sell goods on behalf of its patrons, on commission, and to exchange goods *in specie* [499] in the same manner for a commission, *and had actually transacted some small amount of such business; but the principal business and object for which the said complainant was organized appears to have been to act as the fiscal agent of a certain voluntary association called the League of Equity. This League of Equity consists of a large number of people, approximately 5,000 at present, of various occupations, and scattered throughout the United States and Canada, each of

whom, in his application for membership, consents that the Public Clearing House shall act as fiscal agent for said League of Equity. The said League of Equity was in a way successor to a prior organization called the League of Educators, and this in turn succeeded to a still prior organization called the League of Eligibles, and a certain organization or partnership called the board of managers of the League of Educators and the board of managers of the League of Eligibles were respectively fiscal agents for the two organizations.

"The League of Eligibles was established in the year 1898, and was a voluntary association of unmarried people. Their certificates became matured or realized upon the contingency of marriage, provided that such marriage did not occur within one year from the time when they joined the league. The certificate had a fixed realization value of \$500 and was paid out of the monthly *pro rata* assessment levied upon all members of the league for the benefit of those members whose certificates were matured or realized.

"The plan of the League of Educators was the same, except that it substituted a fixed time for the realization of the certificates, and eliminated the marriage contingency feature.

"2. The plan of the League of Equity differed from that of the League of Educators only in having a fixed monthly payment of \$1, instead of a fluctuating or variable assessment. When the first change was made there were about 1,300 members of the League of Eligibles, all of whom were given an opportunity to become members of the League of Educators without additional cost and without *losing the benefit of their [500] previous term of co-operation, and many of them availed themselves of this opportunity and became members of the League of Educators. Again, when the League of Equity was formed, the League of Educators consisted of some 9,000 members, who were allowed the same privilege of joining the League of Equity, and up to the time when the fraud order was issued against the latter concern, between 4,000 and 5,000 members of the League of Educators had joined the League of Equity.

"3. The evidence showed that up to about the first of November, 1902, during the period of the existence of the League of Eligibles and League of Educators, there had been collected from about 13,784 members a total of \$137,390.66, out of which the board of managers had taken about \$36,000 for their expenses and compensation for themselves and agents in the field. The remainder had been distributed among some 600 or 700 members, and at that time the board of managers had no money in their hands.

"In other words, 600 or 700 members had received an average of something less than \$170 each, and over 10,000 members had received nothing.

"4. The board of managers of the League of Educators had, during its business as fiscal agent for said league, accumulated a large number of address cards of different persons throughout the country, which had been secured through the members or co-operators, and these address cards were, at or about the time of the organization of the Public Clearing House, sold to said Public Clearing House by the said board of managers, for the sum of \$2,500.

[501] "5. The complainant, The Public Clearing House, as such fiscal agent of the League of Equity, invites people to join the said league, and holds out inducements in the shape of a large return for small amounts of money and for services to be rendered by members or co-operators in inducing others to become members or co-operators. There is no contract or agreement issued or entered into with members by the League of Equity itself as a body or association, but a certain so-called co-operator's agreement, a copy of which is attached to the bill herein, is issued to each member or co-operator, and is signed by said Public Clearing House by its president and secretary as fiscal agents for the League of Equity.

"In order to carry on successfully the business of the complainant it is necessary that it have the use of the United States mails; but it has not had the use of the mails since November 13, 1902, by reason of a 'fraud order' issued against it, dated November 10, 1902, by the Postmaster General, and as a result the business has practically been stopped.

"6. The plan or scheme of the League of Equity as set forth in the co-operator's agreement and in other literature issued by said complainant may be briefly stated as follows: Each person who becomes a member or co-operator pays \$3 as enrolment fee, and agrees to pay the sum of \$1 per month for sixty months or five years, and also agrees to 'co-operate' by inducing other persons to become members or co-operators. The agreement states that in consideration of said enrolment fee 'and the faithful compliance with the terms of this agreement hereinafter contained, the above-named person shall receive his *pro rata* share of the total amount realized (less 10 per cent) when entitled to a realization, as hereinafter provided, said realization to be in accordance with the following ordinary causation and realization table.' Then follows a table showing that if the league grows at the rate of fifteen to one, the total realization of the member at the end of five years will be at

the same rate of increase,—that is, he will receive \$900 for his \$60 paid in; if the growth is at the rate of ten to one he will receive \$600 at the end of five years, and so forth and so on down to a growth of only one to one, in which case he will receive only his money back, less the 10 per cent which is in each case deducted as the compensation of the complainant for its services and existence as fiscal agent, and less also the \$3 enrolment fee. Aside from this *10 per cent [502] and the \$3 enrolment fee, the plan does not contemplate that complainant shall retain any of the money paid in by co-operators, or that any reserve fund shall be accumulated or invested, but that the money paid in each month shall be regularly paid out each month (less 10 per cent) to the so-called realizing co-operators, *i. e.*, those whose five years' period has expired and who have continued to make the requisite monthly payments during said five years. There is an additional provision that each co-operator who shall have secured three new members in any one year may realize or receive at the end of each year one fifth of the amount which he would be entitled to receive at the end of five years, assuming that the growth for the five years continued at the same rate; but the plan contemplates that in the end the member who secures new members and the one who does not shall receive the same amount.

"7. All members who join the League of Equity during the same month constitute a class by themselves, and are entitled to realize in all respects precisely the same amount, and at the same time; excepting the member who obtains new co-operators may receive his realization in yearly instalments, instead of in one lump at the end of the five years' period.

"The only source of income to the league, and the only funds to which its members can look for payment of the promised amount, or any amount whatever, is the fund created each month by the payment of monthly dues; and the realization of any amount whatever by the new members is conditioned absolutely upon the constant acquisition of other new members and the new payments to be made by such new members. And what amount the members or co-operators will realize, as is stated by the league literature, depends entirely upon the ratio of growth of the league. No reserve fund is accumulated and no investments whatever are made of any portion of the money paid in by members."

Upon this state of facts the master came to the conclusion that the scheme of the complainant was, in effect, a lottery, *and as such [503] was not entitled to the use of the mails, and also reported to the court that the fraud

order which had been issued by the Postmaster General in October, 1902, was fully justified, and that the injunction should be denied. His action was affirmed by the Circuit Court, and the bill dismissed for the want of equity.

Mr. D. I. Sickelsteel argued the cause and filed a brief for appellant:

The appellant challenges the constitutionality of the statutes which authorize the Postmaster General, upon evidence satisfactory to him, and which do not provide for any trial, hearing, or inquiry of any kind, arbitrarily to seize the honest mail of any citizen of the United States as alleged in the bill, and to interdict and prohibit its receiving any mail, to destroy its business and its property and property rights, and to subject its papers and sealed packets to unreasonable searches and seizures.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 276, 15 L. ed. 372; *Re Siebold*, 100 U. S. 371, 25 L. ed. 717; *Palairot's Appeal*, 67 Pa. 479, 5 Am. Rep. 450; *Hoover v. McChesney*, 81 Fed. 472; *Fairfield Floral Co. v. Bradbury*, 87 Fed. 415; *United States v. Rider*, 50 Fed. 406; *United States v. Keokuk & H. Bridge Co.* 45 Fed. 178; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 97, 23 Sup. Ct. Rep. 33.

The Postmaster General, in issuing the fraud order, has acted outside of his authority under these statutes.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 111, 47 L. ed. 90, 97, 23 Sup. Ct. Rep. 33.

Even if these statutes are constitutional, yet the appellant corporation, from the facts as proved at the trial and found by the court, is not, as a matter of law, engaged in conducting any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, within the meaning of said statutes; and, the Postmaster General having assumed and exercised jurisdiction in a case not covered by said statutes, and having acted outside of the scope of the said statutes, the injunction prayed for should have been granted in any event.

Bouvier, Law Diet. Lottery; *Webster, Diet. Lottery*; *United States v. Olney*, 1 Abb. (U. S.) 278, Deady, 461, Fed. Cas. No. 15,918; *Horner v. United States*, 147 U. S. 458, 37 L. ed. 241, 13 Sup. Ct. Rep. 409; *United States v. Politzer*, 59 Fed. 276; *People v. Elliott*, 74 Mich. 264, 3 L. R. A. 403, 16 Am. St. Rep. 640, 41 N. W. 916; *Ex parte Kam-*
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eta, 36 Or. 251, 78 Am. St. Rep. 775, 60 Pac. 394; *Meyer v. State*, 112 Ga. 20, 51 L. R. A. 496, 81 Am. St. Rep. 17, 37 S. E. 96; *State ex rel. Kellogg v. Kansas Mercantile Asso.* 45 Kan. 351, 11 L. R. A. 430, 23 Am. St. Rep. 727, 25 Pac. 984; *State v. Boneil*, 42 La. Ann. 1112, 10 L. R. A. 60, 21 Am. St. Rep. 413, 8 So. 298; *Barclay v. Pearson* [1893] 2 Ch. 154, 62 L. J. Ch. N. S. 636, 3 Reports, 388, 68 L. T. N. S. 709, 42 Weck. Rep. 74; *Taylor v. Smeaton*, L. R. 11 Q. B. Div. 210, 52 L. J. Mag. Cas. N. S. 101, 48 J. P. 36; *State v. Clarke*, 33 N. H. 335, 66 Am. Dec. 723; *MacDonald v. United States*, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 426; *Lynch v. Rosenthal*, 144 Ind. 90, 31 L. R. A. 835, 55 Am. St. Rep. 168, 42 N. E. 1103; *United States v. Wallis*, 58 Fed. 942; *United States v. Fulkerson*, 74 Fed. 627; *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 83 Am. St. Rep. 754, 60 N. E. 220; 14 Am. & Eng. Enc. Law, 2d ed. p. 600; *Dunn v. People*, 40 Ill. 465; *Thomas v. People*, 59 Ill. 160; *Elder v. Chapman*, 176 Ill. 142, 52 N. E. 10; *Wilkinson v. Gill*, 74 N. Y. 67, 30 Am. Rep. 264; 23 Ops. Atty. Gen. 263.

Assistant Attorney General **Purdy** argued the cause for appellee. **Mr. W. A. Day** filed a brief for appellee:

It is no argument against the constitutionality of U. S. Rev. Stat. §§ 3929, 4041 (U. S. Comp. Stat. 1901, pp. 2686, 2749), as amended, that they do not provide for a judicial hearing in the first instance,—that the first step in their enforcement is taken by an administrative officer under administrative process,—and their validity must be affirmed, unless the court is convinced, on other grounds, that their enactment was an arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559.

These statutes as construed by this court do not deprive complainant of its right to use the mails without a judicial hearing.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

Congress may prescribe what shall be admitted to, and what shall be excluded from, the mails; and the power has no limitation, except that the basis of admission and exclusion must be reasonable and free from unjust discrimination.

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

The action of the Postmaster General under the statutes in question no more involves

the exercise of judicial power than do all those administrative duties, the performance of which involves an inquiry into the existence of facts, and the application to them of rules of law.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 280, 15 L. ed. 372, 376.

The fact that the judicial hearing is postponed a stage does not make the proceeding any the less due process so long as the postponement is not unreasonable or oppressive; and it cannot be said in this case that the postponement is unreasonable or oppressive, because the party considering himself aggrieved by the action of the Postmaster General may appeal to the courts at once.

Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The government may rest its case upon the analogy of the power vested in the controller of the currency by the national banking law, which has been repeatedly sustained and upheld by this court.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216; *Bushnell v. Leland*, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209.

Doubtless, if it were claimed that either officer had acted outside his authority,—that is, had closed a bank which was not insolvent, or denied the privileges of the mails to a person not engaged in promoting a lottery or fraud,—the courts could be appealed to for redress; since such a claim would raise an issue which none but the judicial power would be competent to pass upon.

United States v. Knox, 102 U. S. 425, 26 L. ed. 216; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

Congress is vested with the police power, or its equivalent, in respect to the postal service.

Re Rapier, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

An administrative officer charged with the execution of the law may enforce a police regulation against a person or subject-matter without it being judicially ascertained beforehand that the person or subject-matter is within the scope of the regulation (leaving it to courts to determine afterwards, in case the issue is raised, whether any vested right was invaded in the enforcement of the regulation).

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Health De-*

partment v. Trinity Church, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656.

The statutes do not clothe the Postmaster General with judicial powers.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 280, 284, 15 L. ed. 372, 376, 378; *Bushnell v. Leland*, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216; *Hoff v. Jasper County*, 110 U. S. 53, 56, 28 L. ed. 68, 3 Sup. Ct. Rep. 476; *Hempstead v. Underhill*, 20 Ark. 337, 357; *State ex rel. Martin v. Police Jury*, 32 La. Ann. 1022; *Ex parte Wells*, 21 Fla. 280; *Gough v. Dorsey*, 27 Wis. 119.

The statutes alleged to be unconstitutional are police regulations, or, at least, they are of the nature of police regulations; and, when the validity of such regulations is attacked, there are but two things to be considered: First, whether the subject is a proper one for police regulation, and second, whether the means are reasonably necessary for the accomplishment of the purpose.

Lawton v. Steele, 152 U. S. 133, 135, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499.

The closing of the mails to lotteries in order to prevent their demoralizing influence from spreading is within the police power or an equivalent power.

Re Rapier, 143 U. S. 134, 36 L. ed. 102, 12 Sup. Ct. Rep. 374.

Considering the end to be accomplished, the insidious and far-reaching effects of the evil to be suppressed, and the difficulties which, in the nature of things, beset the regulation of the subject, is the court prepared to overrule the judgment of Congress that the means which it provided are reasonably necessary to accomplish the public end desired, and to affirm that they have no real or substantial relation to that end?

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 623, 631, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger.

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501.

Laws in the nature of police regulations, such as the acts in question, are valid and cannot be challenged by the courts, notwithstanding their enforcement may cause incon-

venience, or even oppression, to some who have done nothing contrary to the policy of the laws.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1251.

If to refuse to deliver mail matter addressed to persons engaged in lotteries and frauds is unlawfully to seize such matter, then Congress is compelled arbitrarily to assist in the dissemination of matters condemned by its judgment through the governmental agencies which it controls (*Re Rapier*, 143 U. S. 134, 36 L. ed. 102, 12 Sup. Ct. Rep. 374), a somewhat strange application of a principle designed for the well-being of society.

Mr. Justice **Brown** delivered the opinion of the court:

By § 3929 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2686), as amended by [505] the act of September 19, 1890 (26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2686), "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-office at which registered letters arrive directed to any such person or company . . . to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'fraudulent' plainly written or stamped upon the outside thereof."

By § 4041 (U. S. Comp. Stat. 1901, p. 2749), the Postmaster General is authorized in similar terms to forbid the payment by any postmaster of any postal money order drawn in favor of any person engaged in the prohibited business; and by § 4 of the act of March 2, 1895 (28 Stat. at L. 964, chap. 191, U. S. Comp. Stat. 1901, p. 2688), the power thus conferred upon the Postmaster General by the preceding section, 3929 (U. S. Comp. Stat. 1901, p. 2686), is extended and made applicable to all letters or other matter sent by mail.

These acts apply to two classes of cases: First, to schemes for the distribution of money, etc., by lot, chance, or drawing of any kind; second, to all schemes or devices for obtaining money or property of any kind

by means of false or fraudulent pretenses, representations, or promises.

It seems that the Postmaster General, in issuing the fraud order in this case, acted upon the theory that the complainant was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, etc., and not in conducting a lottery; but if the order detaining the letters was properly issued, in view of all the evidence introduced in the court below, we do not think it was vitiated by the fact that the Postmaster General acted upon the hypothesis that the business in which complainant was engaged *was a fraudulent scheme instead of a lot- [506] tery, since both are within the purview of these statutes.

We find no difficulty in sustaining the constitutionality of these sections. The postal service is by no means an indispensable adjunct to a civil government, and for hundreds, if not for thousands, of years the transmission of private letters was either intrusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times, and was recognized in the Constitution and in some of the earliest acts of Congress, the rates of postage were so high, and the methods of transmission so slow and uncertain, that it was not until 1845, when the postage was reduced to 5 and 10 cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance it now possesses.

It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defense of the government against insurrection and foreign invasion, and the administration of public justice are; but is a public function, assumed and established by Congress for the general welfare, and in most countries its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue to the government, and really operates as a popular and efficient method of taxation. Indeed, this seems to have been originally the purpose of Congress. The legislative body, in thus establishing a postal service, may annex such conditions to it as it chooses.

The constitutional principles underlying the administration of the Postoffice Department were discussed in the opinion of the court in *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877, in which we held that the power vested in Congress to establish postoffices

and post roads embraced the regulation of [507] the entire postal system *of the country; that Congress might designate what might be carried in the mails and what excluded; and that in the enforcement of such regulations a distinction was made between letters and sealed packages subject to letter postage, and such other packages as were open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, and that the constitutional guaranty against unreasonable searches and seizures extended to letters, but did not extend to printed matter. In establishing such system Congress may restrict its use to letters, and deny it to periodicals; it may include periodicals, and exclude books; it may admit books to the mails, and refuse to admit merchandise; or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages. The postal regulations of this country, issued in pursuance of act of Congress, contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact; such, for instance, as liquids, poisons, explosives, and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights. While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefits of its postal service, and deny it to another person in the same class, and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as, in its judgment, are making *use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality. For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. The same provision was, by the same act, extended to

letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

It is contended, however, that the laws in question are unconstitutional in that they authorize the Postmaster General to seize and return to sender all letters addressed to a particular person, firm, or corporation which he is satisfied is making use of the mail for an illegal purpose. Their constitutionality is attacked upon three grounds: First, because they provide no judicial hearing upon the question of illegality; second, because they authorize the seizure of all letters, without discriminating between those which may contain, and those which may not contain, prohibited matter; and, third, because they empower the Postmaster General to confiscate the money, or the representative of money, of the addressee, which has become his property by the depositing of the letter in the mails.

1. It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. *Bates & G. Co. v. Payne*, 194 U. S. 106, ante, 894, 24 Sup. Ct. Rep. 595. That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and *by many [509] eminent writers upon the subject of constitutional limitations. *Doe ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 280, 15 L. ed. 372, 376; *Bushnell v. Leland*, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209. As was said by Judge Cooley, in *Weimer v. Bunbury*, 30 Mich. 201: "There is nothing in these words [due process of law], however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often taken place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would not afford redress." If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action

was finally taken, the result would entail practically a suspension of some of the most important functions of the government. Even in the recent case of the *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33, the constitutionality of the law authorizing seizures of this kind by the Postmaster General was assumed, if not actually decided, the only reservation being that the person injured may apply to the courts for redress in case the Postmaster General has exceeded his authority, or his action is palpably wrong. So, too, in the recent case of *Bates & G. Co. v. Payne*, 194 U. S. 106, ante, p. 894, 24 Sup. Ct. Rep. 595, the law was also assumed to be constitutional, the only doubtful question being whether this court should accept the findings of the Postmaster General as to the classification of the mail matter as final under the circumstances of the case. Inasmuch as the action of the Postmaster in seizing letters and returning them to the writers is subject to revision by the judicial department of the government in cases where the postmaster has exceeded his authority under the statute (*American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33), we think it within the power of Congress to intrust him with the power of seizing and detaining

[510] *letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases.

2. Nor do we think the law unconstitutional because the Postmaster General may seize and detain all letters, which may include letters of a purely personal or domestic character, and having no connection whatever with the prohibited enterprise. In view of the fact that by these sections the postmaster is denied permission to open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. It is true it may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day, containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, prima facie at least, all such letters are identified with such business. A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts. *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257;

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Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. Whether, in case a private registered letter was thus seized and detained, and damage was thereby occasioned to the addressee, an action would lie against the Postmaster General, is not involved in this case. It certainly is not made the basis of the present suit.

Another answer to this argument, which seems to be conclusive, is that the fraud order in this case is not open to this objection, as the Postmaster General only forbids the postmaster at Chicago to pay any postal money orders, drawn to the order of the League of Equity and the Public Clearing House, or their officers or agents in their capacity as such, and to inform the remitter of any such postal money order that payment thereof has been forbidden, etc., and "to return all *letters, whether registered or [511] not, or other mail matter which shall arrive at your office directed to such concerns or their officers or agents as such, to postmasters at the office at which they were originally mailed." There is nothing in the order thus worded that would authorize the postmaster at Chicago to return letters addressed to an individual unless addressed to such individual as officer or agent of the League of Equity or the complainants. There is nothing in this order that would authorize the interference with the private or domestic mail matter of individuals.

3. The objection that the Postmaster General is authorized by statute to confiscate the money, or the representative of money, of the addressee, is based upon the hypothesis that the money or other article of value contained in a registered letter becomes the property of the addressee as soon as the letter is deposited in the postoffice. The action of the Postmaster General in seizing the letter does not operate as a confiscation of the money, or the determination of the title thereto; but merely as a refusal to extend the facilities of the Postoffice Department to the final delivery of the letter. Congress might undoubtedly have authorized the postmaster at the depositing office to decline to receive the letter at all if its forbidden character were known to him; but as this would be impossible, we think the power to refuse the facilities of the department to the transmission of such letter attends it at every step, from its first deposit in the mail to its final delivery to the addressee; and as the character of the letter cannot be ascertained until it arrives at the office of delivery, the government may then act and refuse to consummate the transaction. If the letter and its contents become the property of the addressee when deposited in the mail, the subsequent seizure by the government would not impair his title or prevent an action by

him for the amount of remittance. True, this might be of no practical value to him, but it is a sufficient reply to show that the title to the letter did not change by its seizure by the postmaster.

[512] *4. The main question involved in this case, however, is whether the scheme of the complainant was within the language of §§ 3929 and 4041 (U. S. Comp. Stat. 1901, pp. 2686 and 2749). The Postmaster General, in his fraud order, a copy of which is found in the bill, assumed that the League of Equity and the Public Clearing House were engaged in conducting a scheme for obtaining money by means of false and fraudulent representations or promises; but as the master found in his report that the Clearing House and its officers had dealt fairly and honestly in respect to the collection and distribution of funds collected by them, and had not been guilty of false or fraudulent representations in order to induce persons to become members of the league, this theory was abandoned by the government, and the case put upon the ground that these corporations were engaged in conducting a "lottery or scheme for the distribution of money . . . by lot, chance, or drawing." That they were not engaged in conducting a lottery in the sense in which that word is ordinarily used is entirely clear, since this involves fixed prizes and the allotment of the prizes to the holder of numbered tickets, which are drawn from a box. In such case the word "lot" or "chance" attaches only to the name or number of the ticket drawn, and not to the amount of the prize, but the statute covers any scheme for the distribution of money by lot or chance, as well as by drawing, and by the word chance, as defined by Webster, is meant "something that befalls, as the result of unknown or unconsidered forces; the issue of uncertain conditions; an event not calculated upon; an unexpected occurrence; a happening; accident, fortuity, casualty." As stated by the master, the plan contemplates that each person who becomes a member or co-operator pays \$3 as enrolment fee, and agrees to pay the sum of \$1 per month for sixty months or five years; and also agrees to co-operate by inducing other members or persons to become co-operators, shall receive his *pro rata* share of the total amount realized when entitled to a "realization" as provided at the end of five years; or in case he shall have secured

[513] three new *members in any one year, he may realize or receive at the end of each year one fifth of the amount which he would be entitled to receive at the end of five years, assuming that the growth of the five years continued at the same rate. The plan also contemplates that in the end the member

who secures new members, and the one who does not, shall receive the same amount. All members joining the league during the same month constitute a class by themselves and are entitled to realize in all respects precisely the same amount, and at the same time, excepting the member who obtains new co-operators may receive his realization in yearly instalments instead of in one lump at the end of the five years' period.

We do not consider it necessary to enter into the details of the plan, which is a somewhat complicated one, and the success of which obviously depended upon constantly and rapidly increasing the number of subscribers or co-operators. The only money paid in was a small enrolment fee of \$3 and a monthly payment of \$1 for five years. The return to the subscribing member, which is called a realization, is not only uncertain in its amount, but depends largely upon the number of new members each subscriber is able to secure, as well as the number of members which his co-operators are able to secure. The return to members who have been able to secure a large number of other members, and to pay their own monthly dues, may be very large in comparison with the amount paid in, but the amount of such return depends so largely, and, indeed, almost wholly, upon conditions which the member is unable to control, that we think it fulfils all the conditions of a distribution of money by chance. In becoming a co-operator each new member evidently contemplates that a large number, probably a large majority, of those subscribing will drop out before the end of five years; that some will and some will not induce others to become members, and that the amount ultimately realized depends not only upon his own prompt payment of dues, and his own exertions, but upon a corresponding action by other *co-[514] operators. One thing, however, is entirely clear, and that is, the success of the scheme depends wholly upon the ability of the members to increase the number of subscribers; and, as there is no reserve fund provided for their indemnification, there is sure to be a loss to every one interested in the enterprise as soon as the number of new members ceases to increase.

Counsel for complainant likened the scheme to that of an ordinary life insurance company, which at an early date was thought by some to involve the elements of chance, but was finally held to be a legitimate business. In such policies there is the payment of a fixed sum, which matures either at the death of the assured or upon the happening of some other contingency expressly provided for in the policy. There is no uncertainty as to the amount to be paid, as in this case, nor does it depend upon the con-

duct of other persons insured in the same company, but simply upon payment of premiums by insured. The only contingency is the time as to when the policy is to mature, and the profits are calculated upon the theory that the premiums paid, with the interest thereon, will in the end amount to more than the sum becoming due upon the happening of the contingency. There is also a reserve fund provided for the security of policy holders in case no new applications are made for insurance, or the business of the company is abandoned. As the only fund provided in this scheme are small monthly payments which are constantly being divided in the shape of monthly realizations, there is no possibility of a reserve fund for the security of the co-operators. The uncertainty of the amount realized upon these settlements is evident from the fact that while a member may possibly realize as high as \$15 for every dollar invested by him, he may realize no profit at all; or, in case the business is suspended, may realize nothing.

In the careful and satisfactory report of the master the plan of the complainant is briefly described "as a plan for securing money from a constantly increasing large number for the benefit of a constantly increasing smaller number, with an *absolute [515] certainty that when the enterprise reaches an end for any reason the large number will lose every dollar they have put into it, and in the meantime the smaller number will have realized such amounts as may have resulted from the growth of the larger number; but no one can predict what that growth will be."

It is true, as urged by the counsel for complainant, that in investing money in any enterprise the investor takes the chance of small profits, or even of failure, as well as the hope of large profits; but such enterprises contemplate the personal exertions of the investor, or of his partners, agents, or employees, while in the present case his profits depend principally upon the exertions of others, over whom he has no control, and with whom he has no connection. It is in this sense the amount realized is determinable by chance.

The scheme lacks the elements of a legitimate business enterprise, and we think there was no error in holding it to be a lottery within the meaning of the statute. Indeed, we think that no scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise. The cases upon the subject of the definition of a lottery are carefully collated and criticized by Mr. Justice Blatchford in *Horner v. United States*, 147 U. S. 449, 458, 37 L. ed. 237, 241, 13 Sup. Ct. Rep. 409, and 194 U. S. U. S., Book 48.

are held to extend to all schemes for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fairs, etc., and various forms of gambling.

That the party injured has a right to invoke the judicial power of the government whenever his property rights have been invaded by the exercise of such power was settled by this court in *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, as well as in the *McAnnulty Case*. But, as already indicated, it would practically arrest the executive arm of the government if the heads of departments were required to obtain the sanction of the courts upon the multifarious questions arising in their departments, before action were taken, in any matter which might involve the temporary disposition of private property. *Each executive department has [516] certain public functions and duties, the performance of which is absolutely necessary to the existence of the government, but it may temporarily, at least, operate with seeming harshness upon individuals. But it is wisely indicated that the rights of the public must, in these particulars, override the rights of individuals, provided there be reserved to them an ultimate recourse to the judiciary.

In the view we have taken of this case, and of the action of the court below, as well as of the course of the argument here, we have not found it necessary to inquire whether the action of the Postmaster General in basing his fraud order upon the theory that the defendants were engaged in a scheme for obtaining money or property by means of false representations was sustainable or not. As already stated, the master found that there had been no false representations of existing facts and no unfair dealing with the co-operators; yet, as we held in *Durland v. United States*, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. Rep. 508, the misrepresentation of existing facts is not necessary to a conviction under a statute applying to "any scheme or artifice to defraud." As was observed by Mr. Justice Brewer (p. 313, L. ed. p. 711, Sup. Ct. Rep. p. 511): "Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. . . . In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." But, notwithstanding this question, we are satisfied the Postmaster General did not exceed his authority in mak-

ing the order in this case, and *the judgment of the court below is therefore affirmed.*

Mr. Justice **Brewer**, Mr. Justice **White**, and Mr. Justice **Holmes** concurred in the result.

Mr. Justice **Peckham** dissented.

[517] *CITY OF CLEVELAND *Appt.*,
v.
CLEVELAND CITY RAILWAY COM-
PANY.

(See S. C. Reporter's ed. 517-538.)

Jurisdiction of Federal circuit court—case involving questions of impairment of contract obligation—equitable jurisdiction to restrain enforcement of ordinance reducing street railway rates—constitutional law—validity of municipal reduction of street railway rates—impairment of contract obligation—municipal corporations—right to renew street railway grant before expiration of original grant.

1. An objection that no question as to the impairment of contract obligations could arise from the enforcement of a municipal ordinance reducing street railway rates, because the right to regulate such rates was expressly reserved in a prior ordinance, cannot be successfully urged to defeat the jurisdiction of a Federal circuit court of a suit to enjoin such enforcement, where complainant relies wholly upon contracts alleged to have resulted from subsequent ordinances which, it was in substance asserted, had deprived the municipality of the power to exercise such reserved right.
2. Jurisdiction of a Federal circuit court of a suit to enjoin the enforcement of a municipal ordinance reducing street railway rates cannot be defeated on the theory that a lack of delegated power to adopt the ordinance withdrew from the case any question as to the impairment of contract obligations, where the municipality's defense is that certain other ordinances asserted as contracts did not deprive it of its continued power to exert authority over such rates, because the state law prevented it from abrogating, by subse-

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; *Bailey v. Mosher*, 11 C. C. A. 308; and *Re Buchanan*, 39 L. ed. U. S. 884.

As to when equity will enjoin enforcement of municipal ordinance—see note to *New Orleans Waterworks Co. v. New Orleans*, 41 L. ed. U. S. 519.

On contract exemptions from legislative power to fix tolls, rates, or prices—see notes to *Winchester & L. Turnp. Road Co. v. Croxton*, 33 L. R. A. 177, and *Detroit v. Detroit Citizens' Street R.* Co. 46 L. ed. U. S. 592.

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quent contracts, the right of regulation expressly reserved in a prior ordinance.

3. Equity will entertain jurisdiction of a suit to restrain, as impairing contract obligations, the enforcement of a municipal ordinance reducing street railway rates on a section only of a consolidated line, in view of the public interests and of the controversies, confusion, risks, and multiplicity of suits which would necessarily be occasioned by resistance to the enforcement of the ordinance.
4. The requisite written acceptances of various municipal ordinances for the consolidation and extension of street railway lines, which secured to the public, for the limited time during which the privileges therein granted should continue, the benefit of a single fare of not more than 5 cents for a continuous passage over the whole length or any portion of the consolidated and extended lines, created a contract right to charge that rate, which could not afterwards be reduced by the municipality over a portion of the consolidated lines, under the authority of a right to regulate fares, reserved in an ordinance adopted before the consolidation, granting a renewal franchise to the corporation which then owned that portion of the lines.
5. A municipal contract which secures to the public for a term of years the benefit of a single fare of not more than 5 cents for a continuous passage over the whole length, or any portion of consolidated and extended street railway lines does not violate the provision of Bates's (Ohio) Anno. Stat. 1897, § 2502, that a municipal corporation shall not, during the term of a street railway grant, or renewal thereof, release the grantee from any obligation or liability thereby imposed, because such contract deprives the municipality of the right to regulate fares over a portion of the consolidated lines, reserved in an ordinance adopted before the consolidation, granting a renewal franchise to the corporation which then owned such portion of the lines.
6. The right to renew street railway grants, conferred upon municipal councils by Bates's (Ohio) Anno. Stat. 1897, § 2501, may be exercised prior to the expiration of the original grant, although the language of such section is that "the council may renew any such grant at its expiration."

[No. 255.]

Argued April 26, 27, 1904. Decided May 31, 1904.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio, to review a decree perpetually enjoining the enforcement of a municipal ordinance reducing street railway rates, as an impairment of contract obligations. *Affirmed.*

See same case below, 94 Fed. 385.

Statement by Mr. Justice **White**:

This suit was brought in the circuit court to restrain the enforcement of an ordinance [518] of the city of Cleveland, passed October, 194 U. S.

1898, fixing the rates of fare to be charged by the appellee on a portion of its line of street railroad.

The bill based the right to relief upon two grounds; that is, a violation of the contract clause of the Constitution of the United States, and of the due process clause of the 14th Amendment; the latter because the rates fixed by the ordinance, if enforced, would be confiscatory.

After hearing, a temporary injunction was allowed. The court, in stating its reasons, confined them exclusively to the alleged impairment of the obligations of contracts, and decided that it was unnecessary to consider the rights alleged under the 14th Amendment. 94 Fed. 385.

Both parties thereupon amended their pleadings, so that upon the face of the record the facts concerning the alleged impairment of contract rights appeared as found by the court in awarding the temporary injunction. The bill as amended, however, also reiterated the facts originally claimed to constitute a violation of the due process clause of the 14th Amendment. The pleadings being thus amended, the complainant moved as follows:

"The above-named complainant, The Cleveland City Railway Company, now comes and moves the court to enter final decree in its favor as prayed for in the amended bill of complaint herein, adjudging the ordinance in said amended bill of complaint described, entitled 'An Ordinance to Provide for a Diminution of the Rate of Fare under Section 7 of an Ordinance Passed August 25th, 1879, entitled "An Ordinance Granting a Renewal of Franchise to the Kinsman Street Railroad Company to Reconstruct, Maintain and Operate its Street Railroad in and Through Certain Streets of the City of Cleveland,"' passed October 17, 1898, to be null and void and of no effect, in that, as appears by the amended bill of complaint and the admissions of the amended answer herein, said ordinance is in violation of the contract obligations existing between the complainant and the defendant herein, and [519]impairs the contract rights of the *complainant, in violation of the Constitution of the United States.

"Complainant further shows that, upon the amended bill, amended answer, and replication, it is entitled to the decree without a determination of any of the matters in respect to which issues are raised by the amended answer of the defendant herein."

The court granted this motion for the reasons which it had expressed in the opinion by it delivered on the allowance of the temporary injunction. A final decree was thereupon entered, perpetually enjoining the enforcement of the assailed ordinance.

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Because of the constitutional question the case was then appealed directly to this court.

Messrs. Newton D. Baker and D. C. Westenhaver argued the cause and filed a brief for appellant.

Mr. William B. Sanders argued the cause and filed a brief for appellee.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

As will appear by the statement just made, whilst two grounds under the Constitution of the United States were asserted in the bill as originally filed and as amended, the cause was in effect submitted to the court for decree upon one of the constitutional grounds alone,—that is, the alleged impairment of the obligations of certain asserted contracts. Conceding that the alleged rights based on the due process clause were not waived, but were merely reserved for future action, it is manifest that the motion of the complainant for decree on the face of the pleadings confined the controversy exclusively to the alleged contract rights, and we shall therefore treat the case as if it solely involved such rights. The facts necessary to a determination of the question of contracts *and their im-[524]pairment appear on the face of the pleadings, and may be summarized as follows:

On August 25, 1879, an ordinance was passed by the city council of Cleveland, granting to the Kinsman Street Railroad Company, an Ohio corporation, a renewal franchise for twenty-five years from September 20, 1879, to reconstruct, maintain, and operate its street railroad in and through certain streets of the city of Cleveland. The ordinance was duly accepted. A section of the ordinance was as follows:

"Sec. 7. Said company shall not charge more than 5 cents fare each way for one passenger over the whole or any part of its line, but said company may charge a reasonable compensation for carrying packages; the council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient."

In 1880 another Ohio corporation, known as the Woodland Avenue Railway Company, then operating a line of street railroad under several grants from the city of Cleveland, became, by purchase, the owner of the Kinsman Street Railroad, and thereafter operated such road.

The Woodland Avenue Railway Company, in May, 1883, was granted by ordinance the right to construct an extension of its line, and provision was made in the ordinance for

a charge of one fare over the entire line, including the extension. The extension was built and operated as required by the ordinance.

At the time the ordinance extending the Woodland avenue road just referred to was passed there was in existence another Ohio corporation, styled the West Side Street Railroad Company, operating a line of railroad in Cleveland under a franchise granted by the city council of Cleveland for a term of twenty-five years from February 10, 1883. This road was independent of the Woodland Avenue Railway Company, and operated its cars chiefly upon the west side of the Cuyahoga river, the Woodland avenue line being upon the east side. There was no exchange [525] of traffic between the roads by way of transfers, and each was charging a fare of 5 cents over its line. In 1885, with this condition of affairs existing, the roads named were consolidated as the Woodland Avenue & West Side Street Railroad Company, and the consolidated company became vested with all the property, rights, and privileges of the two constituent companies. The ordinance, the acceptance of which accomplished such consolidation, was as follows:

"An Ordinance to Fix the Terms and Conditions Upon Which the Railway Tracks of the West Side Street Railroad Company and the Tracks of the Woodland Avenue Railway Company and Said Companies May Be Consolidated.

"Sec. 1. Be it ordained by the city council of the city of Cleveland, that the consent of the city is hereby given to the consolidation of the West Side Street Railroad Company and the Woodland Avenue Railway Company on the following conditions:

"The said consolidated company to carry passengers through without change of cars by running all cars through from the workhouse on the Woodland Avenue Railway to the point on the West Side Street Railroad where Condon avenue crosses Lorain street, and, when practicable in the judgment of the council, to do likewise on the branches of the consolidated line, and that for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than 5 cents shall be collected, and that tickets at the rate of eleven for 50 cents or twenty-two for \$1 shall at all times be kept for sale on the cars by conductors.

"Sec. 2. Said consolidated company shall be subject to all the liabilities, conditions, and penalties to which said several companies are liable; and said consolidated company and its tracks shall, at all times, be subject to the control, regulation, and supervision of the city council, to the same ex-
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tent that the same several companies and their tracks are now liable.

"Sec. 3. This ordinance shall take effect and be in force from and after its passage and legal publication, the filing with *the [526] city of a written agreement accepting and agreeing to the terms thereof, signed by the proper persons for the companies consolidated, and the payment to the city of the expenses of printing and publishing this ordinance.

"Passed February 16, 1885."

By ordinance dated April 8, 1887, duly accepted, the Woodland Avenue & West Side Street Railroad Company was authorized to lay an additional track and extend its line of railroad. The first section of the ordinance reads as follows:

"Sec. 1. Be it ordained by the city council of the City of Cleveland, that the Woodland Avenue & West Side Street Railroad Company, its successors and assigns, be and the same is hereby authorized and empowered to lay an additional track in Franklin avenue, between Pearl street and the westerly line of Franklin circle, and to extend its line of railroad to Franklin avenue from the westerly line of Franklin circle to Kentucky street, as a single track railroad, and connect with the tracks of said company in Kentucky street, as shown on a plan accompanying the petition of said railroad company, and referred to the board of improvements March 14, 1887, and to equip and operate said extension as herein provided, but on the express condition that no increase of fare shall be charged by said railroad company on any part of its main line or on said extension, and so that but one fare, not to exceed 5 cents, shall be charged between any points on said company's main line or extension, including the extension herein granted, and said company shall sell tickets on its cars as follows: Eleven (11) tickets for 50 cents, and twenty-two (22) for \$1. And the right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908."

By ordinance dated August 12, 1887, duly accepted, the Woodland Avenue & West Side Street Railroad Company was authorized to build, equip, and operate an extension of its road therein provided for, the first section containing a provision as to rates of fare and the time of expiration of the right *granted, similar to that contained in the [527] 1st section of the ordinance of April 8, 1887, above quoted. The said railroad company also duly accepted an ordinance, passed on or about June 20, 1892, by the city council of Cleveland, relating to the laying of an additional track on Kinsman street, and the 1st section of the ordinance con-

tained a similar provision to that embodied in the two ordinances last referred to, respecting rates of fare and the time when the right granted should expire.

Prior to May, 1893, besides the Woodland Avenue & West Side Street Railroad Company, there existed in Cleveland a railroad corporation known as the Cleveland City Cable Railway Company. This corporation, as the successor in right of previous corporations, operated two street railroad lines, one by horse power and the other by cable, and each of said lines charged a cash fare of 5 cents.

In June, 1893, with the approval of the common council of the city of Cleveland, the Cleveland City Cable Railway Company and the Woodland Avenue & West Side Street Railroad Company became a consolidated corporation, under the name of the Cleveland City Railway Company, the complainant in this cause. By the consolidation it was provided that the lines should be operated as one system, that proper transfers should be issued, and that but one fare should be charged for a continuous passage upon any portion of the consolidated lines.

It is admitted that, as the result of the various ordinances and consolidations above referred to, the corporations ceased to charge a cash fare of 5 cents for riding over the roads embraced in the Kinsman Street Railroad ordinance of 1879, and on the other roads which had been at that time in existence; and, on the contrary, in consequence of the ordinances and authorized consolidations, there was charged only 5 cents for a ride over the whole system or systems, and tickets were sold and transfers issued as provided in the various ordinances. It is not asserted that the corporations at any time failed to perform the additional obligations imposed upon them by the various ordinances passed subsequently to 1879.

[528] *On October 17, 1898, an ordinance was adopted by the council of the city of Cleveland, reading as follows:

"An Ordinance to Provide for a Diminution of the Rate of Fare Under Section 7 of an Ordinance Passed August 25, 1879, Entitled 'An Ordinance Granting a Renewal of Franchise to the Kinsman Street Railroad Company to Reconstruct, Maintain, and Operate Its Street Railroad in and Through Certain Streets of the City of Cleveland.'

"Whereas, the city council did, on the 25th day of August, 1879, pass an ordinance entitled 'An Ordinance granting a Renewal of Franchise to the Kinsman Street Railroad Company to Reconstruct, Maintain, and Operate Its Street Railroad in and Through Certain Streets of the City of

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Cleveland,' by which ordinance said Kinsman Street Railroad Company, its successors, and assigns, were authorized to reconstruct, maintain, and operate its double-track street railroad, commencing on Superior street, at the intersection of Water street, thence to and around the southwest corner of Monumental square to Ontario street; thence through Ontario street to and through a portion of Broadway street to Woodland avenue (formerly Kinsman street), thence through said avenue to Madison avenue, subject to certain conditions and limitations; and

"Whereas, it was ordained, as part of these conditions and limitations (§ 7), that 'said company shall not charge more than 5 cents fare each way for one passenger over the whole or any part of its line, but said company may charge a reasonable compensation for carrying packages; the council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient;' and

"Whereas, the council does now deem justifiable and expedient a diminution of the rate of fare, therefore—

"Sec. 1. Be it ordained by the city council of the city of Cleveland, that the rate of fare for a single continuous passage over the lines, and all extensions thereof, operated under the aforesaid grant to the said Kinsman Street Railroad Company, *be, and is[529] hereby, fixed at four (4) cents cash fare over the whole or any part thereof.

"Sec. 2. For the better accommodation of the public any person, company, or corporation operating said line of railway under said grant shall at all times keep on sale on the cars, when in operation, tickets good for a single continuous passage over said lines and all extensions thereof at the rate of seven tickets for 25 cents.

"Sec. 3. This ordinance shall take effect and be in force from and after its passage and legal publication."

And this ordinance is the one complained of, the enforcement of which the final decree below enjoined.

Bearing the facts above stated in mind, we come to consider the merits of the case. Before proceeding, however, to do so, we must dispose of contentions made below and reiterated in the argument in this court, concerning the jurisdiction of the circuit court.

The alleged want of jurisdiction in the circuit court is based upon two propositions; first, that the suit is not one arising under the Constitution of the United States; and, second, that the subject-matter of the suit is not within the cognizance of a court of equity.

The argument in support of the first contention presents a twofold aspect: (a) That as the reduction of fares provided in the assailed ordinance only related to carriage over that portion of the consolidated road which was formerly owned by the Kinsman Street Railroad Company, no impairment of the obligation of a contract could or did arise, because in the ordinance of 1879 there was an express reservation of the right of the city to alter the rates of fare as to the road affected by that ordinance.

The proposition is without merit. It assumes a false issue; and upon that erroneous premise, the challenge to the jurisdiction is based. The complainant did not rely upon a contract arising from the ordinance of 1879, but upon the contracts alleged to have resulted from the subsequent [530] ordinances, which *it was in substance asserted had deprived the city of the power to exercise the right reserved in the ordinance of 1879, and it was these subsequent contracts which it was contended were impaired by the assailed ordinance.

(b) That there was no jurisdiction, even although the complainant relied upon contracts arising from the ordinances adopted subsequent to that of 1879. To constitute the impairment of a contract within the sense of the Constitution, it is correctly argued, requires that some subsequent action taken by the state or under its authority should have been given effect as against the contract. The argument is that as there had not been delegated by the state of Ohio to the city of Cleveland independent authority to reduce rates of fares on street railroads, and as the power asserted by the assailed ordinance was based solely on the right reserved in the ordinance of 1879, it follows that the assailed ordinance, even if unwarranted, was not an impairment of a contract right in the constitutional sense.

This proposition is in conflict with the one just considered, and in effect assumes that the defense of the city was without merit, and hence there was no jurisdiction. But irrespective of the assumption upon which it rests, the proposition is untenable, and the argument by which it is sought to be sustained is somewhat wanting in consistency. The passage by the city of the assailed ordinance necessarily amounted to an assertion on its part that the legislative authority vested in it to pass the ordinance of 1879 gave the continued power to pass subsequent ordinances executing the rights initiated by the ordinance of 1879, despite the ordinances which had supervened. This in its very essence was the assertion of a delegated power to legislate against the contracts embodied in the ordinances relied upon. We have said that the argument is

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somewhat wanting in consistency, because the contention of the city on the record is that the ordinances asserted as contracts, passed subsequently to 1879, did not deprive the city of the continued power to exert authority as to rates, because *the statutes of [531] Ohio prevented the city from abrogating, by the subsequent contracts, the rights reserved in the ordinance of 1879. And this is but to assert that, as a consequence of the continued effect of the legislation of the state of Ohio, the city had the power to pass the assailed ordinance, even although it had apparently disabled itself from so doing by the passage of many ordinances adopted after 1879 and up to the time when the assailed ordinance was passed. These considerations distinguish this case from *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90, and *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575, relied upon by the appellant.

Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion, risks, and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity. This conclusion is, we think, besides, inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily would have engendered the enforcement of two rates of fare over the same line, leading to consequences dangerous to the public interest, peace, and tranquillity, the extent of which it would be difficult in advance to perceive. And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

We come, then, to the merits. For convenience of reference we copy in the margin†

†Copied from Bates's Annotated Statutes of Ohio—Revision of 1897.

Sec. 2501. (Terms and conditions of construction and operation to be fixed by council; renewal of grant.)—No corporation, individual, or individuals shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission and prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated, and

[532]pertinent sections of the Revised Statutes *of Ohio, embracing all which, either directly or indirectly, during the period covered by the ordinances set out in the bill, vested the municipal council of Cleveland with [533]power to regulate *or to contract in respect to the rates of fare to be charged by street railways.

the streets and alleys which shall be used and occupied therefor; but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest.

Sec. 2502. (Proceedings to establish a street railroad route; grant not valid for more than twenty-five years.)—Nothing mentioned in the next preceding section shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon recommendation of the board of public works in cities having such a board, and of the board of improvements in other municipalities having such a board; and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given by the clerk of the corporation in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation, for the period of at least three consecutive weeks; and no such grant as mentioned in said preceding section shall be made, except to the corporation, individual, or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rate of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed; provided, that no grant or renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal, except in cities of the second grade of the second class, in which no grant or renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than fifty years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant.

Sec. 2504. (Pavement of streets where railroads are constructed; proviso.)—The council may require any part or all of the track between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders, or the Nicholson or other wooden or asphaltic pavement, as may be deemed proper; but without the corporate limits, paving between the rails with stone, boulders, or Nicholson, or other wooden or asphaltic pavement, shall not be required; provided, that in cities of the second grade of the first class the council may require of any street railroad company to pave and keep in constant repair, sixteen feet for a double track or seven feet for a single track, all of

The statutes show that there was lodged by the legislature *of Ohio in the municipal [534] council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case

which pavement shall be of the same material as the balance of the street is paved with.

Sec. 2505. (Council of city or village may grant extension of street railroad.)—The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of §§ 3,437, 3,438, 3,439, 3,440, 3,441, 3,442, and 3,443, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation.

Sec. 2505b. (Consolidation.)—Wherever the lines or authorized lines of road of any street railroad corporations or companies meet or intersect, or whenever any such line of any street railroad corporation or company, and that of any inclined plane railway or railroad company or corporation, or any railroad operated by electricity or other means of rapid transit may be conveniently connected, to be operated to mutual advantage, such corporations or companies, or any two or more of them, are hereby authorized to consolidate themselves into a single corporation; or whenever a line of road of any street railroad company or corporation organized in this state is made, or is in process of construction to the boundary line of the state, or to any point either within or without the state, such corporation or company may consolidate its capital stock with the capital stock of any corporation or company, or corporations or companies, in an adjoining state, the line or lines of whose road or roads have been made or are in process of construction to the same point or points, in the same manner, and with the same effect as provided for the consolidation of railroad companies in §§ 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, and 3392 of the Revised Statutes, and any and all acts amendatory and supplementary to said sections and each of them; and the said sections, including these so amended and supplemented, are adopted and made a part of this section.

Sec. 3443. (Council, etc., may fix terms and conditions.)—Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such [street] railways may be constructed, operated, extended, and consolidated.

(3443-12.) Sec. 5. (Consolidation.)—Such street railroad companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies; provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation.

of an extension or consolidation no increase in the rate of fare should be allowed.

That in passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state, as an agency of the state, cannot in reason be disputed. If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinance of October, 1898, impaired these contracts.

The question for decision, then, is, Did the consolidated ordinance of February, 1885, and the ordinances thereafter passed and accepted, already referred to, constitute binding contracts in respect to the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant?

That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. *Cincinnati & S. R. Co. v. Carthage*, 36 Ohio St. 631, 634; *Columbus v. Columbus Street R. Co.* 45 Ohio St. 98, 12 N. E. 651. But let us consider [535] the question without *treating the Ohio decisions as conclusive. It is undoubtedly true that immediately before, and for a long time prior to, the passage of the ordinances concerning the various consolidations and extensions referred to, the respective roads affected thereby were charging a cash fare of 5 cents over their respective lines, and that the effect of the consolidations and extensions was to secure to the public the benefit of a cash fare of 5 cents over the whole length of the consolidated and extended lines.

Now, undoubtedly, the common council of Cleveland, in authorizing the extension and consolidation of the lines of street railroads in question, did so because, in its opinion, such extensions and consolidations would operate beneficially to the public. See near the close of § 2505, Ohio Rev. Stat., previously inserted in the margin. That in exercising these powers it was the intention of the city to avail of the authority conferred by § 3443 of the Revised Statutes of Ohio, "to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated," and that it was also the intention of the city to execute binding agreements in respect to the rates of fare to be thereafter charged by the railroad companies, will, we think, become

clearly apparent by considering the language employed in the ordinances. Thus, in the ordinance of February 16, 1885, fixing the terms and conditions upon which the West Side Street Railroad Company and the Woodland Avenue Railway Company, and the tracks of those companies, might be consolidated, it was specifically provided "that for a single fare from any point to any point on the line or branches of the consolidated road, no greater charge than 5 cents shall be collected, and that tickets at the rate of eleven for 50 cents or twenty-two for \$1 shall at all times be kept for sale on the cars by conductors." The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing, and filed with the city. Like provisions were contained in the ordinance of April 8, 1887, authorizing the laying *of an addition- [536] al track and the extension of the lines of the Woodland Avenue & West Side Street Railroad Company, and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that "The right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908." The ordinance of August 12, 1887, authorizing a further extension, and the ordinance of June 20, 1892, authorizing the double tracking of a portion of the line, contained similar language.

In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, and approvingly referred to in *Knoxville Water Co. v. Knoxville*, 189 U. S. 437, 47 L. ed. 891, 23 Sup. Ct. Rep. 531. This being the case, the question is whether the ordinance

of 1898 impaired the obligations of those contracts.

By the assailed ordinance the city of Cleveland, assuming to assert continuing delegated power, and upon the theory that the subsequent contracts were void as to that power, disregarded the provisions for [537] consolidations, extensions, etc., and *whilst retaining all the benefits procured by the ordinances for the public, reduced the cash and ticket fares over the portions of the line embraced in the ordinance of 1879, of the Kinsman Street Railroad, which had long since lost its identity and become merged with other roads. That this was an impairment of the contracts embodied in the prior ordinances, we think is free from doubt.

Finally, it is contended that the ordinances embodying the contracts were void in so far as they attempted to deprive the city of the continuing legislative power to act on the reservation contained in the ordinance of 1879. This is based on the assumption that the right reserved in that ordinance to increase or reduce rates of fare was an obligation and liability imposed upon the railroad corporation within the meaning of § 2502 of the Revised Statutes of Ohio, declaring that a municipal corporation should not, during the term of a grant or renewal thereof, release the grantee from any obligation or liability imposed by grant. But it has been held in Ohio, on reasoning commending itself, that a modification of a contract between a municipality and the owner of a street railroad, made in good faith, for the better accommodation of the public, is not void by virtue of said § 2502 of the Revised Statutes of Ohio. *Clement v. Cincinnati*, 16 Ohio L. J. 355, decided June 14, 1886, by the general term of the superior court of Cincinnati; leave to file a petition in error refused by the supreme court of Ohio, on January 17, 1888. 19 Ohio L. J. 74.

It is further contended "that any attempt to treat the consent to extensions, consolidations, or change of motive power as renewals of the rights renewed by the ordinance of 1879, must be nugatory in view of the positive provisions of the statute above cited, which confer upon municipal corporations power to make such renewals only at the expiration of existing grants." This contention has also been passed upon by the courts of Ohio, construing the provisions of the Revised Statutes of that state, relied upon, and it has been held that renewals [538] may *be made before the expiration of the original grant. *State ex rel. Hadden v. East Cleveland R. Co.* 6 Ohio C. C. 318, affirmed by the supreme court of Ohio without opinion, 27 Ohio L. J. 64.
194 U. S.

Concluding, as we do, that the ordinance of 1898 impaired the obligations of contracts entered into by the city of Cleveland fixing the rate of fare to be charged on the lines of railroad operated by the complainant, *the decree of the Circuit Court adjudging the nullity of this ordinance was right, and it is therefore affirmed.*

Mr. Justice **Harlan** took no part in the decision of this cause.

CITY OF CLEVELAND, *Appt.*,

v.

CLEVELAND ELECTRIC RAILWAY
COMPANY.

(See S. C. Reporter's ed. 538-540.)

Jurisdiction of Federal circuit court—case involving questions of impairment of contract obligation—equitable jurisdiction to restrain enforcement of ordinance reducing street railway rates—constitutional law—validity of municipal reduction of street railway rates—impairment of contract obligation—municipal corporations—right to renew street railway grant before expiration of original grant.

This case is governed by the decision in *Cleveland v. Cleveland City R. Co.*, ante, 1102.

[No. 256.]

Argued April 26, 27, 1904. Decided May 31, 1904.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio to review a decree perpetually enjoining the enforcement of a municipal ordinance reducing street railway rates, as an impairment of contract obligation. *Affirmed.*

See same case below, 94 Fed. 385.

Messrs. Newton D. Baker and **D. C. Westenhaver** argued the cause and filed a brief for appellant.

Mr. William B. Sanders argued the cause and filed a brief for appellee.

Mr. Justice **White** delivered the opinion of the court:

This case is analogous in the facts shown by the record to *the one just decided (*Cleveland v. Cleveland City R. Co.* 194 U. S. 517, ante, 1102, 24 Sup. Ct. Rep. 756), and presents identical questions of law. [539]

We shall briefly advert to some only of the material facts.

An ordinance was passed by the city council of Cleveland in 1879, granting a renew-

al of franchise to the East Cleveland Railroad Company, and in § 6 of the ordinance it was provided as follows:

"Said company shall not charge more than 5 cents fare each way for one passenger over the whole or any part of the line herein renewed, but said company may charge a reasonable compensation for carrying packages. The council, however, reserves the right to hereafter increase or diminish the rate of fare, as it may deem justifiable and expedient."

By ordinances duly accepted, passed in 1886, 1888, and 1889, extensions were authorized, the right was given to double-track portions of the line, the franchise was extended, and additional obligations were assumed by the railroad company in respect to paving, etc. It was expressly stipulated in the ordinances of 1886 and 1887 that the company should charge and collect for passage over its lines in either direction but one fare, of not more than 5 cents; there was no reservation of the future right to alter rates of fare; and it was agreed that the rights conferred should continue during the life of the franchise.

In 1893 the East Cleveland Railroad Company was consolidated with three other corporations, independent lines of railway, in the city of Cleveland, each of them operating under contracts or grants from the city, and charging, as authorized in the ordinance permitting their operation, a cash fare of 5 cents. As to no one of these companies was there any right remaining in the city council to increase or diminish the rate of fare during the period of the several grants. The fare then being charged by all the constituent companies was 5 cents. Since the consolidation the system has been operated in its entirety, and but a single fare of 5 cents has been charged.

[540] On October 17, 1898, the city council of Cleveland passed **an* ordinance reducing the cash fare to be charged by the complainant on the portion of its line affected by the ordinance of 1879 to 4 cents, and required seven tickets to be sold for 25 cents. The validity of this ordinance was assailed by the bill filed in this cause, and similar contentions were urged against its constitutionality as are contained in the bill filed in the suit brought by the Cleveland Railway Company. Like jurisdictional objections were also interposed in this case by the city of Cleveland as were raised in the other case.

The circuit court granted a motion for judgment upon the pleadings, and decreed that the ordinance of 1898 was void because it impaired the obligations of prior contracts. 94 Fed. 385. The principles applied in the case of the Cleveland City Railway

Company, just decided, govern this case, and, as a result, *the decree of the Circuit Court must be, and it is, affirmed.*

Mr. Justice Harlan took no part in the decision of this cause.

WALTER N. DIMMICK, *Appt.*,

v.

JOHN W. TOMPKINS, Warden of the State Prison of the State of California, at San Quentin.

(See S. C. Reporter's ed. 540-552.)

Appeal in habeas corpus proceedings — imprisonment cannot be shortened by convict's efforts to postpone beginning of sentence—validity of sentence of Federal court to imprisonment in state prison — questions reviewable by habeas corpus.

1. A decision of a Federal circuit court denying a writ of habeas corpus may be reviewed by direct appeal to the Federal Supreme Court, where the petition averred that the imprisonment of the appellant was in violation of the Federal Constitution.
2. Detention in a county jail cannot be considered, on habeas corpus, as any part of the time of imprisonment at hard labor in the state prison to which the prisoner was sentenced, where it does not appear but that such detention was due to the prisoner's efforts to obtain a review and reversal of the judgment of conviction, and, in the meantime, a supersedeas thereon, so as to prevent his transportation to the state prison.
3. A sentence of a Federal circuit court of two years' imprisonment in a state prison will not be held void on habeas corpus, on the theory that, as the convict was found guilty on two counts of the indictment, the imprisonment was directed for a period not exceeding one year on each count, where there is nothing in the record to show that there was a separate sentence of one year's imprisonment upon each count.
4. Errors of a trial court in sustaining an indictment which fails to charge with sufficient certainty and fullness some particular fact cannot be reviewed on habeas corpus to inquire into the legality of an imprisonment under the sentence imposed after a conviction on such indictment.

[No. 528.]

NOTE.—On direct review of circuit and district court judgments in Federal Supreme Court—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

That absence from jail will not be considered in satisfaction of sentence—see note to *Ex parte Vance*, 13 L. R. A. 574.

As to questions reviewable by habeas corpus—see notes to *State v. Jackson*, 1 L. R. A. 373; and *Bion's Appeal*, 11 L. R. A. 694; *United States v. Hamilton*, 1 L. ed. U. S. 490; *Ex parte Carll*, 27 L. ed. U. S. 288; *Oteliza y Cortes v. Jacobus*, 34 L. ed. 464; and *Pearce v. Texas*, 39 L. ed. U. S. 164.

Submitted May, 16, 1904. Decided May 31, 1904.

A PPEAL from the Circuit Court of the United States for the Northern District of California to review an order denying a petition for a writ of habeas corpus. *Affirmed.*

Statement by Mr. Justice **Peckham**:

Dimmick, the appellant, presented his petition for a writ of habeas corpus to the circuit court of the United States, northern district of California. The petition was denied, and an appeal taken to this court from the order denying the application. The appellant alleged in his petition for the writ that he was unlawfully imprisoned in the state prison of the state of California; that the imprisonment was illegal and in contravention of the Constitution of the United States, article five of the Amendments to the same; that on October 16, 1901, he was sentenced to imprisonment in the state prison by the district court of the United States in and for the northern district of California for the period of two years, to date from the 16th day of October, 1901; that he had been imprisoned, under the judgment, in the state prison ever since April 13, 1903, and that prior thereto, and from the date of the judgment to April 13, 1903, he was imprisoned, under said judgment, in the county jail of the county of Alameda, by the order of the district court.

The appellant also alleged that, notwithstanding the foregoing facts, the warden refused to discharge or release him from imprisonment, although the term of said imprisonment expired, according to its terms, on October 16, 1903. The appellant then set forth in the petition a copy of the record of the proceedings of the district court of the United States, which showed that he was convicted in the district court on the 16th of October, 1901, of making and presenting a false claim, as charged in the first count of the indictment, and of using a portion of the public moneys of the United States for *a purpose not prescribed by law, as charged in the fourth count; and that he was sentenced "to be imprisoned at hard labor for the term of two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the state prison of the state of California, at San Quentin, Marin county, California."

The record was signed by the district judge who held the court.

The petition also set forth a copy of the indictment under which the trial was had. It was founded upon §§ 5438 and 5497 of 194 U. S.,

the United States Revised Statutes (U. S. Comp. Stat. 1901, pp. 3674, 3707), and charged, in substance, the presentation to the cashier of the mint at San Francisco of a certain false, fictitious, and fraudulent claim against the United States, and known to be fraudulent by the defendant at the time he presented it; also, with having unlawfully used a portion of the public moneys for a purpose not prescribed by law. The appellant averred that neither the first nor the fourth count charged any crime or public offense against the United States, nor the violation of any law of the United States, and that both counts were fatally defective. The appellant also averred that the judgment of the court, in as far as it required his imprisonment in the state prison, was void because the United States district court sentenced him for one year, and no more, upon each of the two counts of the indictment referred to in the judgment, and did not sentence him to imprisonment for a period of more than one year upon each of said counts, and that a sentence to the state prison for a period of not more than one year violated the statutes of the United States.

Mr. George D. Collins submitted the cause for appellant:

It surely is competent for a court to fix the date of the commencement of the term of sentence.

Ex parte Gibson, 31 Cal. 627, 91 Am. Dec. 546; *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047; *State v. Gaskins*, 65 N. C. 320; *Kelly v. State*, 3 Smedes & M. 518.

The term of the sentence may well expire before the actual imprisonment even begins.

Johnson v. People, 83 Ill. 431.

The judgment, however, cannot be changed after it is partially executed by imprisonment for a portion of the time prescribed.

Ex parte Lange, 18 Wall. 163, 173, 176, 21 L. ed. 872, 878.

A citizen, can only be condemned to imprisonment by virtue of the judgment of a court of competent jurisdiction; and, when the time expires for which the sentence runs as given in the judgment, the prisoner is entitled to his discharge.

Flora v. Sachs, 64 Ind. 155; *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047.

The day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment.

Bishop, Statutory Crimes, § 218; *Com. v. Keniston*, 5 Pick. 420.

Where a person is sentenced to the penitentiary for an offense which is only a misdemeanor, the time he spends in the county jail subsequent to judgment must be cred-

ited on the sentence, even though its terms require incarceration in the penitentiary.

People v. Lincoln, 62 How. Pr. 412; Bishop, Statutory Crimes, § 218.

When a state imprisons a person convicted of a misdemeanor, no matter where the imprisonment is had, even though it be not the prison designated in the judgment, the time thus served in jail is to that extent a satisfaction of the sentence.

People v. Lincoln, 62 How. Pr. 412; *Re Jennings*, 118 Fed. 481.

The conviction of appellant for violating U. S. Rev. Stat. §§ 5438, 5497, is a conviction for a misdemeanor, and not the conviction for a felony.

Ex parte Wilson, 114 U. S. 422, 29 L. ed. 91, 5 Sup. Ct. Rep. 935; *Mackin v. United States*, 117 U. S. 350, 29 L. ed. 910, 6 Sup. Ct. Rep. 777; *Bannon v. United States*, 156 U. S. 466, 467, 39 L. ed. 495, 496, 15 Sup. Ct. Rep. 467; *Reagan v. United States*, 157 U. S. 303, 39 L. ed. 710, 15 Sup. Ct. Rep. 610.

The law of the state of California prohibits the imprisonment in the penitentiary of persons convicted of a misdemeanor.

Ex parte Ah Cha, 40 Cal. 426.

The sentence is void because it directs imprisonment in the penitentiary for a period that does not exceed one year on each count.

Re Mills, 135 U. S. 270, 34 L. ed. 110, 10 Sup. Ct. Rep. 762.

Each count is, in law, a separate indictment.

Selvester v. United States, 170 U. S. 262, 266, 42 L. ed. 1029, 1031, 18 Sup. Ct. Rep. 580.

Where, as here, there are two offenses upon which there is one sentence for the period of two years, it cannot possibly be a sentence exceeding one year for each offense; and it is, therefore, absolutely void.

Re Mills, 135 U. S. 270, 34 L. ed. 110, 10 Sup. Ct. Rep. 762.

If a person is imprisoned for what is not a crime against the United States, he is entitled to his discharge on habeas corpus.

Bacon, Abr. *Habeas Corpus*, 585; *Ex parte Siebold*, 100 U. S. 376, 25 L. ed. 719; *Ex parte Hollis*, 59 Cal. 407; *Re Corryell*, 22 Cal. 181.

Solicitor General Hoyt submitted the cause for appellee:

The time from which the sentence was to commence was directory merely.

Ex parte Bell, 56 Miss. 282; *Ex parte Duckett*, 15 S. C. 210, 40 Am. Rep. 694.

The general rule is that the time when the imprisonment is to begin or end need not be, and, according to the better practice, is not, specified in the sentence, it being sufficient to state its duration merely.

Bishop, New Crim. Proc. § 1310, ¶ 3; 25 Am. & Eng. Enc. Law, 2d ed. p. 303.

The rule as to the place of imprisonment is different. According to the prevailing practice, when the sentence is imprisonment the place of imprisonment should be specified.

25 Am. & Eng. Enc. Law, 2d ed. p. 302.

The nature of the punishment—whether infamous or not—depends upon the place of imprisonment. Imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment.

Ex parte Wilson, 114 U. S. 417, 428, 29 L. ed. 89, 93, 5 Sup. Ct. Rep. 935; *Mackin v. United States*, 117 U. S. 348, 352, 29 L. ed. 909, 911, 6 Sup. Ct. Rep. 777; *United States v. De Walt*, 128 U. S. 393, 32 L. ed. 485, 9 Sup. Ct. Rep. 111.

Courts will take judicial notice of their own records, with reference to prior proceedings in the case at bar.

See 17 Am. & Eng. Enc. Law, 2d ed. p. 925.

An appellate court will take judicial notice of its own record on a former appeal.

Gans v. Holland, 37 Ark. 483; *Bell v. Williams*, 10 La. 514; *Thornton v. Webb*, 13 Minn. 498, Gil. 457; *Dawson v. Dawson*, 29 Mo. App. 521; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217, 46 L. ed. 1132, 1134, 22 Sup. Ct. Rep. 820.

The time a convicted party is detained pending his appeal does not run upon the sentence, even where no supersedeas is granted.

Ex parte Duckett, 15 S. C. 210, 40 Am. Rep. 694; *Ex parte Espalla*, 109 Ala. 92, 19 So. 984.

The fact that petitioner was convicted upon two counts is wholly immaterial, even if each count is to be treated as a separate indictment.

For aught that appears, the court may have sentenced upon one count only, and disregarded the verdict of conviction upon the other. So, too, if one count of the indictment were defective, the conviction on the other would be sufficient to support the judgment and sentence.

Claassen v. United States, 142 U. S. 140, 146, 35 L. ed. 966, 968, 12 Sup. Ct. Rep. 169; *Evans v. United States*, 153 U. S. 584, 608, 38 L. ed. 830, 839, 14 Sup. Ct. Rep. 934; *Dimmick v. United States*, 54 C. C. A. 329, 116 Fed. 825.

If the sentence is erroneous in this respect, opportunity should be given the United States to have Dimmick resentenced in accordance with law, upon the verdict against him.

Re Bonner, 151 U. S. 242, 262, 38 L. ed. 149, 153, 14 Sup. Ct. Rep. 323; *Haynes v. United States*, 42 C. C. A. 34, 101 Fed. 817; *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473.

The question whether the facts charged in the indictment constituted an offense under the statute is not open to review on habeas corpus, since the district court had general jurisdiction of the class of offenses to which it belonged.

Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; *Re Eckart*, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638.

Mr. Justice **Peckham**, after making the above statement of facts, delivered the opinion of the court:

The appeal directly to this court from the decision of the circuit court denying the writ of habeas corpus was proper under the averments contained in the petition, that the imprisonment of the appellant was in violation of the Federal Constitution. *Cramer v. Washington*, 168 U. S. 124, 127, 42 L. ed. 407, 408, 18 Sup. Ct. Rep. 1.

The appellant contends that, as his sentence was imprisonment "at hard labor for the term of two years from October 16, 1901," his term of imprisonment under that sentence necessarily expired by its own limitation on October 16, 1903, even without any deduction for credits earned by good behavior.

If the appellant had been at once transported to the state prison under the sentence imposed upon him after his conviction, it is, of course, plain that two years from the time of his sentence (if he remained there in the meantime) would be the extent of his legal detention. In fact, [547] he was not taken *to the state prison until April 13, 1903; but he avers that he had been previously, and from October 16, 1901, the date of the judgment, to April 13, 1903, imprisoned under said judgment in the county jail of the county of Alameda, by the order of said district court. The sentence upon the verdict of guilty is given in the record, which is made a part of the petition, and that record shows that the appellant was "sentenced to be imprisoned at hard labor for the term of two years from October 16, 1901; and it is further ordered that said sentence of imprisonment be executed upon the said Walter N. Dimmick by imprisonment in the state prison of the state of California, at San Quentin, Marin county, California."

The imprisonment of the appellant in the county jail could not, therefore, have been under the judgment which prescribes imprisonment in the state prison. But such detention may have been owing to his efforts to obtain a review and reversal of the judgment, and, 194 U. S.

in the meantime, a supersedeas thereon, so as to prevent his transportation to the state prison, and in that case such detention should not be counted as any part of the time of imprisonment in the state prison. In that event his imprisonment in the state prison, under the judgment, should be counted from the time it actually commenced, notwithstanding the statement of the sentence that it should be for two years from October 16, 1901. The time of commencement was postponed by his own action, and he cannot take advantage of it, and thus shorten the term of his imprisonment *at hard labor in the state prison*.

Upon this writ the question to be examined is one of jurisdiction; and in this case it is whether the warden of the prison has the legal right to continue the imprisonment under the sentence and warrant of commitment notwithstanding the expiration of two years from the time of sentence. If, as we have said, the detention in the jail was the result of his own action, and his imprisonment at hard labor in the state prison did not, for that reason, commence until April 13, 1903, then the legal term of his imprisonment in the state prison has not *expired, and he is properly detained. As [548] it was incumbent upon the appellant to show his continued imprisonment was illegal (there being no presumption that it was), the duty and the burden rested upon him to aver, and, if the averment were traversed, to prove, that his detention in jail had not been by reason of the fact suggested. This he has not done. There is no such averment in the petition for the writ and there is no proof of such fact to be found. *Non constat*, that he was not detained for the very reason already stated. This is fatal to the appellant, so far as this point is concerned.

As might be surmised, there was ample reason for not making the allegation. It would not have been true.

It appears from our own records that a petition for a certiorari was filed in this court by appellant February 2, 1903, asking for a review of the above-mentioned judgment, and in that petition it is stated that the appellant had taken proceedings to have the judgment reviewed by the circuit court of appeals, and had obtained a supersedeas thereon, and after the judgment had been affirmed by that court, and on January 13, 1903, the district court ordered the execution of the judgment thus affirmed to be stayed for the period of thirty days from that date to enable the appellant to make application to this court for a writ of certiorari, which application was made, and denied by this court March 2, 1903. 189 U. S. 509, 47 L. ed. 923, 23 Sup. Ct. Rep. 850.

In a case like this the court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. The principle permitting it is announced in the following cases: *Butler v. Eaton*, 141 U. S. 240, 242, 35 L. ed. 713, 714, 11 Sup. Ct. Rep. 985; *Craemer v. Washington*, 168 U. S. 124, 129, 42 L. ed. 407, 409, 18 Sup. Ct. Rep. 1; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217, 46 L. ed. 1132, 1135, 22 Sup. Ct. Rep. 820.

That the party seeking to review a judgment of imprisonment in a state prison cannot take advantage of his own action in so doing as to thereby shorten the term of imprisonment in the state prison is, as we think, plain. To hold otherwise would be inconsistent with the general principle that [549] a person *shall not be permitted to take advantage of any act of another which was committed upon his own request, or was caused by his own conduct. See *McElvaine v. Brush*, 142 U. S. 155, 159, 35 L. ed. 971, 973, 12 Sup. Ct. Rep. 156. The question has arisen in some of the state courts, and has been so decided. See *Ex parte Duckett*, 15 S. C. 210, 40 Am. Rep. 694, decided in 1881; *Ex parte Espalla*, 109 Ala. 92, 19 So. 984, decided in 1896. In such cases the provision of the sentence that the imprisonment is to commence on or to continue from a certain day is rendered impossible of performance by the act of the defendant, and he will not be permitted to obtain an advantage in such manner. The appellant cites no case which questions this principle. Those cited by him have, generally, reference to the construction to be given the language of the sentence as to the time of its commencement. They do not deny the rule as to the action of defendant in preventing its execution.

Johnson v. People, 83 Ill. 431, is not in point. The case arose on error brought by the defendant after conviction in the court below. He was convicted under several counts of an indictment for selling intoxicating liquors, and the sentence fixed a day and hour when the imprisonment should commence under each count. This was held to be error, as the sentence to imprisonment should have been for a specified number of days under each count upon which conviction is had, and the imprisonment under each succeeding count would begin when it ended under the preceding one, without fixing the day or hour of any. It appeared in that case that a supersedeas had been granted, and that it had become impossible that the judgment of imprisonment could be carried into effect, as the time fixed by the court had elapsed. The sentence was held to be an erroneous one, and the judg-

ment was reversed and the case remanded, with directions that the court should enter a proper judgment on the verdict.

In *Dolan's Case*, 101, Mass. 219, the prisoner, after imprisonment, had escaped before the term of the sentence *had expired, [550] and, having been retaken, claimed his discharge at the expiration of the time that he would have been entitled to it if he had not escaped. Neither the date of its commencement nor of its expiration was fixed by the terms of the sentence. His application was denied, and it was held that the defendant must be imprisoned for a time which corresponded with his original sentence, and that the expiration of the time without imprisonment was in no sense an execution of the sentence.

Also in *State v. Cockerham*, 24 N. C. (2 Ired. L.) 204, it was held that the time at which the sentence should be carried into execution forms no part of the judgment. The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. So here, in the case before us, the material part of the sentence is imprisonment for two years in the state prison, and that sentence is not satisfied by a detention in the county jail for a portion of the two years by reason of the proceedings of appellant to review the judgment under which the sentence was given.

As to the time of the commencement of the sentence, *State v. Gaskins*, 65 N. C. 320, is based upon a statute which declared that the term of imprisonment "shall begin to run upon, and shall include, the day of conviction." The question did not arise by reason of the act of the defendant in taking proceedings to review the judgment.

Woodward v. Murdock, 124 Ind. 439, 24 N. E. 1047, simply holds that the period the prisoner is out of jail under parole is part of the time for which he was sentenced, and when the original time expires he is entitled to his discharge just the same as if he had been in prison the whole time. It was held that he was constructively in prison, although in fact conditionally at large under his parole, and that while thus on parole his sentence ran on.

The sentence given in this case could only have been satisfied by imprisonment in the state prison at San Quentin for the *period [551] of time mentioned in the sentence. This is not the case of an arbitrary detention in jail, without excuse or justification, after sentence to imprisonment in a state prison. If in such case the defendant were helpless, the question might arise whether the time of such improper detention in jail should

not be counted, as to that extent, a satisfaction of the sentence.

It is also objected that the sentence is void because it directs imprisonment in the state prison for a period that does not exceed one year on each count of the indictment; and *Re Mills*, 135 U. S. 263-268, 34 L. ed. 107-110, 10 Sup. Ct. Rep. 762, is cited to sustain the proposition.

In that case the prisoner was sentenced upon two indictments to imprisonment in the penitentiary,—in one case for a year and in the other for six months; and it was held that the imprisonment was in violation of the statutes of the United States. See Rev. Stat. §§ 5541, 5546, 5547 (U. S. Comp. Stat. 1901, pp. 3721, 3723, 3724).

In the case at bar the sentence was for two years upon one indictment, and there is no statement in the record that there was a separate sentence each for one year upon the first and fourth counts of the indictment. In this we think there was no violation of the statute, and the sentence was therefore proper and legal. The appellant may have been sentenced upon one count only for two years. Although for some purposes the different counts in an indictment may be regarded as so far separate as to be in effect two different indictments, yet it is not true necessarily and in all cases. But this record shows a sentence for two years to the state prison, and there is nothing to show the court was without jurisdiction to impose such sentence for the crime of which the defendant was convicted.

It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offense under the statute, and that the sentence was therefore without jurisdiction. We are not by any means prepared to adjudge that the indictment did not properly charge an offense in both the first and fourth counts. See *Dimmick v. United States*, 54 C. C. A. 329, 116 Fed. 825, involving this indictment, where *it is set forth. It is not, however, necessary in this case to decide the point, for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment. If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be re-examined on habeas corpus. The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty

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and fulness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be re-examined on habeas corpus. *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; *Re Eckart*, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638. In the last case it was stated that (page 483, L. ed. p. 1086, Sup. Ct. Rep. p. 638):

"The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment is possessed of authority to determine the sufficiency of an indictment, and that, in adjudging it to be valid and sufficient, acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on habeas corpus, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime."

The order refusing the writ was right, and is affirmed.

*WILLIAM SHEPARD *et al.*, *Appts.*, [553]
v.

O. E. D. BARRON, Treasurer of Franklin County, Ohio.

(See S. C. Reporter's ed. 553-572.)

Estoppel to contest constitutionality of frontage rule of assessment by active promoters of public improvement.

An objection that the frontage rule of assessment for a public improvement, prescribed by 87 Ohio Laws, 113, operated as a denial of due process of law, cannot be urged to defeat the collection of the assessments, by abutting owners who petitioned for the improvement under the act, actively participated in carrying out the work, recognized the justice of the assessments from time to time during its progress, and signed a statement for the purpose of inducing the issuance and purchase of county improvement bonds practically to the effect that the work had been properly done, and that there was no defense to the bonds.

[No. 217.]

Argued April 14, 15, 1904. Decided May 31, 1904.

1118

APPEAL from the Circuit Court of the United States for the Southern District of Ohio to review a judgment dismissing a bill to enjoin a county treasurer from proceeding to collect a balance of an assessment for a public improvement, on the ground that the frontage rule of assessment prescribed by the statute under which the improvement was made operated as a denial of due process of law. *Affirmed.*

Statement by Mr. Justice **Peckham**:

This bill was filed in the circuit court of the United States for the southern district of Ohio, against the defendant, as the treasurer of the county of Franklin, in the state of Ohio, to enjoin him from taking any proceedings towards the collection of the balance of an assessment for a local improvement upon land belonging to the appellants near the city of Columbus, in the state of Ohio, because, among other grounds alleged in the bill, the assessment to pay for the improvement as provided for in the act was to be made by the foot front, and not in proportion to the special benefit which might result from the improvement to the prop-
[554]erty assessed, and on this ground it *was averred that the act violated the 5th Amendment, and also § 1 of the 14th Amendment to the Federal Constitution. The bill was dismissed by the circuit court, and from the judgment of dismissal the plaintiffs have appealed directly to this court, because the law of Ohio referred to in the bill is claimed to be in contravention of the Federal Constitution. Act of 1891, § 5 [26 Stat. at L. 827, chap. 517], U. S. Comp. Stat. 1901, p. 549.

The original plaintiffs were partners doing business under the name of the Alum Creek Ice Company, and as such were the owners of the land described in the bill, and soon after the commencement of this suit one of the plaintiffs sold out his interest in the property, including the land, and his grantees were substituted as plaintiffs in his stead, and assumed his liabilities with regard to the land. Hereinafter they will all be described as the plaintiffs, as if they had all originally been parties to the suit, and had signed the papers and made the representations hereinafter mentioned.

The answer denied the averments of the bill, and also set up facts which, as defendant insisted, precluded the plaintiffs from obtaining relief by injunction, as prayed for in the bill.

Upon the trial it appeared that the plaintiffs and others were separate owners of distinct portions of a tract of land adjoining the city of Columbus, Ohio, and bounded by the Columbus and Granville turnpike road, which was a public highway leading to and

from the city of Columbus. The tract had a frontage on the road of 9,615.38 feet, of which the plaintiffs owned 1,111 feet. On March 26, 1890, an act was passed by the Ohio legislature (87 Ohio Laws, 113) which authorized the county commissioners in counties in which there were situate cities of the first grade of the second class to improve roads extending from such cities, and other roads and streets in certain cases. The act provided for an assessment by the foot front on the adjoining land in order to pay the cost of the improvement. Immediately upon the passage of the act, and on or about March 31, 1890, the owners of the tract, including the plaintiffs, who were owners of a part thereof, inaugurated proceedings *under the act, and presented a pe-
[555]tition to the county commissioners asking for the improvement of the road through their property, as provided for in the act. The petition has been lost, but the evidence shows it was signed in behalf of all the owners of the land (including the plaintiffs) fronting or abutting on that part of the road proposed to be improved. The persons who signed this petition and subsequently other papers, on behalf of plaintiffs, were duly authorized so to do. The petition was granted, and the commissioners made an order to that effect, and for the execution of the work at an expense of \$7.25 per front foot. On or about August 1, 1890, a contract was entered into for the construction of the improvement, and between that time and October 16, 1891, the improvement was completed. An assessment was, on October 15, 1891, laid upon the whole tract to pay for the cost of the improvement, which amounted to \$11.25 per front foot, thus largely exceeding the amount originally contemplated as such cost. This cost was thus enhanced by reason of changes of plans regarding the improvement, made from time to time as the work progressed, and which were assented to or asked for by the land owners, including the plaintiffs.

In order to pay the cash for the cost of this improvement bonds were issued and sold by the county commissioners as provided for in the act, amounting to \$110,000, in two issues, the first of \$50,000 and the second of \$60,000.

The total amount of the assessment on the plaintiffs' land, assessed per front foot, as provided for in the act, was \$12,812.61, which, as the plaintiffs insist, largely exceeded the special benefit arising from the improvement, and would result, if enforced to its full extent, in the confiscation of plaintiffs' property. The bonds not having been paid, an action was brought on them against the county commissioners in the Federal circuit court in Ohio, and judgment

recovered by the bondholders, which was affirmed by the United States circuit court of appeals (55 C. C. A. 614, 119 Fed. 36). without, however, passing upon the validity [556] of the assessment now before this *court (C. C. A. p. 626, Fed. p. 48). The act under which the improvement is made is set forth in full in the above report.

After the plaintiffs had paid seven annual instalments of the assessment, each instalment amounting to \$1,258.61, and the total being \$8,810.27, there remained a balance due on the assessment of \$4,002.34, and this bill was filed on June 12, 1899, for the purpose of enjoining the collection of the balance remaining unpaid on the assessment, on the grounds already stated.

Immediately after the contract for doing the work of improvement was entered into between the county commissioners and the contractor, and in compliance with the provisions of the act (§ 13), the commissioners designated two of the owners of the abutting property, who, together with the county surveyor, were to constitute a board, which was authorized to elect a superintendent to see that the contract was performed in accordance to its true intent, and that all orders of the county surveyor in furtherance thereof were obeyed. Mr. Shepard, one of the plaintiffs, was designated as a member of the board, and acted as such, with another landowner and the county surveyor, and elected a superintendent, as provided for in the act.

Mr. Shepard was also frequently present during the progress of the work, and knew of the alterations in the work as they were subsequently and from time to time made. He was familiar with the law under which the action of the county commissioners was invoked, and knew that it provided for an assessment upon the abutting property by the front foot for the payment of the cost of the improvement.

During the progress of the work, and on June 29, 1891, the agent of the Columbus Land Association (one of the owners of a portion of the tract) made a written proposal to the commissioners in relation to the improvement in question, and agreed that the land association would secure and pay the entire expense in removing the earth upon the circle in East Broad street, and in beautifying and adorning the circle, upon [557] *the condition that the street around the circle should be completed and paved in accordance with the plat, order, and contract mentioned. The plaintiffs, acting under the name of the Alum Creek Ice Company, together with the other owners of real estate abutting upon these improvements, addressed a written communication to the county commissioners in connection with the foregoing

proposal of the land company, in which they spoke of the improvements "now being made under proceedings by and before this board of county commissioners of Franklin county," and in which they also said that they "hereby withdraw all objection to said improvement and the assessment of their said real estate therefor on condition that the foregoing agreement shall be kept by said Columbus Land Association." The offer of the company was accepted, and there is no claim made that the company did not fulfil the agreement.

On September 2, 1891, the owners of the tract (plaintiffs among them) petitioned the commissioners to cancel the contract, with the assent of the contractor, for sodding the sides of the improved roadways, and gave as a reason therefor that a number of the property owners had informed the contractor that they would rather have grass seed sown thereon. The petitioners concluded: "We therefore petition that you cancel the above mentioned contract, and that each one, for their respective frontage upon said street, will see to it that grass seed is sown upon said sideways of East Broad street this fall, and take upon themselves the care and charge of the same." The contract was canceled, as asked for, with the consent of the contractor.

There was also presented to the commissioners a communication signed by the owners of the land, including the plaintiffs, asking the commissioners to cause all bonds issued by them for the expense of the improvement to be made for a period of twenty years from the date thereof, "and if you can extend the time to twenty years for the bonds already sold, the extension of the time at which they would mature would be *satisfactory to the undersigned; all of which we respectfully petition for." [558]

There was also signed by the plaintiffs Shepard and McLeish, among others, as members of the board appointed under the act (§ 13), a resolution, "That the board for the improvement of said street hereby respectfully requests the county commissioners to do all in their power to carry out the prayer of said petition;" the petition being to the board of county commissioners to take steps to have the bonds for the improvement extended so as to run twenty years.

There was also signed by all the landowners, including the plaintiffs, a communication, which, on account of its recitals and statement, is set forth at length:

"Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto was by us presented to the board of county commissioners of Franklin county, Ohio, praying for the improvement of the extension of East Broad street, in this coun-

ty, beginning at the bridge across Alum creek on said street, and extending eastwardly therefrom to the Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the general assembly of Ohio, entitled 'An Act to Authorize County Commissioners in Counties in Which There Are Situated Cities of the First Grade of the Second Class, to Improve Roads Extending from Such Cities, and Other Roads or Streets in Certain Cases. Passed March 26, 1890.' Which said petition stated with what material said street should be paved and what provisions should be made for sidewalks, gutters, and other passages for carrying off the water, and between what points said street was to be improved, and the kind of material of a permanent character said petitioners desired used in said improvement; and whereas said petition was signed by all the persons owning property abutting upon the portion of said street in said petition asked to be improved, said petition stating the number of feet between the termini of said improvement;

[559] *And whereas, such proceedings were had by said board of county commissioners on said petition and in accordance with said act of the general assembly that the prayer of said petition was granted and said improvement made in accordance with the prayer of said petition; and

"Whereas said original petition as well as other papers relating to said improvement have been lost or mislaid:

"Now, in consideration of said improvement, and in order that the bonds to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original papers,

"We hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against any assessment upon our said property abutting upon said improvement for the payment of bonds issued on account thereof any informality arising from the absence or loss of any of said papers, but agree that said improvement was legally made and constructed."

This paper was signed before the bonds, spoken of therein, were issued by the commissioners. It was required by the proposed purchaser of the bonds before they were taken and paid for. After the paper was signed the county commissioners thereupon issued the bonds, and delivered them to the Ohio National Bank of Columbus, as agents for the purchasers.

After the improvements were completed, the plaintiffs, in connection with other prop-

erty owners, signed a petition to the county commissioners to lay sewer pipe (a 15 and a 24-inch pipe), and the petition provided: "The expense of said work to be assessed against the respective property on the street, the same as other expenses for making said improvement are levied and paid."

This is claimed to be a recognition of the assessment after the improvement had been made, and after the landowners knew what it was, of their willingness to be still further assessed to effect a complete work.

Another paper, containing somewhat more in detail the *alleged facts regarding the im-[560]provement, and ending with the statement, "Said improvement has been, and is now being, legally made and constructed, and we hereby request that you execute and issue such further amount of bonds as shall be necessary to pay the cost of improvement," and purporting to be signed by the plaintiffs, among others, was offered (though it does not appear to have been received) in evidence. It was objected to by the plaintiffs on the ground that there was no proof that the paper had been signed by the plaintiffs, and that if the paper was a copy of another paper of similar import, the original was already in evidence. The record does not disclose what was the decision upon the objection thus made. The paper, it was stipulated between the parties, was a copy of the county commissioners' record of Franklin county, Ohio. A motion was also subsequently made to suppress this testimony, but no decision of the motion is disclosed by the record.

During the making of the improvement, and for some time thereafter, all parties assumed the act of 1890, under which the improvement was made, was constitutional.

The court below, upon all the evidence, held that it would consider but one matter of defense,—that of estoppel,—and held that it was sufficiently made out, and accordingly dismissed the bill.

Mr. David F. Pugh argued the cause, and, with Messrs. Pugh & Pugh, filed a brief for appellants:

To make the principles of estoppel available, either fraud, or its equivalent, culpable negligence, must be proved.

Leather Mfrs'. Nat. Bank v. Morgan, 117 U. S. 108, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Henshaw v. Bissell*, 18 Wall. 271, 21 L. ed. 841.

Estoppel is not a favorite of courts of equity.

Lyon v. Tonawanda, 98 Fed. 361.

In the face of the decision rendered in *Birdseye v. Clyde*, 61 Ohio St. 27, 55 N. E. 169, it would be vain for the appellee here

to contend that the signing of the petition by these appellants was an act of estoppel.

A petition for an improvement is not a petition for an illegal assessment.

Lyon v. Tonawanda, 98 Fed. 369.

There is no essential difference between petitioning for the improvement and participating in the election of commissioners.

Columbus v. Slyh, 44 Ohio St. 484, 8 N. E. 302.

Under the decision in *O'Brien v. Whcelock*, 37 C. C. A. 309, 95 Fed. 883, there is no merit in the defense of estoppel interposed in this case.

The question of estoppel is one of general law, of general jurisprudence; and, upon such a question, the Federal courts exercise their own independent judgment. The solution of the question of estoppel must be worked out by the aid of general principles, and common to all courts.

Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382.

Messrs. Augustus F. Seymour and Henry A. Williams argued the cause and filed a brief for appellee:

Appellants are estopped to contest the assessment.

State ex rel. Columbus v. Mitchell, 31 Ohio St. 592; *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438; *Columbus v. Sohl*, 44 Ohio St. 479, 8 N. E. 299; *Corry v. Gaynor*, 22 Ohio St. 584; *Brown County v. Martin*, 50 Ohio St. 197, 33 N. E. 1112; *Mott v. Hubbard*, 59 Ohio St. 199, 53 N. E. 47.

Private individuals may waive constitutional provisions enacted for their benefit.

Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64.

[564] *Mr. Justice **Peckham**, after making the above statement of facts, delivered the opinion of the court:

Both parties in this case seem to agree that the statute of 1890, under which these proceedings were taken, is void, as in violation of the state Constitution. As authority for that proposition the case of *Hixson v. Burson*, 54 Ohio St. 470, 43 N. E. 1000, is cited. The case holds that a statute of a nature similar to the one under consideration violated the provision of the Ohio Constitution, because, while its subject-matter was general, its operation and effect were local, thus violating the provisions of § 26 of article 2 of the Constitution of that state, which provides that "all laws of a general nature shall have a uniform operation throughout the state." The act under consideration in the case at bar seems to come within the principle of the above case.

The invalidity of the act as in violation of the state Constitution has also been rec-

ognized by the circuit court of appeals in the sixth circuit, in the case of *Franklin County v. Gardiner Sav. Inst.* 55 C. C. A. 614, 119 Fed. 36.

The bonds were held in that case to be valid obligations of the county, notwithstanding the unconstitutionality of the act under which they were issued, because at the time of their issue, which was before the decision in *Hixson v. Burson*, the supreme court of Ohio had held in *State ex rel. Hibbs v. Franklin County*, 35 Ohio St. 459, that an act which was in all respects similar in its nature to the one under consideration was constitutional and valid, and the circuit court of appeals, therefore, held that under those circumstances the law as it had been declared at the time when the bonds were issued was the law applicable to them.

But the plaintiffs also insist that the act is void as a violation of the 5th and 14th Amendments to the Federal Constitution. The assessment per foot front, it is contended, leads in this case to a confiscation of the property of the plaintiffs, and is not based upon the fact of benefits received, and it *results in taking the property of plain-[565] tiffs without due process of law.

Before coming to the consideration of the validity of these objections to the statute, the defendant insists that by virtue of the facts already detailed in the foregoing statement the plaintiffs are not in a position to raise the question. We regard this objection as well taken.

The facts upon which the defense rests are above set forth at length, not including the paper, which does not appear to have been received in evidence. A defense of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel. While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts, by which the party obtaining the benefit of the work agrees to pay for it in the manner provided in the statute under which it is done, even though the statute turn out to be unconstitutional. It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking of the nature of both, the result arrived at being that the plaintiffs are told that under all the facts proved in the case they cannot set up the unconstitutionality of the act, or that they are bound by their contract to pay the assessment. Where, as in this case, the work is done and the assessment made at the instance and request of the plaintiffs and the other owners, and pursuant to an act (in form, at least) of the legislature of the state, and in strict compliance with its

provisions and with the petition of the landowners, there is an implied contract arising from such facts that the party at whose request and for whose benefit the work has been done will pay for it in the manner provided for by the act under which the work was done.

In this case the manner of payment was, as provided for in the act, by an assessment upon the land by the foot front. The money thus collected would form a fund to be used to pay the bonds which were to be issued in accordance with the act by the county commissioners, acting for the county. [566] The *county thus became the debtor for a debt which was incurred entirely for the benefit, and at the request, of the owners of the land. Under such facts the county has the right to look at the assessment upon the land as the fund out of which to pay the bonds. In this view the constant and frequent promises and representations made by the plaintiffs after the work was embarked upon are material evidence of the implied contract to pay for the work, arising from the request for its performance. It is, therefore, upon these facts, immaterial that the law under which the proceedings were conducted was unconstitutional, because the work was done at the special request of the owners, under the provisions of the act, and upon a contract, both implied and in substance expressed, that the bonds would be paid, and the assessment to be imposed for the raising of a fund to pay them would be legal and proper.

Although the landowners have been greatly disappointed in the results of the improvement, and the affair has proved somewhat disastrous, yet they have obtained just such an improvement as they asked for and expected, and they are the ones to bear the disappointment and loss.

It is true this action is not between the bondholders and the owners of the land. The representations and agreement of the landowners were, however, made for the purpose of obtaining a market for the sale of the bonds, and, in order that there should not be any suspicion of their invalidity, the landowners agreed that the work was legally done, and the improvement legally constructed. The representation and agreement were, in fact, directed to all who might be interested in the matter, including the county commissioners, who were to issue the bonds as representatives of the county. The effect was to provide, in substance, that the lien of the assessment should be valid and the assessment should create a fund for the payment of the bonds. The defendant, representing the county, must be permitted to take advantage of the representations and agreement of the landowners, as the county

has a direct interest in sustaining the validity of the assessment, and the representations *were made, among others, to the county commissioners, who represented the county in issuing the bonds and in doing the work. [567]

On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken, and that the assessment should be made in accordance with those provisions. This principle has been recognized in Ohio many times. See also *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 592, 609; *Tone v. Columbus*, 39 Ohio St. 281, 296, 48 Am. Rep. 438; *Columbus v. Sohl*, 44 Ohio St. 479, 481, 8 N. E. 299; *Columbus v. Slyh*, 44 Ohio St. 484, 8 N. E. 302; *Mott v. Hubbard*, 59 Ohio St. 199, 211, 53 N. E. 47.

In *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616, this court, while not positively deciding the proposition, yet strongly intimated (p. 377, L. ed. p. 904, Sup. Ct. Rep. p. 618), that by reason of the acts of the appellees they were not in a position to question the validity of the statute there under consideration, but as there were others than the appellees concerned, and a decision of the court of appeals had declared the act void as to the appellees, it was thought better to pass by the question whether they were estopped by having made the dedication provided for in the act, and to decide the question of the constitutionality of the act of Congress under which the proceedings were had. The act was held to be valid.

Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains; and some of the cases go so far in that direction as to hold that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect. *Cooley, Taxn.* p. 573, and cases cited in note 5; *Tash v. Adams*, 10 Cush. 252; *Bidwell v. Pittsburgh*, 85 Pa. 412, 27 Am. Rep. 662; *Shutte v. Thompson*, 15 Wall. 151, 21 L. ed. 123.

*Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a

course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request, and upon the instigation, of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid, and the expense thereof, which he ought to pay, transferred to a third person.

Plaintiffs argue that, although the work was to be done under the provisions of the act of 1890, yet they had the right to assume that the assessment to be imposed for the payment of the bonds would be what they term a valid assessment; or, in other words, would be made as they insist, not upon the foot front (as provided for in the act), but according to the actual benefit received from the improvement; and they cite *Birdseye v. Clyde*, 61 Ohio St. 27, 55 N. E. 169, as authority for the proposition.

In that case it was held that the landowner was not estopped to object to the assessment because he had acquiesced in the construction of the improvement and had petitioned therefor, and thereby consented to the raising of a certain proportion of its cost by an assessment on all abutting property. There was, however, a statute, which provided that no assessment should be made on any lot or land for an improvement in excess of 25 per cent of the value of the property as assessed for taxation. Although the plaintiff had petitioned for the improvement, it was held that he was not on that account estopped from objecting to any assessment which was over 25 per cent of the value of the property. It was not to be assumed that the plaintiff waived the benefit of the general statute because he asked for the work. The case has no application, as we think, to the one before us. Certainly, in the *Birdseye Case*, the plaintiff had a right to assume, notwithstanding his petition that the work should be done, that the assessment on his land should not be greater than the law provided for. But in the case at bar the petition asked for the doing of the work under the very statute which in terms provided that the assessment should be made by the foot front, exactly as in fact it was made, and in making such assessment the commissioners but complied with the request of the petitioners.

The plaintiffs have referred to *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354, as the chief authority to support their contentions as to estoppel. In that case, while the estoppel contended for

was denied, yet (at page 491, L. ed. p. 655, Sup. Ct. Rep. p. 370), it is stated, in the opinion of the court, which was delivered by the Chief Justice, that: "The result is not inconsistent with the cases that hold that, although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced."

In the case at bar it is seen that the plaintiffs did, in fact, receive the full consideration for the contract. They obtained the improvement asked for, so far as the doing of the work was concerned, although the results arising therefrom were a great disappointment to them.

Looking at the facts in the case cited, they show that the scheme proposed and under which the proceedings were taken was of large proportions, and consisted of a plan to redeem from overflow by the Mississippi river a large amount of land, from 3 to 5 miles in width, extending along the river for more than 50 miles, containing over 100,000 acres, lying in portions of three different counties, varying greatly in condition and value, and owned severally by a great number of people. The work was to be done by building levees and digging drains and ditches, and doing other work by which to drain the land and render it valuable for agricultural purposes. Certain of the landowners had at all times opposed the proceedings instituted to assess their land. The permanent success of the scheme rested in the character of the work and in its maintenance by compulsory process after it had been constructed in its various branches. The case is one seldom equalled in respect to the size of the tract to be reclaimed at the expense of the landowners, the numbers interested as such owners, and the immense expense of the work. The first requisite was a valid act of the legislature authorizing the work, and providing a means for its accomplishment. To that end the act of 1871 was passed. The history of the proceeding thereafter is given, commencing at page 457 of the report in 184 U. S., L. ed. p. 639, Sup. Ct. Rep. p. 357, but it is entirely too long to be referred to here in detail. It is enough to say that, after perusing it, there will be found great difficulty in perceiving even a slight analogy to the case before us. The facts cannot be summarized. They must be appreciated in all their fullness and detail, and when thus examined the result arrived at will, as we

think, seem inevitable. The case was *sui generis*.

The one great purpose was not alone to build, but to maintain, a work which in its nature would require constant supervision and repair. Unless the work could be maintained by compulsion when necessary, it plainly would have appeared at the very beginning to involve an idle waste of money. It could not be maintained unless the act upon which the whole scheme rested was valid, and could from time to time and always be enforced. But that act was held to be unconstitutional long before the work was completed, and the landowners, on account of the inability to compel either the completion or the maintenance of the work, were unable to receive the benefit which it had been supposed would accrue under the act thus declared illegal. The work never was [571] fully *and in all things completed, while the credit of the bonds, which were issued to the contractors for doing the work, and sold by them, was maintained by reference simply to the law under which they were issued, and upon the opinion of counsel as to its validity.

It also appears that the landowners never gave any assurance to the contractors for the work or to those who purchased the bonds after they were delivered to the contractors, regarding their validity or value, but they supposed if the work were done it could and would be kept up under the sanction of the law which provided for it.

Upon the facts as detailed in the report, the court held that there was nothing in the general principles of implied contract which would prevent the landowners from resisting the enforcement of the lien of the bonds upon the land.

In contrast with these facts it is seen that in the case at bar the plaintiffs and other landowners have received full consideration for their promise, and have obtained precisely what they asked for, and in the manner they asked it. We have also the written petition for the improvement, and active participation of the plaintiffs in carrying it out under the act, the frequent statements on their part and upon the part of the other landowners of the validity of the work, and the regularity of the assessment to be made under the terms of the act, and the specific statement, made for the purpose of inducing the issuing of the bonds and their purchase by the individuals who took them, that practically the work had been done properly, and there was no defense to the bonds. This is equivalent to saying the assessment to be laid as requested, under the act of 1890, would be valid, and no defense interposed to its collection. The differences of fact in the two cases show that the *O'Brien Case*

furnishes no authority for the plaintiffs herein. We concur in the remarks of the District Judge in this case, when he said that: "The complainants invoked the action of the county commissioners to enhance the value of their land; they actively promoted the improvement, knowing that its cost *must be paid by a front foot assess-[572]ment on their property; they recognized the justice of the assessment from time to time during the progress of the work, and afterwards by paying annual instalments of the assessment for seven years, and until they were tempted by the decision of the Supreme Court, in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, to cast their burden upon the general public; and it is now too late to complain of the method of the assessment or of the lack of the special benefits which were dissipated by the collapse of the 'boom.'"

We do not consider the validity of the contention on the part of the plaintiffs, that the act, or the assessment in furtherance of its provisions, violates in any particular the Federal Constitution. For the reason given above we are of opinion the judgment is right, and it is affirmed.

ARCHIE BURRELL, *Plff. in Err.*,

v.

STATE OF MONTANA.

(See S. C. Reporter's ed. 572-579.)

Criminal law — protection of bankrupt act against use of bankrupt's testimony does not exempt him from prosecution.

Exemption from prosecution for an offense growing out of a transaction concerning which a bankrupt testified before the referee in bankruptcy is not given by the provision of the bankrupt act of July 1, 1898 (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424), § 7, that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."

[No. 218.]

Submitted April 13, 1904. Decided May 31, 1904.

IN ERROR to the Supreme Court of the State of Montana to review a judgment

NOTE.—On the constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to *Levy v. Superior Court*, 29 L. R. A. 811.

On the sufficiency of statutory immunity to satisfy constitutional guaranty against self-incrimination—see notes to *Re Buskett*, 14 L. R. A. 407; *United States v. James*, 26 L. R. A. 418; *Interstate Commerce Commission v. Baird*, ante, 860.

which affirmed a conviction of obtaining money under false pretenses, upon an information filed in the District Court of the Eighth Judicial District of that state. *Affirmed.*

See same case below, 27 Mont. 282, 70 Pac. 982.

The facts are stated in the opinion.

Mr. E. C. Day submitted the cause for plaintiff in error.

Mr. James Donovan submitted the cause for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

[576] Plaintiff in error was convicted upon information filed in the district court of the eighth judicial district of the state *of Montana of the crime of obtaining money under false pretenses. The judgment of conviction was affirmed by the supreme court of the state. 27 Mont. 282, 70 Pac. 982.

The false pretenses consisted of a false statement in writing made to the Royal Milling Company, a corporation, concerning his assets and liabilities, whereby he induced the company to sell him goods of great value.

Plaintiff in error testified in his own behalf, and during the cross-examination he was questioned in regard to statements made by him in testimony made before the referee in bankruptcy in his own proceedings. No objection was made.

In view of the examination the trial court instructed the jury as follows:

"The court instructs the jury that the fact that the defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody or charged with a criminal offense when he made such admission, if he did make any such."

Plaintiff in error excepted to the instruction as follows: "For the reason that said instruction invades the province of the jury, in that it directs their attention to the alleged admissions of the defendant, and is a charge upon the effect and weight of the evidence. The defendant excepts to the instruction for the further reason that the same does not correctly state the law, in this: that it appears from the testimony that the defendant had testified upon an examination before a referee in bankruptcy, held pursuant to the provisions of the act of Congress, approved July 1, 1898 [30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424], which said act provides as follows: chapter 194 U. S.

III., section, etc. 'But no testimony given by him [upon his examination] shall be offered in evidence against him in any criminal proceeding.' And the said instruction is against the law."

*The instruction seems to oppose the provisions of the statute, but the circumstances of the case must be considered. There was no objection made to the introduction of the testimony, and as we understand the instruction, it was but the expression of the value of the testimony. The contention of plaintiff in error must have been in the trial court as it was in the supreme court, and is here: to wit, that § 7 of the bankruptcy act grants more than a mere immunity against the admission in evidence of the testimony given before the referee in bankruptcy,—that it grants him protection from prosecution for any crime growing out of the transaction about which he was examined; and this necessarily to secure to him the full protection of that clause of the Constitution of the United States which provides that "no person shall be compelled in criminal cases to be a witness against himself." Upon this broad contention he must now rely. A narrower contention might have been yielded to by the state courts. It certainly should have been submitted to them. The statute does not prohibit the use of testimony against the consent of him who gave it. It prescribes a rule of competency of evidence which may or may not be insisted upon. It does not declare a policy the protection of which cannot be waived. And the time to avail of it is when the testimony is offered. After the testimony is admitted, its probative force cannot be limited. This could not be contended even under the broader provision of the Constitution. A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he was not compellable to give it.

In the case at bar, the court dealt with testimony which had been admitted without question or objection. We are brought, therefore, to the broad and ultimate contention of the plaintiff. We think it is untenable. There is no ambiguity in § 7 of the bankrupt act. It requires a bankrupt to submit to an examination concerning his property and affairs, and provides: "But no testimony given by him shall be offered in evidence against him in any criminal proceeding." *It does not say that he shall be [578] exempt from prosecution, but only, in case of prosecution, his testimony cannot be used against him.

The two things are different, and cannot be confounded. The difference is illustrated by the different constructions this court has

given to § 860 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 661), and the provisions of the act of Congress of February 11, 1893 (chap. 83, 27 Stat. at L. 443, U. S. Comp. Stat. 1901, p. 3173).

In *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, it was contended that the protection of § 860 (U. S. Comp. Stat. 1901, p. 661) was that of the Constitution, and it was sought to compel a witness to testify to matters which he claimed would incriminate him. This court held against the contention, and the witness was justified. We did not attempt to extend the section to the prohibition of criminal prosecutions, but confined its immunity to that which was expressed, to wit, that the testimony given should not "be given in evidence, or in any manner used, against him or his property or estate, in any court of the United States, in any criminal proceeding. . . ."

The act of February 11 was different and the ruling upon it was different. It provided as follows:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena or the subpoena of either of them, or in any such case or proceeding."

It was held in *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644, that the act was virtually one of "general amnesty," and the protection of the Constitution was "fully accomplished by the statutory immunity." As in *Counselman v. Hitchcock*, a witness before a grand jury which was investigating alleged violations of the Interstate Commerce Act claimed that questions addressed to him "would tend to incriminate him." Upon proceedings in the district court he was adjudged guilty of contempt, and ordered to [579] pay a fine of \$5 and to be taken into custody until he should answer the question. He petitioned the circuit court for writ of *habeas corpus*, and from the judgment remanding him to custody prosecuted an appeal to this court. It was held that he was compellable to answer.

In the case at bar, as we have already said, plaintiff in error did not claim the protection afforded him by the bankrupt act. He made no objection to the use of the testimony which he gave before the referee, nor does he now urge its use as error. He broadly claimed, and now claims, exemption from prosecution. For the reasons we have given the claim is untenable.

Judgment affirmed.

TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY, *Plff. in Err.*,
v.

STATE OF INDIANA *ex rel.* WILLIAM A. KETCHAM, Attorney General.

(See S. C. Reporter's ed. 579-589.)

Error to state court—Federal question—constitutional law—validity of state legislation for the enforcement of a non-existent liability.

1. The Federal Supreme Court may review a decision of a state court sustaining the enforcement against a railway company of an alleged charter obligation to pay over the surplus profits to the state, which could not have been reached except by erroneously construing the charter, without relying on subsequent legislation flagrantly repugnant to the Federal Constitution, and challenged for that reason, where the state court clearly did rely upon that legislation to some extent, although it put forward in its judgment the untenable construction more than the unconstitutional statutes.
2. The surrender by a railway company of its special charter, to accept a general railroad law, before the state had made any attempt to regulate its tolls, freed the company from all liability to the state under a charter provision that when declared dividends shall aggregate a specified amount the legislature "may so regulate" the tolls that not more than a fixed percentage shall be divided annually on the capital employed, and the surplus profits shall be paid over to the state treasurer, and that, "If required," the corporation shall furnish the legislature a statement of expenditures; and such liability, therefore, cannot be enforced by virtue of subsequent legislation, without impairing the rights of the railroad company under the Federal Constitution.

[No. 264.]

Argued April 29, May 2, 1904. Decided May 31, 1904.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On legislative power to fix tolls, rates, and prices—see note to *Winchester & L. Turnp. Road Co. v. Croxton*, 33 L. R. A. 177.

which affirmed a judgment of the Superior Court of Marion County in that State, sustaining certain exceptions to a master's report, and enforcing against a railroad company an alleged charter obligation to pay over to the State its surplus profits. *Reversed.*

See same case below, 159 Ind. 438, 65 N. E. 401.

The facts are stated in the opinion.

Messrs. Lawrence Maxwell, Jr., and John G. Williams argued the cause, and with *Mr. Samuel O. Pickens* filed a brief for plaintiff in error:

Where a contract is alleged to have been impaired by subsequent legislation, this court will put its own construction upon it, though it may differ from that of the supreme court of the state.

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 44, 45 L. ed. 417, 21 Sup. Ct. Rep. 256; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 492, 38 L. ed. 793, 795, 14 Sup. Ct. Rep. 968; *Wilson v. Standefer*, 184 U. S. 399, 411, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384; *Chapman v. Goodnow*, 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211; *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, *ante*, 598, 24 Sup. Ct. Rep. 310; *McCullough v. Virginia*, 172 U. S. 102, 109, 43 L. ed. 382, 384, 19 Sup. Ct. Rep. 134.

When a contract is asserted, and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to review, and also all that which is claimed to have taken it away.

Citizens' Bank v. Parker, 192 U. S. 73, 85, *ante*, 346, 356, 24 Sup. Ct. Rep. 181.

The provisions of the 14th Amendment refer to all the instrumentalities of the state, including its legislative, executive, and judicial authorities.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

A contingent liability which can only ripen into an obligation as the result of future legislation which may or may not take place is not a present obligation, and the legislation which converts it into an obligation cannot be regarded as providing a remedy only. To perfect an obligation is the same thing as to create it, for there can be no obligation in the absence of an element essential to its existence. There is only a contingent or inchoate right or liability which may never ripen into a real right or obligation.

Bass v. Roanoke Nav. & Water Power Co. 111 N. C. 439, 19 L. R. A. 247, 16 S. E. 402.

The distinction between a statute which provides a remedy only, and one which imposes an obligation, is considered in *Hamilton County v. Rosche Bros.* 50 Ohio St. 103, 194 U. S.

19 L. R. A. 584, 40 Am. St. Rep. 653, 33 N. E. 408, which was a suit under a statute authorizing the recovery of taxes voluntarily paid on property which was not subject to taxation. The court held the statute unconstitutional on the ground that it imposed an obligation on the county for past transactions where none existed at the time the taxes were paid.

The legislation of 1897 was not necessary to provide a remedy.

State ex rel. Atty. Gen. v. Denny, 67 Ind. 148; *Carr v. State*, 81 Ind. 342; *Tippecanoe County v. State*, 92 Ind. 353; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 278, 31 L. ed. 747, 749, 8 Sup. Ct. Rep. 850.

The legislation was necessary to create a cause of action.

The surrender of the charter was equivalent to its repeal with the consent of the company; and the well-settled rule is that the repeal of a statute, without a saving clause, takes away all powers, which depend upon the statute, that have not been exercised and are not reserved.

Sutherland, Stat. Constr. §§ 162, 163; 26 Am. & Eng. Enc. Law, 2d ed. pp. 745, 747, 752; *Endlich*, Interpretation of Statutes, §§ 478, 480; *Robison v. Beall*, 26 Ga. 17; *Moor v. Seaton*, 31 Ind. 11; *Surtees v. Ellison*, 9 Barn. & C. 750, 4 Mann. & R. 586, 7 L. J. K. B. 335; *Kay v. Goodwin*, 6 Bing. 576; *Millev's Case*, 1 W. Bl. 451; *Lamb v. Schottler*, 54 Cal. 319; *Terry v. Dale*, 27 Tex. Civ. App. 1, 65 S. W. 51, 396; *Cushman v. Hale*, 68 Vt. 444, 35 Atl. 382; *Van Inwagen v. Chicago*, 61 Ill. 31; *Curran v. Owens*, 15 W. Va. 208; *Dillon v. Linder*, 36 Wis. 344; *Bennet v. Hargus*, 1 Neb. 419; *Kertschacke v. Ludwig*, 28 Wis. 430; *Rood v. Chicago, M. & St. P. R. Co.* 43 Wis. 146.

There are many cases in this court in which the rule has been applied where statutes imposing taxes, creating penalties, giving new rights of action, or conferring jurisdiction, have been repealed. They recognize the principle that when a statute is repealed without a saving clause all contingent interests and inchoate rights, and all proceedings begun which have not ripened into vested rights, fall with the repeal.

Ycaton v. United States, 5 Cranch, 281, 283, 3 L. ed. 101, 102; *The Rachel v. United States*, 6 Cranch, 329, 3 L. ed. 239; *Ex parte McCordle*, 7 Wall. 506, 514, 19 L. ed. 264, 265; *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 401, 25 L. ed. 231, 232; *Gurnee v. Patrick County*, 137 U. S. 141, 34 L. ed. 601, 11 Sup. Ct. Rep. 34; *Re Hall*, 167 U. S. 38, 42 L. ed. 69, 17 Sup. Ct. Rep. 723; *Bank of Hamilton v. Dudley*, 2 Pet. 492, 7 L. ed. 496; *Clapp v. Mason*, 94 U. S. 589, 24 L. ed. 212; *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894.

The rule has been applied frequently to mechanics' liens given by statute, where the requisite proceedings to fix the lien have not been completed at the date of repeal.

Bailey v. Mason, 4 Minn. 546, Gil. 430; *Holcomb v. Boynton*, 151 Ill. 294, 37 N. E. 1031; *Bangor v. Goding*, 35 Me. 73, 56 Am. Dec. 688; *Frost v. Ilsley*, 54 Me. 345; *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022; *John S. Hanes & Co. v. Wadey*, 73 Mich. 178, 2 L. R. A. 498, 41 N. W. 222.

There is a distinction between a vested right under a statute which the repeal of the statute does not affect, and an inchoate or contingent interest which falls with the repeal.

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 456, 17 L. ed. 805, 806; *Aspinwall v. Daviess County*, 22 How. 364, 16 L. ed. 296; *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395, 399, 13 L. ed. 469, 471.

Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction.

Thornley v. United States, 113 U. S. 310, 313, 28 L. ed. 999, 1000, 5 Sup. Ct. Rep. 491.

What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.

Hadden v. The Collector, 5 Wall. 107, 111, 18 L. ed. 518, 519.

The writing, it is true, may be read by the light of surrounding circumstances in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of words they have used.

1 Greenl. Ev. § 277.

No strained construction is to be adopted simply because the state is a party.

Tennessee v. Whitworth, 117 U. S. 129, 137, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 645.

Messrs. Robert S. Taylor and William A. Ketcham argued the cause, and, with **Messrs. Roscoe O. Hawkins and Ferdinand Winter**, filed a brief for defendant in error:

The jurisdiction of this court in the present case depends upon whether in the court below the defendant in error asserted the validity of the legislation by the general as-

sembly of the state of Indiana of 1897, and the plaintiff denied such validity on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, or whether any right claimed under the Constitution of the United States, and specially set up and claimed by the plaintiff in error, has been denied.

Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *De Saussure v. Gaillard*, 127 U. S. 218, 32 L. ed. 126, 8 Sup. Ct. Rep. 1053; *Missouri v. Adriano*, 138 U. S. 497, 34 L. ed. 1013, 11 Sup. Ct. Rep. 385; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Carothers v. Mayer*, 164 U. S. 325, 41 L. ed. 453, 17 Sup. Ct. Rep. 106.

Only the Federal question thus presented can be reviewed in this court.

Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

Where the case was decided in the court below on an independent ground broad enough to maintain the judgment, and not involving a Federal question, this court will dismiss the writ of error without considering the Federal question.

Beatty v. Benton, 135 U. S. 244, 34 L. ed. 124, 10 Sup. Ct. Rep. 747; *Marrow v. Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Hale v. Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Costillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

If merely the construction of state statutes is involved, the writ of error will not lie.

Phoenix Ins. Co. v. The Treasurer, 11 Wall. 204, 20 L. ed. 112.

Nor will it lie to review the decision of the court below upon questions of fact.

Dowce v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

Nor to review decisions upon the question of the admission or rejection of evidence which does not bear directly upon some matter of a Federal nature.

Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766.

A Federal question is not presented simply because the party litigant asserts that the claim made against him by his adversary depends upon the assertion, or involves the denial, of some right secured to him by the Constitution or laws of the United States. The record must affirmatively show such to be the fact.

Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458.

The assignment of errors, asserting the existence and decision against the plaintiff in error of a Federal question, counts for nothing, unless the fact appears from the record itself.

Fowler v. Lamson, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *Clarke v. McDade*, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; *Walker v. Villavaso*, 6 Wall. 124, 18 L. ed. 853.

The construction of a state statute and the scope and effect of a judgment as an estoppel are not Federal questions.

California v. Holladay, 159 U. S. 415, 40 L. ed. 202, 16 Sup. Ct. Rep. 53.

There is no vested right in a remedy. The remedy for the enforcement of a contract is not part of the obligation of the contract protected from impairment by subsequent legislation, except to the extent that, on the one hand, the existing remedies may not be taken away or so changed as not to leave the obligee a reasonably efficient remedy, or, on the other hand, so increased as to give the obligee more than the contract contemplates. Within these limits state legislation relating to matters of remedy does not impair the obligations of contracts.

Cooley, Const. Lim. 346, 347.

The right of the legislature to pass an act providing for the making of a demand, and designating the officer or agent by whom it shall be made, is a part of the contract obligation; and such an act does not impair but perfects and enforces, such obligation.

Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; *Beers v. Haughton*, 9 Pet. 329, 9 L. ed. 145; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610.

Chicago & E. I. R. Co. v. State, 153 Ind. 135, 51 N. E. 924, is directly in point.

Corporations are mere creatures of law, and have no powers except those expressly granted, or indispensably necessary to the exercise of those expressly granted.

Com. v. Erie & N. E. R. Co. 27 Pa. 339, 67 Am. Dec. 471; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Stourbridge Canal Co. v. Wheeley*, 2 Barn. & Ad. 793; 4 Thomp. Corp. § 5661; *Corington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

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Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit brought by the state of Indiana to ascertain and to recover from the plaintiff in error the total net profits made by the latter over 15 per cent on the true cost of construction of its railroad, from the time when the net earnings equalled that cost, with 10 per cent on the same added. The claim of the state was made under § 23 of the charter of the railroad, approved January 26, 1847, and four acts of 1897, to be referred to. The complaint admits, and the answer sets up, a surrender on January 17, 1873, of the charter of 1847, on which the supposed obligation was based, and an acceptance of the general railroad law by the company, and also a judgment for the company in March, 1876, on a former complaint for the same cause. The answer also makes a general denial, and invokes the 14th Amendment and other relevant parts of the Constitution of the United States. The case was referred to a master, who ruled that the former judgment was not a bar, but ruled also that the company was not liable. The superior court ruled the other way, and gave judgment against the company for \$913,905.01. This judgment was affirmed by the supreme court of the state, and the case then was brought here by writ of error.

By § 22 of the charter the railroad is given absolute discretion in the fixing of charges. Then, by § 23: "When the aggregate amount of dividends declared shall amount to the full sum invested and 10 per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than 15 per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools; but the corporation *shall not be [586] compelled by law to reduce the tolls and freights so that a dividend of 15 per centum per annum cannot be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits, after deducting all expenses," etc., By § 24: Semiannual dividends of so much of the profits as the corporation may deem expedient are to be made, and "the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper." By § 35, repealed in 1848, the cor-

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poration is to keep a fair record of the whole expense of making and repairing its road, etc., and also a fair account of the tolls received, and the state is to have the right to purchase the stock of the company after twenty-five years for a sum equal, with the tolls received, to the cost and expenses of the railroad, with 10 per cent.

The complaint relied also upon an amendment of § 23, on February 24, 1897, attempting to make the above-mentioned surplus profits a debt, and to make the company accountable from the beginning of such profits. The complaint still further relied upon an act of January 27, 1897, requiring the railroad to account; an act of March 4, 1897, appropriating the net earnings of the company above 15 per cent, etc., as above, to the use of common schools, and authorizing a demand and a suit; and an amendment of the general railroad law on February 18, 1897, after the surrender of this company's charter, providing that all liabilities to the state, whether inchoate or complete, under special charter, were and should be reserved, notwithstanding the past or future acceptance of the surrender of such special charters.

[587] The supreme court, while agreeing that the right of the state must depend on the original charter, did give force to this later legislation, in terms, as providing a remedy, and, on the construction which we are compelled to give to the charter, did also give force in fact to the amendment to the provision attempting retrospectively to save the charter obligations after *a surrender had been accepted. Therefore the question is properly here whether these statutes impaired the rights of the railroad under the Constitution of the United States. For, in order to determine whether the later legislation impairs those rights, this court must decide for itself what those rights were. If, in the opinion of this court, the state had lost all right to demand any sum whatever under § 23 of the charter, legislation necessary to enforce such a demand is invalid, and may be pronounced so by this court, notwithstanding the fact that the cause of action now is based upon the original act. We shall recur to the question of our jurisdiction after discussing the merits of the case, which we must do to make what little we have to add plain.

The supreme court of the state seems, although it is not clear, to have construed § 23 as creating by itself alone a debt to the state which accrued as fast as surplus profits were realized, which, under that section, might have been required to be paid over to the treasurer of state. It is pointed out

that in 1847 the state had no credit, and was in need of roads and schools, and that, therefore, it was natural to provide for the handing over of any surplus after a liberal return to the owners of the road. It is thought that the express grant of an absolute right to 15 per cent negatives the right to more, that the provisions for an account in §§ 23 and 35, and the mandatory language as to the surplus, confirm this result, and that it is unreasonable to suppose that the legislature, after indicating what, by the agreement of the parties, would be a fair demand of the state, should leave the right of the state in abeyance until a future legislature should choose to act. In this way the amendment of § 23 in 1897 is practically carried into effect. While repudiated as legislation, it is adopted by construction, and is found to express only the meaning of the original act.

We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the decision of a state court upon state laws. The language is plain. The *legislature "may so" regulate [588] tolls "that" not more than 15 per cent shall be divided, "and" the surplus profit shall be paid over. The word "may," it is agreed, is permissive, not mandatory. In the next place, it is only upon its regulation of tolls, so that not more than 15 per cent shall be divided, that dividends are confined to that sum. Otherwise the general power, given by § 24, to declare such dividends as the company deems expedient, remains in force. Finally, the payment over of the surplus profits above 15 per cent is not a separate, independent, and absolute mandate, but is connected with "so regulate tolls that" by "and." Like the cutting down of dividends, it is a result of the regulation. Again, the duty of the corporation to furnish the legislature a statement of expenditures is only "if required." It might be required in order to be certain whether it was advisable to regulate tolls. Perhaps, if the legislature had regulated them, it might be required in order to find out what was due. The provision for a record and an account in the repealed § 35 seems to us to have little bearing. They were required there, primarily at least, with reference to the possible purchase of the stock by the state. We infer that the state courts considered the words "regulate tolls" to refer solely to fixing the amount to be charged, and regarded the payment over of the surplus as an independent mandate. It seems to us that the words as here used meant more, and embraced not only fixing the amount to be charged to the public, but an order for the

division of earnings between the railroad and the schools. The provision as to the surplus over 15 per cent is not sufficiently accounted for if the regulation of tolls is intended to make the profits as near 15 per cent as may be.

Not only the absolute discretion as to dividends given by § 24, but the similar discretion given by the same section as to the proportion of profits to be retained, confirms the grammatical construction of § 23. Circumstances might change, and knowledge might change. It is agreed that they did not know much about railroads in 1847.

[589] The corporation *was allowed to make and to distribute or retain such earnings as it could, subject to the power of the state in certain events to require it to pay over extra profits, or to sell its stock. But which, and whether the state would make either demand, was left undecided; and, until the state elected, the whole earnings of the company were its own.

It follows that when the company surrendered its charter in 1873, there having been no attempt by the state to regulate tolls before that time, the company was free from liability or the possibility of demand. Therefore it is only by attempting, as it did attempt in its complaint, to apply the subsequent amendment of the general railroad law, that the state can come into court. That law, it will be remembered, purported retrospectively to save rights under surrendered charters. It does not need argument to show that this amendment could not affect the plaintiff.

The case then stands thus: The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court. *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 697, 29 L. ed. 510, 516, 6 Sup. Ct. Rep. 265. We may add that it is admitted that one of the acts of 1897 was necessary to authorize a demand, and so to create a cause of action. It was for want of an authorized demand that the former suit was held no bar. But in our opinion the state had no right, in 1897, to make a demand.

Judgment reversed.

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*MERRITT CHANDLER, *Appt.*, [590]
v.

ROSCOE D. DIX, Auditor General of the State of Michigan, James H. Kerr, County Treasurer of Alpena County, *et al.*

(See S. C. Reporter's ed. 590-593.)

Suits against a state—waiver—abatement of suit against public official.

1. No waiver by the state of its constitutional immunity from a suit in a Federal court to set aside the title of the state to lands sold for unpaid taxes can be gathered from the provision of Mich. Pub. Acts 1899, act No. 97, for making the auditor general a party defendant to all actions or proceedings to set aside a sale for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, since the statute makes such requirements with reference to procedure and costs as to indicate that the legislature had in mind only proceedings in the state courts.
2. A bill to enjoin the auditor general and certain county treasurers from proceeding to assess alleged illegal taxes on lands held by the state as the purchaser at a tax sale cannot be maintained, at least, without amendment, after the auditor general has retired from office.

[No. 261.]

Argued April 28, 1904. Decided May 31, 1904.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan to review a decree dismissing, on demurrer, a bill to set aside the title of the state to lands sold for unpaid taxes, and to enjoin the auditor general and certain county treasurers from proceeding to assess alleged illegal taxes on land held by the state as a purchaser at a tax sale. *Affirmed.*

The facts are stated in the opinion.

Messrs. John A. McKay and George W. Weadock argued the cause and filed a brief for appellant:

Cases in which it has been held by this court that an abatement took place by the expiration of the term of office have been suits against officers of the government whose alleged delinquency was personal, not involving any charge against the government whose officers they were.

Thompson v. United States, 103 U. S. 484, 26 L. ed. 523.

This is not a suit against the state.

Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; *Osborn v. Bank of United States*, 9 Wheat.

NOTE.—On the immunity of a state from suit—see notes to *Murdock Parlor Grate Co. v. Com.* 8 L. R. A. 399; *Carr v. Indiana*, 11 L. R. A. 370; and *Hans v. Louisiana*, 33 L. ed. U. S. 842.

738, 6 L. ed. 204; 2 Tucker, Const. p. 791; Guthrie's 14th Amendment, pp. 176, 177; 1 Desty, Fed. Proc. 9th ed. pp. 25, 26; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Virginia Coupon Cases*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Re Ayers*, 123 U. S. 447, 31 L. ed. 217, 8 Sup. Ct. Rep. 164; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Re Tyler*, 149 U. S. 164, 191, 37 L. ed. 689, 698, 13 Sup. Ct. Rep. 785; *Tindal v. Wesley*, 167 U. S. 204, 220, 42 L. ed. 137, 142, 17 Sup. Ct. Rep. 770; *Fitts v. McGhee*, 172 U. S. 527, 43 L. ed. 540, 19 Sup. Ct. Rep. 269; *Gregg v. Sanford*, 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151; *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65; *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; *Fargo v. Hart*, 193 U. S. 490, ante, 761, 24 Sup. Ct. Rep. 498; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Lake Superior Ship Canal, R. & I. Co. v. Aplin*, 79 Mich. 351, 44 N. W. 616.

The only ground upon which it could be charged that the suit is one against the state would be that the defendants were acting under and according to the provisions of a valid law of the state; but they are acting under an act which is unconstitutional, which, therefore, is not, and cannot be, a law of the state; and, therefore, they are stripped of all official character, and become to the law and in the eyes of the court merely private individuals.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 406, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Starr v. Chicago, R. I. & P. R. Co.* 110 Fed. 3; *Tindall v. Wesley*, 13 C. C. A. 165, 25 U. S. App. 124, 65 Fed. 731.

Mr. John H. Goff argued the cause, and, with *Messrs. Charles A. Blair* and *Henry E. Chase*, filed a brief for appellees:

The state is prima facie the owner of lands bid in by it.

Semer v. Auditor General (Mich.) 10 Det. L. N. 309, 95 N. W. 732; *Allen v. Cowley*, 128 Mich. 530, 87 N. W. 620; *Auditor General v. Sage Land & Improv. Co.* 129 Mich. 182, 56 L. R. A. 105, 88 N. W. 468.

The statute of limitations runs against the state upon lands bid off to the state at a tax sale.

Chamberlain v. Ahrens, 55 Mich. 111, 20 N. W. 814.

It is this prima facie title of the state of Michigan to the lands in question which the complainant asks to have declared void, and asks that he may be declared the owner in
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fee simple. The suit is, therefore, in effect a suit against the state.

The question whether a suit is within the prohibition of the 11th Amendment to the Federal Constitution is not always determined by reference to the nominal parties on the record.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

Such a suit as the present has been held by the supreme court of Michigan to be a suit, in effect, against the state; and it has been held that such a suit could not be maintained in the state court.

Burrill v. Auditor General, 46 Mich. 256, 9 N. W. 273; *Stevens v. Saginaw County*, 62 Mich. 597, 29 N. W. 492; *McElroy v. Swart*, 57 Mich. 500, 24 N. W. 766.

The contention that the present suit is a suit against the state is supported by the case of *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919.

Even if in this case all the tax statutes appeared to be unconstitutional, which is not at all conceded, still this is a suit against the state.

Louisiana ex rel. New York Guaranty & Indemnity Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511.

The question whether or not this is in effect a suit against the state of Michigan may be raised by demurrer.

Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251.

The Auditor General has no control over tax homestead lands.

State Land Office v. Auditor General, 131 Mich. 147, 91 N. W. 153.

If the bill will not lie against the Auditor General, it will not lie against the county treasurers.

Warner Valley Stock Co. v. Smith, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225.

The amended bill cannot be maintained against the successor in office of the Auditor General.

Ibid.

Mr. Justice **Holmes** delivered the opinion of the court:

This bill is not artificially drawn, but we take it to be primarily, at least, a bill to remove a cloud upon the plaintiff's title to certain lands which have been sold for taxes, brought upon the ground that the tax laws of Michigan, for a series of years named, were unconstitutional, and deprived the plaintiff of his property contrary to the 14th Amendment. The circuit court dismissed the bill on demurrer, and the plaintiff *appealed. The dismissal was so plain-[591] ly right that it is less necessary than otherwise it might be to pick out and analyze the meagre allegations of fact from the

much more lengthy suggestions and arguments of matter of law. It is to be gathered that all of the lands referred to have been sold, and that in some, if not all, cases, the state was the purchaser, under the state laws. It does not appear that the state has sold to any one else, or that, if it has, the purchaser is a party to the bill. It does appear that the state claims title and, it would seem, possession of a large part, if not all, of the lands. It does not appear by sufficient allegations that any defendant claims either possession or title.

It is obvious, without going further, that the bill cannot be maintained. The auditor general and county treasurer claim no interest in the land, and have none in the question whether the state's title is good. The state's title, so far as appears, is the only one assailed. The state, therefore, is a necessary party (*Burrill v. Auditor General*, 46 Mich. 256, 9 N. W. 273); and, as this suit cannot be maintained against a state, the bill, so far as it seeks to have tax sales declared void, must be dismissed, whether it be admitted that Michigan is not represented, or be said that it is represented by the auditor general. The plaintiff relies upon the Public Acts of Michigan, 1899, act 97, adding § 144 to the general tax law of 1893. That act provides that "the auditor general shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made." But we are of opinion that if the foregoing words otherwise would apply to this case, they should not be construed as expressing a waiver by the state of its constitutional immunity from suit in a United States court. The provisions indicate that the legislature had in mind only proceedings in the courts of the state.

[592] A copy of the complaint *is to be served upon the prosecuting attorney, who is to send a copy thereof within five days to the auditor general, and this is to be in lieu of service of process. It then is left to the discretion of the auditor general to cause the attorney general to represent him, and it is provided that in such suits no costs shall be taxed. These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control. Of course, a taxpayer denied rights secured to him by the Constitution and laws of the United States, and specially set up by him, could bring the case here by writ of error from the highest courts of the state. But the statute does

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not warrant the beginning of a suit in the Federal court to set aside the title of the state. *Smith v. Recves*, 178 U. S. 436, 445, 44 L. ed. 1140, 1145, 20 Sup. Ct. Rep. 919.

It is true that the statute deals also with suits for setting aside taxes for which sales have not been made, and that apart from the statute, injunctions against officers proceeding unconstitutionally, under color of their office, are well known. *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Fargo v. Hart*, decided at this term (193 U. S. 490, *ante*, 761, 24 Sup. Ct. Rep. 498). It is true, also, that while the prayers of the bill are directed mainly to the setting aside of conveyances supposed to have been made before the filing of the bill, there is also a prayer that the defendants be enjoined from levying taxes on the lands, from selling them, or from taking further proceedings under the said laws. It seems to be the practice in Michigan to continue to assess lands sold for taxes while in the hands of the state, for reasons which are easily understood, but do not need to be explained. It is unnecessary to consider whether an injunction could be granted against this without disposing of the title alleged by the state, or whether sufficient foundation is laid for the prayer in the vague allegations of the bill. It is enough to say that, as the defendant Dix has retired from office, the bill must be dismissed. It does not appear upon the record that any amendment was sought to be made, or that, if one had been offered, it could have been allowed. *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225. *The case was [593] disposed of properly by the circuit court on the foregoing grounds. Therefore, the merits cannot be discussed.

Decree affirmed.

CHARLES H. SHAW, Trustee; Union Light, Heat, & Power Co., and Suburban Electric Co., *Appts.*,

v.

CITY OF COVINGTON *et al.*,

(See S. C. Reporter's ed. 593-600.)

Corporations—consolidation—continuance of exclusive privilege of constituent corporation.

A new corporation formed by consolidation un-

NOTE.—On the effect of consolidation of corporations—see notes to Louisville, N. A. & C. R. Co. v. Boney, 3 L. R. A. 435; *Shields v. Ohio*, 24 L. ed. U. S. 357; and *Cantillon v. Dubuque & N. W. R. Co.* 5 L. R. A. 726.

On the right of corporations to consolidate—see note to *Wood v. Seattle*, 52 L. R. A. 369.

der Ky. act of April 5, 1893, can claim no right to the exclusive privilege to conduct an electric light, heat, and power business, conferred by Ky. act of April 22, 1882, upon one of the constituent corporations, in view of the provision of the consolidation statute for the merger of the old corporations into a single corporation, which is to be subject to all the provisions of that statute and other laws relating to it, and is to be vested with all the property, business, credits, assets, and effects of the constituent corporations,—especially since the policy of the law at the time of the passage of the consolidation statute was entirely opposed to the continuance of any such special privileges.

[No. 246.]

Argued April 22, 25, 1904. Decided May 31, 1904.

APPEAL from the Circuit Court of the United States for the Eastern District of Kentucky to review a decree which dismissed a bill to enjoin a municipal corporation from constructing an electric plant, on the ground that such action would impair contract obligations. *Affirmed.*

The facts are stated in the opinion.

Messrs. Miller Outcalt and Alfred C. Cassatt argued the cause, and, with **Mr. Richard P. Ernst**, filed a brief for appellants:

If there is no provision to the contrary in the statute or the agreement between the parties, the general rule, based upon the presumed intention of the legislature and the corporations, is that the consolidated corporation acquires, by the consolidation, all the rights, franchises, privileges, and property of the consolidating corporations, subject to the same burdens and restrictions which attached thereto in the hands of the consolidating corporations respectively, under their charters.

2 Clark & M. Priv. Corp. § 355a. And see *Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

No intention appearing to subject its charter to the provisions of the new Constitution, it does not follow that the Covington Electric Light Company, by entering into the consolidation, subjected itself to that instrument to any greater extent than it had been before.

Citizens' Street R. Co. v. Memphis, 53 Fed. 715.

There is nothing in the new Constitution which either forbids or terminates an exclusive franchise of the character indicated.

Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *New Orleans Gaslight Co. v.* 1132

Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273.

Mr. F. J. Hanlon argued the cause and filed a brief for appellees:

The exclusive franchise granted to the Covington Electric Light Company was lost when said company consolidated with the suburban company.

6 Am. & Eng. Enc. Law, 2d ed. pp. 810, 811, 813, 818; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 2, 45 L. ed. 396, 21 Sup. Ct. Rep. 240; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185.

***Mr. Justice Holmes** delivered the opinion of the court: [596]

This is a suit in equity brought by the appellants to enjoin the city of Covington from setting up an electric plant to furnish light, heat, and power to the city and its citizens. The ground of the suit is that the intended action of the city will impair the obligations of a contract with the Suburban Electric Company, contrary to article 1, § 10, of the Constitution of the United States. The plaintiff Shaw is trustee in bankruptcy of the Electric Company. The contract set up consists of a clause in a charter granted by the legislature of Kentucky on April 22, 1882, to the Covington Electric Light Company. By § 5 the business of the company is limited to furnishing the city of Covington, its inhabitants, and others near the city, with light, motive power, and heat, and the company is given the "exclusive privilege of conducting the business above described within and adjacent to said city for the term of twenty-five years; but a non-user of the privilege of this act of incorporation for five years shall work a forfeiture." One of the contentions of the defendant is that this privilege was lost by nonuser. But as our judgment proceeds upon other grounds we say nothing about that, but assume, for the purposes of decision, that the privilege was acquired subject to the general reservation by the state of the power to repeal. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 571.

The circuit court dismissed the bill on the grounds that this privilege was repealed

from and after September 28, 1897, by what is now § 573 of the Kentucky statutes (1894), or would have been repealed if not previously lost by the consolidation of the Covington Electric Light Company with other companies on April 11, 1894, as the court thought that it had been. The plaintiffs appealed to this court. They are met at the outset by the dilemma that either the action of the municipality is sanctioned by the state, in which case the state must [597] be *taken to have exercised its reserved right to repeal its grant to that extent, or the action of the municipality is not so sanctioned; in which case it cannot be a law impairing the obligations of contracts within the clause of the Constitution, and the plaintiffs are out of court. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 385, ante, 229, 230, 24 Sup. Ct. Rep. 107. See *Joplin v. Southwest Missouri Light Co.* 191 U. S. 150, 155, 156, ante, p. 127, 129, 24 Sup. Ct. Rep. 43. But in view of *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653, we do not stop to consider this point further, as the result will be the same, whatever the ground.

As we have implied, the original grantee of the exclusive privilege consolidated with other companies on April 11, 1894. This was done under what are now §§ 555 and 556 of the Kentucky statutes. By the latter section, when the agreement of consolidation is recorded, etc., "the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation, in accordance with the said agreement, and subject to all the provisions of this chapter, and other laws relating to it, and shall be vested with all the property, business, credits, assets, and effects of the constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities." The old companies disappear and the new company must claim whatever rights it gets from the law which calls it into being. It is absolutely subject to the Constitution and laws then in force. Therefore it can claim the franchises and privileges of its constituent companies by succession, only under the words "property," or "assets and effects," if at all. These words certainly are not happily chosen to express the transfer of a franchise, still less to express the continuance of a right not to be competed with, granted by the legislature to a named corporation, after that corporation shall have ceased to exist. The natural meaning of the words would be that the ordinary property of the consolidating cor-

porations, the property such as any one might own without *special franchise, and [598] might transfer by deed, shall belong to the new company without deed, but the franchises of the new company would seem to be left to be determined by the general law. The new corporation is to be "subject to all the provisions of this chapter, and other laws relating to it." This interpretation is strengthened by the consideration that other sections show that the legislature had franchises and privileges before its mind, and evidently did not fail to mention them from forgetfulness. In the cases cited by the appellants the privileges and franchises of the constituent companies were continued in the new company by explicit and careful words. *Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

The impression that the plaintiffs did not inherit a right to exclude the city of Covington from setting up a plant before 1907 as the result of the consolidation is confirmed still further when we consider the state of the law at the time. By § 191 of the Constitution of 1891 "all existing charters or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place, . . . shall thereafter be void and of no effect." Again, by § 164, no city can grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years, and the grantee is to be the highest and best bidder at public offer. We assume that the Covington Electric Light Company escaped these sections, but they show the policy of the state to have been against such a right as it claimed. It is doubtful, at least, whether the legislature could have granted it in 1894; and this is a reason the more for construing the strict language of the consolidation sections to have meant no more than they said. We may add to the foregoing, as indicative of the general jealousy of exclusive rights, § 3 of the Bill of Rights: "No grant of exclusive . . . privileges shall be made to any man or set of men except in consideration of public services." It was uncertain, until decided, whether, *under this section, such an ex-[599] clusive right as that of the Covington Electric Light Company could be granted, and the prevailing local opinion was that such grants were forbidden. *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 683, 6 Sup. Ct. Rep. 265; S. C. 81 Ky. 263. This, again, goes to show that the meagre words used in describing the rights of the new company were chosen with intelligent care. Everything in the Constitution

looked to the abolition and refusal of special privileges, and to putting all corporations on an equal footing. It was natural, therefore, when old corporations consolidated, that the law should treat the new corporation which it then called into being as it would have treated another corporation coming into being at the same time, but starting fresh, instead of being a consolidation of the old. We refer again to the words, "subject to all the provisions of this chapter, and other laws relating to it," in § 556.

Finally, we add to the language of the Constitution the section of the statutes which the circuit court adjudged to have repealed the grant of a monopoly to the original company. By § 573 the provisions of all charters "which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges, or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897," and the exercise of the repealed powers is made a crime. After September 28, 1897, the provisions of the chapter are to apply to all corporations if they would be applicable to such corporations if organized under that chapter. There was nice discussion, and it is a fair question whether this section did not repeal the exclusive privilege given to the Covington company in 1897, if that privilege survived the consolidation. But we refer to it only as an aid in construing § 556. It is another evidence of the wish and intent of the legislature to bring all corporations to a level when it could.

Practically it was admitted that the new [600] corporation formed *by consolidation in 1894 was subject to the statutes and Constitution then in force. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240. To dispute the proposition would be to discredit the whole of the appellant's case. But that being so, we think that we have shown that the policy of the law at the time of the passage of the consolidation statute (Ky. Stat. § 556, act of April 5, 1893) was entirely opposed to the continuance of such a special right as is claimed, and therefore have given a sufficient reason for construing the words as meaning what they seem on their face to mean, and no more. It may be doubted whether the legislature could have kept the Covington Light Company monopoly alive in the hands of a new and distinct corporation. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592. But, at all events, we are satisfied that it did not try to do so. See *Yazoo &*

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M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

In the very able argument for the appellant an attempt was made to detach the exclusive privilege, given by § 5 of the Covington Electric Light Company's charter, from "conducting the business," to which it was attached by that section, and to transfer it to the "privilege," granted by § 6, "subject to the regulations of the city authorities, to lay its pipes and mains, to erect its poles, posts, and wires through and along any street," etc. The latter, it is said, is an easement, the exclusive character is part of it, and it all goes, like any other property, to the successors of the Covington Company. We cannot be so ingenious. However the plaintiffs may stand as to using the streets, the Covington Company's monopoly in business was distinct from its rights in the streets. When the Covington Company died its monopoly came to an end.

Decree affirmed.

Mr. Justice **White** dissented.

*INTERNATIONAL POSTAL SUPPLY[601]
COMPANY OF NEW YORK

v.

DWIGHT H. BRUCE.

(See S. C. Reporter's ed. 601-617.)

Injunction against Federal official—when inability to make the United States a party defeats the suit.

The inability to make the United States a party defeats the right of a patentee for improvements in stamp canceling and postmarking machines to enjoin the use by a postmaster in a United States postoffice of infringing machines of which the United States is a lessee in possession, for a term which is not expired.

[No. 215.]

Argued April 13, 14, 1904. Decided May 31, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question as to the right of a patentee for improvements in stamp canceling and postmarking machines to enjoin the use by a postmaster in a United States postoffice of certain infringing machines of which the United States is a lessee in possession, for an unexpired term. *Answered in the negative.*

NOTE.—On injunction to restrain acts of public officers—see note to *Mississippi v. Johnson*, 18 L. ed. U. S. 437.

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Statement by Mr. Justice **Holmes**:

This case came before the court on the following certificate for instructions:

"The complainant, as the owner of letters patent of the United States for new and useful improvements in stamp canceling and postmarking machines, brought a bill in equity against the defendant, who is postmaster of the United States postoffice at Syracuse, New York, complaining of the use in said postoffice of two machines which infringe the complainant's letters patent, and praying for an injunction against the further use of said machines. The defendant never personally used any stamp canceling and postmarking machines, but the use of said two machines in said postoffice at Syracuse is by some of defendant's subordinates, who are employees of the United States government, such use being in the service of the United States.

[602] "The machines so used were hired by the United States Postoffice Department for a term, which is, as yet, unexpired, *from the manufacturer and owner of said machines, at an agreed rental, which is payable on the order of the Postoffice Department, by whose orders said machines were placed in the Syracuse postoffice, and were and are now used there.

"And the said United States circuit court of appeals for the second circuit further certifies that, to the end that it may properly decide the questions in such cause, and presented in the assignments of error therein filed, it requires the instructions of the Supreme Court of the United States on the following question, to wit:

"Upon the foregoing facts, has the United States circuit court the power to grant an injunction against the defendant, restraining the use of the machines?"

Mr. Louis Marshall argued the cause, and, with **Mr. George W. Hey**, filed a brief for the International Postal Supply Company:

The government of the United States, by granting the letters patent on which the complainant bases its claims for relief, conferred upon it an exclusive property therein which cannot be appropriated or used by the government itself, or by any of its officials, without the complainant's consent.

Walker, Patents, § 167; 3 Robinson, Patents, § 397; *United States v. Burns*, 12 Wall. 246, 20 L. ed. 388; *James v. Campbell*, 104 U. S. 356, 26 L. ed. 786; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; *Solomons v. United States*, 137 U. S. 348, 34 L. ed. 669, 11 Sup. Ct. Rep. 88; *Head v. Porter*, 48 Fed. 481; *Belknap v. Schild*, 161 U. S. 194 U. S.

15, 16, 40 L. ed. 600, 601, 16 Sup. Ct. Rep. 443.

The defendant Bruce having used an infringing device against the complainant's protest, his tortious act cannot be made the basis of a suit against the United States in the court of claims, or in any other court.

Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453; *Morgan v. United States*, 14 Wall. 531, 20 L. ed. 738; *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010; *United States v. Jones*, 131 U. S. 1, 16, 18, 33 L. ed. 90, 91, 9 Sup. Ct. Rep. 669; *German Bank v. United States*, 148 U. S. 573, 579, 580, 37 L. ed. 564, 568, 569, 13 Sup. Ct. Rep. 702; *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011.

It has accordingly been held that the United States is not liable to a suit for an infringement of a patent, since such a suit is one sounding in tort.

Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *United States v. Berdan Fire-Arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420.

The complainant would thus be remediless with respect to a conceded infringement of its rights, unless relief by injunction is granted against the defendant Bruce for his continuing trespass against the complainant's property right.

It has been held from an early day that the exemption of the United States, and of the several states, from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the government which they represent.

Little v. Barreme, 2 Cranch, 170, 2 L. ed. 243; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

Numerous actions have been maintained against customs officials for exacting excessive duties (*Elliott v. Swartwout*, 10 Pet. 137, 9 L. ed. 373); against executive officers for making illegal or tortious seizures of property (*Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204); and against tax collectors for seeking to enforce a void tax law (*Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962).

An action has been maintained against a postmaster for withholding a newspaper in

accordance with instructions from the Postmaster General.

Teall v. Felton, 1 N. Y. 537, 49 Am. Dec. 352, Affirmed in 12 How. 284, 13 L. ed. 990.

An action for false imprisonment has been held to lie against the sergeant at arms of the House of Representatives who acted under a void warrant of commitment issued by the House.

Kilbourn v. Thompson, 103 U. S. 198, 26 L. ed. 389.

Actions of ejectment have been maintained against government officers in possession of land under government authority.

United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770. See also *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; *Stanley v. Schwalby*, 147 U. S. 508, 518, 37 L. ed. 259, 263, 13 Sup. Ct. Rep. 478; *McGahey v. Virginia*, 135 U. S. 662, 684, 34 L. ed. 304, 312, 10 Sup. Ct. Rep. 972; *Smyth v. Ames*, 169 U. S. 518, 519, 42 L. ed. 839, 18 Sup. Ct. Rep. 418.

The power of the Federal courts to enjoin a postmaster from interfering with the property rights of a citizen has been recently recognized in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

While it cannot be said that the Supreme Court has squarely decided that a patentee may maintain a suit for an infringement of a patent right, against one whose defense is that all of his acts in relation thereto were done as an officer or agent of the government and in obedience to its orders, it may be safely asserted that the court has not decided against the maintenance of such a suit, and that the weight of authority, as well as of reason, is in favor of the maintenance of such an action.

Cammeyer v. Newton, 94 U. S. 225, 234, 24 L. ed. 72, 75; *James v. Campbell*, 104 U. S. 356, 26 L. ed. 786; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; *Head v. Porter*, 48 Fed. 481.

Belknap v. Schild, 161 U. S. 15, 16, 40 L. ed. 600, 601, 16 Sup. Ct. Rep. 443, is not controlling.

Vavasaur v. Krupp, L. R. 9 Ch. Div. 351, 39 L. T. N. S. 437, 27 Week. Rep. 176; *Dashiell v. Grosvenor*, 162 U. S. 425, 40 L. ed. 1025, 16 Sup. Ct. Rep. 805; *Tindal v. Wesley*, 167 U. S. 204, 219, 42 L. ed. 137, 142, 17 Sup. Ct. Rep. 770; *Scott v. Donald*, 165 U. S. 108, 41 L. ed. 648, 17 Sup. Ct.

Rep. 262; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Howell v. Miller*, 33 C. C. A. 407, 62 U. S. App. 17, 91 Fed. 129.

Where a third person establishes title to demised premises superior to that of the landlord, and gains possession by virtue of that title, the tenant is freed from the obligation to pay rent. It is not necessary that he should be forcibly ejected or dispossessed from the demised premises by process of law. He may peaceably yield possession to the person who has superior title, or who is adjudged to be entitled to the possession, and treat himself as having been evicted.

Tomlinson v. Day, 2 Brod. & B. 680, 5 J. B. Moore, 558, 23 Revised Rep. 541; *Neale v. Mackenzie*, 1 Mees. & W. 747, 2 Gale, 174, 6 L. J. Exch. N. S. 263; *Fitchburg Cotton Mfg. Corp. v. Melven*, 15 Mass. 268; *Simers v. Saltus*, 3 Denio, 214; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370.

The same principle has been applied in favor of the licensees of rights under letters patent.

Walker, Patents, 3d ed. § 307; *White v. Lee*, 14 Fed. 791; *McKay v. Smith*, 39 Fed. 557; *Pacific Iron Works v. Newhall*, 34 Conn. 67; 3 Robinson, Patents, § 1251; *Herzog v. Heyman*, 151 N. Y. 587, 56 Am. St. Rep. 646, 46 N. E. 1148; *Standard Button Fastening Co. v. Ellis*, 159 Mass. 448, 34 N. E. 682.

Mr. William K. Richardson argued the cause, and, with *Assistant Attorney General McReynolds*, filed a brief for *Dwight H. Bruce*:

This case is directly governed by the decision of this court in *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443. See *Dickerson v. Sheldon*, 39 C. C. A. 191, 98 Fed. 621.

The United States, having hired the machines in question for a term, had a title thereto as special owner, which the law recognizes and protects.

2 Bl. Com. pp. 395, 453; *United States v. Shca*, 152 U. S. 178, 38 L. ed. 403, 14 Sup. Ct. Rep. 519; *The Jersey City*, 2 C. C. A. 365, 1 U. S. App. 244, 51 Fed. 527; *Smith v. Plomer*, 15 East, 607; *Muggridge v. Eveleth*, 9 Met. 233; *Fairbank v. Phelps*, 22 Pick. 535; *Wade v. Mason*, 12 Gray, 335, 74 Am. Dec. 597.

The injunction cannot be granted because it seeks to interfere with the use by the United States of property which is lawfully in their possession under a good title.

The Federal courts have, from the beginning, recognized the hardship arising from an injunction against the use of alleged infringing machines.

Barnard v. Gibson, 7 How. 650, 658, 12

L. ed. 857, 860; *Morris v. Lowell Mfg. Co.* 3 Fisher Pat. Cas. 67, 69, Fed. Cas. No. 9,833; *Bliss v. Brooklyn*, 8 Blatchf. 533, 4 Fisher Pat. Cas. 596, Fed. Cas. No. 1,544; *Ballard v. Pittsburg*, 12 Fed. 783, 786; *Westinghouse Air-Brake Co. v. Burton Stock-Car Co.* 70 Fed. 619; *Westinghouse Air-Brake Co. v. Burton Stock-Car Co.* 23 C. C. A. 174, 33 U. S. App. 692, 77 Fed. 301; *Huntingdon Dry-Pulverizer Co. v. Alpha Portland Cement Co.* 91 Fed. 534.

It has never been suggested that suspension of rentals was a compensation for the loss occasioned by such an injunction.

As to the possession of the alleged infringing articles, there is obviously no distinction between the *Belknap Case* and the case at bar. In each case the United States was in possession through its officers.

Belknap v. Schild, 161 U. S. 25, 40 L. ed. 604, 16 Sup. Ct. Rep. 443; *The Davis*, 10 Wall. 21, 19 L. ed. 877.

A government official is not responsible for a tort committed by his subordinates, with which tort the official was not personally connected.

Robertson v. Sichel, 127 U. S. 507, 515, 32 L. ed. 203, 206, 8 Sup. Ct. Rep. 1286; *Keenan v. Southworth*, 110 Mass. 474, 14 Am. Rep. 613.

Mr. Justice **Holmes** delivered the opinion of the court:

This case is governed by *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443. There an injunction was sought against the commandant of the United States navy yard at Mare island, California, and some of his subordinates, to prevent the use of a caisson gate in the dry dock at that place, contrary to the rights of the plaintiff, as patentee. The case was heard on pleas setting up that the caisson gate was made and used by the United States for public purposes, and, as they were construed, that it was the property of the United States. The pleas were held bad as answers to the whole bill, because the bill also sought damages, and the defendants might be personally liable, but it was held that an injunction could not be granted, and the bill was dismissed, without prejudice to an action at law. *Vavas seur v. Krupp*, L. R. 9 Ch. Div. 351, was cited for the proposition which was made the turning point of the case, that the court could not interfere with an object of property unless it had before it the person entitled to the thing, and this proposition was held to extend to an injunction against the use of the thing as well as to a destruction of it or to a removal of the part which infringed. It was pointed out that the defendants had no personal interest in the continuance of the use, and that, so far as 194 U. S.

the injunction was concerned, the suit really was against the United States. Of course, if those defendants were enjoined, other persons attempting to use the caisson gate would be, and thus the injunction practically would work a prohibition against its use by the United States.

Belknap v. Schild differed from *United States v. Lec*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240, and *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770. and also from *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33, relied on by the appellant, in the fact, among others, that the title of the United States to the caisson gate was admitted, and therefore the United States was a necessary party to a suit which was intended to deprive it of the incident of title,—the right to use the gate. As the United States could not be made a party, the suit failed. In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has a property,—a right *in rem*,—in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. This right cannot be interfered with behind its back; and, as it cannot be made a party, this suit, like that of *Belknap v. Schild*, must fail. The answer to the question certified must be "No." Whether or not a renewal of the lease could be enjoined is not before us.

The question is answered in the negative, and it will be so certified.

Mr. Justice **Harlan**, dissenting:

It is to be assumed upon this record that the plaintiff, the International Postal Supply Company, is the owner of letters patent granted by the United States for new and useful improvements in stamp canceling and postmarking machines; and that the defendant, Bruce, against the will of the patentee, and without paying any royalty to him, is using, and, unless enjoined, will continue to use, machines that infringe the plaintiff's letters patent.

Can the defendant be prevented from thus violating rights of the plaintiff in respect of his patent, the validity of which is not here disputed? In answering this question it is necessary to bring together the observations of this court in some cases heretofore decided. That being done, but little additional need be said.

*In *James v. Campbell*, 104 U. S. 356, 357, [607] 26 L. ed. 786, 787, this court, speaking by Mr. Justice Bradley, said: "That the government of the United States, when it grants letters patent for a new invention

or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use, without compensation, land which has been patented to a private purchaser, we have no doubt. The Constitution gives to Congress power 'to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries,' which could not be effected if the government had a reserved right to publish such writings or to use such inventions without the consent of the owner. Many inventions relate to subjects which can only be properly used by the government, such as explosive shells, rams, and submarine batteries, to be attached to armed vessels. If it could use such inventions without compensation, the inventors could get no return at all for their discoveries and experiments. It has been the general practice, when inventions have been made which are desirable for government use, either for the government to purchase them from the inventors, and use them as secrets of the proper department; or, if a patent is granted, to pay the patentee a fair compensation for their use. The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters patent to those who entitle themselves to such grants. The government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor." Observe, that the court said that, without compensation to the patentee, the government could not appropriate or use his invention.

[608] *These views were reaffirmed by the unanimous judgment of this court in *United States v. Palmer*, 128 U. S. 262, 272, 32 L. ed. 442, 445, 9 Sup. Ct. Rep. 104. And as late as *Belknap v. Schild*, 161 U. S. 10, 16, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443, 444, after observing that in England the grant of a patent for an invention was considered as simply an exercise of the royal prerogative, and was not to be construed as precluding the Crown from using the invention at its pleasure, the court said: "But, in this country, letters patent for inventions are not granted in the exercise of prerogative or as a matter of favor, but under art. 1, § 8, of the Constitution of the United States, which

gives Congress power 'to promote the progress of science and useful arts by securing, for limited terms, to authors and inventors, the exclusive right to their respective writings and discoveries.' The Patent act [16 Stat. at L. 201, chap. 230, § 22, U. S. Comp. Stat. 1901, p. 3381] provides that every patent shall contain a grant to the patentee, his heirs, and assigns, for a certain term of years, of 'the exclusive right to make, use, and vend the invention or discovery throughout the United States.' . . . And this court has repeatedly and uniformly declared that the United States have no more right than any private person to use a patented invention without license of the patentee or making compensation to him"—citing *United States v. Burns*, 12 Wall. 246, 252, 20 L. ed. 388, 389; *Cammeyer v. Newton*, 94 U. S. 225, 235, 24 L. ed. 72, 76; *James v. Campbell*, 104 U. S. 356, 358, 26 L. ed. 786, 787; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 67, 28 L. ed. 901, 903, 5 Sup. Ct. Rep. 717; *United States v. Palmer*, 128 U. S. 262, 270, 272, 32 L. ed. 442, 444, 445, 9 Sup. Ct. Rep. 104.

In the previous case of *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240, which was a suit to recover certain lands to which the plaintiffs claimed title, but which were in the possession of the defendants (officers of the Army), who asserted title in the United States, it was contended that the suit was, in legal effect, one against the United States, and therefore not maintainable. But the contrary was adjudged in that case. The court, upon an extended review of the authorities, held that the suit was not to be deemed one against the government, within the recognized rule that the United States cannot be sued without its consent, and that it was competent for the *courts to protect the[609] rights of the plaintiffs against the wrong acts of the defendants, although they were officers of the government, and acting by its authority. Mr. Justice Miller, speaking for the court, said: "This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the execu-

tive passed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation. These provisions for the security of the rights of the citizen stand in the Constitution in the same connection, and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. . . . No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon the controverted rights of [610] the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress, and approved by the President, to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized, and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

In *Pennoyer v. McConaughy*, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699, 701, the court, speaking by Mr. Justice Lamar, after referring to the class of suits in which the defendants, claiming to act as officers of the state, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff, said: "Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for com-

pensation in damages, or, in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial,—is not, within the meaning of the 11th Amendment, an action against the state." This principle was reaffirmed by the court, speaking by the present Chief Justice, in *Re Tyler*, 149 U. S. 164, 169, 37 L. ed. 689, 691, 13 Sup. Ct. Rep. 785, and again in *Scott v. Donald*, 165 U. S. 58, 68, 41 L. ed. 632, 633, 17 Sup. Ct. Rep. 265.

In *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770, by a unanimous judgment, the court held that a suit against an individual, to recover possession of certain real estate, was not one against a state, forbidden by the 11th Amendment, [611] although defendant was in possession as an officer of the state, not asserting any interest for himself in the property. It said: "If a suit against officers of a state, to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking, under a void statute, the property of the citizen, be not one against the state, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff, and illegally withheld by the defendants, can be deemed a suit against the state. Any other view leads to this result: That if a state, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no state shall deprive any person of property without due process of law (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 236, 241, 41 L. ed. 979, 984, 986, 17 Sup. Ct. Rep. 581), the citizen is remediless so long as the state, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated."

I cannot agree that the present decision is in harmony with the principles announced in the above cases. The United States is not here sued, although, as in *United States v. Lee*, it may be incidentally affected by the result. No decree is asked against it. The suit is against Dwight H. Bruce, who is proceeding in violation of the plaintiff's right of property, and denies the power of any court to interfere with him, solely upon

the ground that what he is doing is under the order and sanction of the Postoffice Department. He is, so to speak, in the possession of, and wrongfully using, the plaintiff's patented invention, and denies the right of any court, by its mandatory order, to prevent him from continuing in his lawless invasion *of a right granted by the Constitution and laws of the United States. But, as shown by the cases above cited, not even the United States, much less the head of a department, has a right to use the patent of the plaintiff without its license and without compensation. Although the Constitution and statutes of the United States give to the plaintiff the right to the exclusive use of the invention, nevertheless, according to the present decision, that use may be rendered utterly valueless by the device of an order from the head of an executive department to a subordinate, to proceed in disregard of the rights of the patentee. Thus every patented right to an invention which can be profitably or conveniently used in the business of the government may be destroyed by the arbitrary action of the head of a department, and the patentee deprived of any compensation whatever for his invention, except such as Congress may, in its discretion, choose to allow.

If Congress, by statute, and in the exercise of its power of eminent domain, had chosen to take the plaintiff's patent right for public use, at the same time opening the way, by some appropriate proceeding, through which the patentee could secure compensation from the government for his property so taken, different considerations would arise. But no such action has been taken by Congress. The case before us is one in which it is held that the court cannot, by any direct process against the defendant, stop him from doing that which, confessedly, he has no legal right to do,—namely, to use an invention against the will of the patentee. It was supposed that this court announced an incontrovertible proposition when, in *United States v. Lee*, it said that “no man in this country is so high that he is above the law,” and that “all the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.” But it seems that some officers are above the law, and may trample upon the rights of private property; heads of departments, who may, upon their own motion, seize the property of a patentee, and use it in the public business, and then close [613] the doors of the courts *with such effect that a subordinate officer, acting under departmental orders, may not be stopped in his wrongful violation of the rights of the patentee. Such arbitrary destruction of the property rights of the citizen might be ex-

pected to occur under a despotic government, but it ought not to be tolerated under a government whose fundamental law forbids all deprivation of property without due process of law, or the taking of private property for public use without compensation. Both the Constitution and the acts of Congress recognize the patentee's right to the exclusive use of his invention. But, for every practical purpose, the present decision not only places it in the power of an executive department to destroy the rights of the patentee, but recognizes the helplessness of the judiciary in the presence of such a wrong.

Suppose Congress, under its power to regulate commerce, should enact a statute regulating rates for freight and passengers on interstate carriers, and that such statute, by reason of some provisions in it, was unconstitutional, or incapable of execution without destroying the legal rights of such carriers. Could it be doubted that the courts might, at the instance of an interstate carrier directly affected by the act, enjoin the public officers charged with the execution of the act from enforcing its provisions? Would their hands be stayed by the suggestion that, as the United States, in its corporate capacity, could not be made a party defendant of record, no relief could be granted against the persons who sought, under the cover of official station, to enforce an unconstitutional statute, destructive of private rights?

Or, suppose Congress should, by statute, expressly direct the Postmaster General to use a particular patented invention, paying nothing for such use, and at the same time withhold from the courts jurisdiction of any suit against the government by the patentee to obtain compensation for his property, so taken for public use. Ought it to be doubted that such an act would be declared unconstitutional and void, and that the courts would, at the suit of the patentee, although *the government was not and could not be [614] made a party defendant of record, prevent the person holding the office of Postmaster General from proceeding under the act? Such a suit would not be regarded as a suit against the United States in its governmental capacity, any more than a suit by a railroad company against the official representatives of a state, charged with the execution of an unconstitutional statute fixing confiscatory rates for freights, would be deemed a suit against a state within the meaning of the 11th Amendment. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, and authorities cited.

Let me give another illustration. Suppose Congress should, by statute, in a time of peace, direct the Secretary of War to

take possession of the private residence of a citizen and use it for a quartermaster's office, and at the same time exclude from the jurisdiction of any court a suit against the United States to recover compensation for the property so taken for public use. Would the court refuse to stay the hands of the Secretary of War in executing the provisions of such a statute, simply because the United States could not be made a party of record to the suit? Surely not.

The court regards *Belknap v. Schild* as decisive of this case. I cannot assent to that view. That case was exceptional in its facts, and its doctrines ought not to be extended so as to embrace the present one. If there are expressions in the opinion in that case which seem to sustain the present decision, they should be withdrawn, or so modified as not to impair the force of previous decisions. The relief asked in that case was not only an injunction against the defendants from using the caisson gate which had been constructed, as was alleged, in violation of the plaintiff's rights as patentee for an improvement in caisson gates, but an order for the destruction or delivery to the plaintiff of the particular gate in question, which had been built for the United States, according to plans furnished by its officers, and had been placed in such position that it had become a part, physically, of the docks at the government navy yard. The destruction or displacement *of the gate, by order of the court, would have seriously disturbed the general business of the entire Navy Yard. In the present case the facts are altogether different. To enjoin the present defendant from using the plaintiff's invention may produce some inconvenience, for a time, at his particular office, but it will only make it necessary for the government to be honest, and either pay the plaintiff for the right to use its invention, or direct that some mode of stamp canceling be employed other than that involved in the plaintiff's patent. A government employer cannot justify the illegal use of a patentee's invention upon the ground that such use will subserve his convenience, or enable him more efficiently to serve the public. The effective relief sought here is not the physical destruction of the machines leased by the government, but an injunction to prevent the defendant Bruce from using the plaintiff's invention, embodied in whatever machine, without his license, and without compensation to him. No relief is asked against any other person than the defendant. It is admitted that the United States cannot, any more than a private individual, use a patented invention without the license of the patentee. It is admitted that the head of an executive department cannot legally au-

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thorize a postmaster to use such invention against the will of the patentee. It is admitted that no postmaster can legally justify his invasion of the patentee's right by any order given by the Postmaster General which was made or issued in derogation of the rights of the patentee. And yet it is now adjudged that, although a postmaster may be confessedly proceeding in direct violation of the legal rights of the patentee, the court cannot, by any direct process, stop him in his destruction of the patentee's right of property. Under the present decision, the Postoffice Department not only may use, without compensation, the particular postmarking machines in question here, but it can lease others, and continue its violation of the patentee's rights at its discretion, thereby making the exclusive use granted by the patent of no value whatever.

*It may be said that the patentee has a [616] remedy in an action for damages against the infringer. But clearly such a remedy is not at all adequate or efficacious. The slightest reflection will show this. The only effectual remedy is an injunction against him. In *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699, and in *Re Tyler*, 149 U. S. 164, 169, 37 L. ed. 689, 691, 13 Sup. Ct. Rep. 785, it was held that in suits against public officers on account of wrongful acts done under color of an unconstitutional statute, where the remedy at law was inadequate, an injunction to prevent such wrong and injury was proper. The books are full of cases in support of that principle. I submit that the immunity of the United States from direct suit is an all-sufficient reason why the court shall lay its hands upon the defendant, who happens to be a local postmaster, and prevent him, by injunction, from disregarding the admittedly legal rights of the plaintiff. No other remedy is adequate. If that relief cannot be granted, then the rights of all patentees whose inventions can be used in the prosecution of the business of the government are subject to be destroyed by the arbitrary action of heads of departments and their subordinate officers.

I am of opinion that every officer of the government, however high his position, may be prevented by injunction, operating directly upon him, from illegally injuring or destroying the property rights of the citizen; and this relief should more readily be given when the government itself cannot be made a party of record.

The courts may, by mandamus, compel a public officer to perform a plain, ministerial duty prescribed by law; and that may be done, although the government itself cannot be made a party of record. Can it be possi-

ble that the court is without authority to enjoin the same officer from doing a direct, affirmative wrong to the property rights of the citizen, upon the ground that the government whom he represents, and in whose interest he is acting, is not and cannot be made a party of record? The present decision—erroneously, I take leave to say—answers this question favorably to the defendant. *But that answer cannot, I submit, be made consistently with the declaration which this court has often repeated, that no officer of the law, however high his position, can set that law at defiance with impunity; that the government, as well as the citizen, is subject to the Constitution, and therefore cannot legally appropriate or use a patented invention without just compensation any more than it can appropriate or use, without compensation, land that it had patented to a private purchaser. Instead of a patentee having the exclusive use or control of his invention,—which is the mandate of both the Constitution and the statute,—heads of department, it seems, are not bound to respect the rights of inventors, but can enjoy the exclusive privilege of appropriating to the use of the government, without compensation to the patentee, any patented invention that may be beneficial in the prosecution of the public business. In my judgment it is not possible to conceive of any case, arising under our system of constitutional government, in which the courts may not, in some effective mode, and properly, protect the rights of the citizen against illegal aggression, and to that end, if need be, stay the hands of the aggressor, even if he be a public officer, who acts in the interest, or by the direction, of the government.

Mr. Justice **Peckham** concurs in this dissent.

[618] ***RICHARD H. FIELD, Appt.,**
v.
BARBER ASPHALT PAVING COMPANY.
(No. 201)
BARBER ASPHALT PAVING COMPANY,
Appt.,
v.
RICHARD H. FIELD. (No. 202)
(See S. C. Reporter's ed. 618-626.)
Direct appeal from circuit court—cross ap-

peals — due process of law in public improvements—equal protection of the laws—interference with interstate commerce—fraud in securing contract—abuse of municipal power in ordering repavement.

1. A cross appeal to review only the non-Federal questions decided against the defendant may be taken directly to the Federal Supreme Court under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, from a decree of the circuit court in a case in which jurisdiction was invoked both because of diverse citizenship and on constitutional grounds, where the complainant has appealed from so much of the decree as denied his prayer for relief on the Federal grounds alleged.
2. Neither due process of law nor the equal protection of the laws is denied nonresident owners of property liable to taxation for a proposed public improvement, by the provision of Mo. Rev. Stat. § 5989, that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, although no such privilege of protest is afforded nonresident owners, where there is no discrimination among property owners in taxing for the improvement.
3. The specification by a municipal council, in its resolutions and ordinances for street improvements, that Trinidad lake asphalt shall be the material used, does not constitute such a direct interference with interstate commerce as to be repugnant either to the commerce clause of the Federal Constitution or to the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), because this particular kind of asphalt is a product of a foreign country, and there are deposits in several of the United States from which suitable asphalt can be had.
4. Tax bills for a public improvement will not be set aside after full performance, because of the acts of the agent of the contractor, looking toward the securing of the contract, where no fraud or corruption is shown.
5. No such evidence of fraud or gross abuse of power by a municipal council is shown by its decision to pave with asphalt a street already macadamized as will justify the courts in setting aside the tax bills for the improvement, where a majority of the abutting owners had petitioned for the asphalt pavement, no protest or objection was made during the progress of the work, and the testimony tends to show that the macadam was considerably worn, and that the value of abutting property was enhanced by the improvement.

[Nos. 201, 202.]

Argued April 11, 1904. Decided May 31, 1904.

NOTE.—On the direct review of judgments of district and circuit courts in the Federal Supreme Court—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; and

Gilman v. Tucker, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina ex rel. Caldwell*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note; and *State v. Loomis*, 21 L. R. A. 789, and note.

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CROSS APPEALS from the Circuit Court of the United States for the Western District of Missouri, to review a decree denying the relief sought against certain tax bills issued to pay for street improvements, so far as they were attacked upon Federal grounds, but granting the prayer of the bill as to the tax bills issued for the paving of a certain street, which the court held to be unnecessary. *Reversed* so far as the decree granted relief to the complainant; otherwise *affirmed*, and the case remanded, with instructions to dismiss the bill.

See same case below, 117 Fed. 925.

The facts are stated in the opinion.

Mr. Richard H. Field in *propria persona* argued the cause and filed a brief for appellant in No. 201, and for appellee in No. 202:

It is proper to look at the opinion of the trial court to determine the right to the respective appeals to this court.

Loeb v. Columbia Twp. 179 U. S. 472, 481, 45 L. ed. 280, 286, 21 Sup. Ct. Rep. 174; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Robinson v. Caldwell*, 165 U. S. 360, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *Murdock v. Memphis*, 20 Wall. 591, 22 L. ed. 429.

Only the unsuccessful party on the issue as to the constitutionality of a state law has a direct appeal to the Supreme Court of the United States.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *New Orleans v. Emsheimer*, 181 U. S. 153, 45 L. ed. 794, 21 Sup. Ct. Rep. 584; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

Cross appeals in equity must be prosecuted like other appeals.

Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771. See also *Hilton v. Dickinson*, 108 U. S. 165, 27 L. ed. 688, 2 Sup. Ct. Rep. 424; *The S. S. Osborne*, 105 U. S. 447, 26 L. ed. 1065.

This was said and held as to the time and manner for taking appeals from circuit-court judgments prescribed in other existing provisions of Congress. It would seem only a fair corollary to hold that the appellate jurisdiction of a cross appeal must be determined the same as if a sole appeal.

Plaintiff and defendant have respectively an independent right of appeal from the judgment in this case.

United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Northern P. R. Co. v. Glaspell*, 1 C. C. A. 327, 4 U. S. App. 238, 49 Fed. 482.

There is no room for any inference that Congress intended to authorize or permit the Supreme Court to have, or exercise, any

implied appellate jurisdiction, or any further appellate jurisdiction, from United States circuit courts, other than what is specified in the provisions above quoted. *Expressum facit cessare tacitum.*

National Exch. Bank v. Peters, 144 U. S. 572, 573, 36 L. ed. 545, 546, 12 Sup. Ct. Rep. 767; *Mississippi Mills v. Cohn*, 150 U. S. 202-209, 37 L. ed. 1052-1055, 14 Sup. Ct. Rep. 75; *Smith v. McKay*, 161 U. S. 355-359, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229.

The circuit court of appeals act clearly intended to vest all appellate jurisdiction from circuit courts of the United States in the circuit court of appeals, except such as was expressly vested in the Supreme Court. First, it specified all of the appellate jurisdiction of the Supreme Court, and then, by a residuary clause following, it provided that all unspecified or remaining appellate jurisdiction from a circuit court should be in the circuit court of appeals. This act left no remnant of appellate jurisdiction from circuit courts undistributed.

Lau Ow Bie v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; *The Paquete Habana*, 175 U. S. 685, 686, 44 L. ed. 323, 324, 20 Sup. Ct. Rep. 290.

A right of defendant to appeal to this court because of complainant's appeal and right of appeal cannot be inferred in the face of such contrary provisions. The provisions of the act of Congress restrict the right of appeal from the circuit court to the Supreme Court to such instances as are specified in the act. By the very words of the act any right of appeal, not specified, is to the circuit court of appeals, and not to the Supreme Court. Defendant's appeal is excluded thereby, and should be dismissed.

To hold that this court has any appellate jurisdiction or right of review of the judgment in so far as it was adverse to the defendant on complainant's appeal upon a different portion and subject-matter of the judgment would be contrary to the general scope of appeals. An appeal in equity brings up all the matters which were decided in the circuit court to the prejudice of appellant, and no more of the case.

Buckingham v. McLean, 13 How. 150, 14 L. ed. 90. See also *Kelsey v. Western*, 2 N. Y. 500; *Williams v. Palmer*, 2 Baxt. 488; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336; *Oliver v. Wilhite*, 201 Ill. 552, 66 N. E. 837; *Northern P. R. Co. v. Glaspell*, 1 C. C. A. 327, 4 U. S. App. 238, 49 Fed. 482; *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39.

There may be cases where this court has considered the counter rights or counter

equities of an appellee in acting upon the particular subject-matter of an appeal as a unit, and properly so. But only to this extent is it just and equitable that the case be considered reopened by the appeal on one side.

Gillfillan v. McKee, 159 U. S. 316, 40 L. ed. 161, 16 Sup. Ct. Rep. 6; *United States v. Mosby*, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Douglas v. Kansas City*, 147 Mo. 428, 48 S. W. 851; *Reichenbach v. United Masonic Ben. Asso.* 112 Mo. 22, 20 S. W. 317; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336.

Having been unsuccessful in the trial court upon the issues of law raised on the provisions of the Constitution of the United States, complainant had an indefeasible right, under the act of Congress, to a direct appeal to the Supreme Court of the United States.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *New Orleans v. Emsheimer*, 181 U. S. 153, 45 L. ed. 794, 21 Sup. Ct. Rep. 584; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498.

Defendant could not, by taking its appeal to the circuit court of appeals from the portion of the judgment and decree adverse to it, and assigning errors thereon, have reopened the controversy, and conferred upon the circuit court of appeals the appellate jurisdiction of the subject-matter in the decree adverse to the complainant. Otherwise the act of Congress of 1891 did not, as construed, give an independent right of appeal to complainant and defendant.

United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Northern P. R. Co. v. Glaspell*, 1 C. C. A. 327, 4 U. S. App. 238, 49 Fed. 482.

It follows that, if defendant's appeal and right of appeal could not impair or change the appellate jurisdiction of this court over complainant's appeal, the appellate jurisdiction of the circuit court of appeals of defendant's independent right of appeal was not determined, impaired, or changed by complainant's appeal. This corollary sustains complainant's motion to dismiss defendant's appeal.

Had the defendant perfected its appeal to the United States circuit court of appeals as authorized by the act of Congress, and had that court, on defendant's appeal, affirmed the portion of the judgment and de-

creed adverse to the defendant on general principles of law, such judgment of the circuit court of appeals would be no bar or impairment of complainant's right subsequently to appeal to the Supreme Court of the United States from the portion of the judgment and decree adverse to him.

Brennan v. State Bank, 10 Colo. App. 368, 50 Pac. 1076; *Wickliffe v. Buckman*, 12 B. Mon. 424; *Gates v. Pennsylvania R. Co.* 154 Pa. 566, 26 Atl. 598; *State ex rel. Gunderson v. King*, 6 S. D. 297, 60 N. W. 75; *Kelsey v. Western*, 2 N. Y. 500; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336; *Oliver v. Wilhite*, 201 Ill. 552, 66 N. E. 837.

This court has repeatedly allowed even one plaintiff or one defendant a right of appeal, while it denied to other plaintiffs or other defendants a right of appeal in the same case, because of the difference of the subject-matter of the appeal, and of the difference of the right of appeal of the parties respectively from a decree in equity; in other words, an appeal by a party entitled to appeal does not bring to the Supreme Court a different part of the decree adverse to another party who is not entitled to appeal to this court. The subject-matter of such appeal is to be regarded as independently as if in another suit.

Fourth Nat. Bank v. Stout, 113 U. S. 686, 28 L. ed. 1152, 5 Sup. Ct. Rep. 695; *Schwed v. Smith*, 106 U. S. 190, 27 L. ed. 157, 1 Sup. Ct. Rep. 221; *Hawley v. Fairbanks*, 108 U. S. 549, 27 L. ed. 822, 2 Sup. Ct. Rep. 846; *Stewart v. Dunham*, 115 U. S. 64, 65, 29 L. ed. 331, 5 Sup. Ct. Rep. 1163; *Henderson v. Wadsworth*, 115 U. S. 264, 29 L. ed. 377, 6 Sup. Ct. Rep. 40; *Ex parte Phoenix Ins. Co.* 117 U. S. 367, 29 L. ed. 923, 6 Sup. Ct. Rep. 772; *Wheeler v. Cloyd*, 134 U. S. 537, 33 L. ed. 1008, 10 Sup. Ct. Rep. 601; *McMurray v. Moran*, 134 U. S. 159, 160, 33 L. ed. 818, 10 Sup. Ct. Rep. 427; *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98.

This court has also regarded a decree in equity, where it was in part for the complainant and the remainder for the defendant, as so far severable that the complainant could accept and appropriate the part of the decree favorable to him, and afterward appeal from the remainder of the decree unfavorable to him.

Gillfillan v. McKee, 159 U. S. 303-311, 40 L. ed. 161-163, 16 Sup. Ct. Rep. 6. See also *Worthington v. Beeman*, 33 C. C. A. 475, 63 U. S. App. 536, 91 Fed. 232.

The questions of law and fact as to each street pavement are to be determined as independently as if involved, each, in a different suit.

Worthington v. Beeman, 33 C. C. A. 475, 63 U. S. App. 536, 91 Fed. 232; *Manitoba Fish Co. v. Booth*, 48 C. C. A. 564, 109 Fed. 594.

Diverse appeals in this case would have worked no inconvenience. The appeal of the defendant to the circuit court of appeals would, if asked and allowed, have been stayed there till complainant's appeal in the Supreme Court was disposed of.

United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Northern P. R. Co. v. Glaspell*, 1 C. C. A. 327, 4 U. S. App. 238, 49 Fed. 482.

In such diverse appeals each appellant, by filing a præcipe with the clerk of the trial court, could have confined the contents of the transcript to the portions of the record material or necessary to the hearing of his appeal. This practice is not only permitted, but urgently invited, by both this court and the circuit court of appeals.

Teller v. United States, 49 C. C. A. 263, 111 Fed. 119; *Cunningham v. German Ins. Bank*, 43 C. C. A. 377, 103 Fed. 932; *Hunt v. Kile*, 38 C. C. A. 641, 98 Fed. 49; *Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168; *Meyer v. Mansur & T. Implement Co.* 29 C. C. A. 465, 52 U. S. App. 474, 85 Fed. 874; *Gregory v. Pike*, 12 C. C. A. 202, 21 U. S. App. 474, 64 Fed. 415; *Starcke v. Klein*, 10 C. C. A. 445, 13 U. S. App. 589, 62 Fed. 502; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 2 C. C. A. 542, 5 U. S. App. 97, 51 Fed. 929, 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 237; *Blanks v. Klein*, 1 C. C. A. 254, 2 U. S. App. 155, 49 Fed. 1; *Union P. R. Co. v. Stewart*, 95 U. S. 279, 24 L. ed. 431; *Florida C. R. Co. v. Schutte*, 100 U. S. 644-647, 25 L. ed. 605, 606; *The Adriatic*, 103 U. S. 730, 26 L. ed. 605; *Ball & Socket Fastener Co. v. Kractzer*, 150 U. S. 112, 37 L. ed. 1019, 14 Sup. Ct. Rep. 48.

The absolute power over street improvements, conferred by statute upon the majority of the residents who own adjacent lands, is contrary to the law of the land.

People ex rel. Shunway v. Bennett, 29 Mich. 464, 18 Am. Rep. 107; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *State v. Garibaldi*, 44 La. Ann. 810, 11 So. 36; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L. R. A. 621, 60 N. W. 156; *Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12; *Wells v. Weston*, 22 Mo. 388, 66 Am. Dec. 627; *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; *State v. Field*, 17 Mo. 529, 59 194 U. S.

Am. Dec. 275; *Cicero Lumber Co. v. Cicero*, 176 Ill. 26, 42 L. R. A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Robison v. Miner*, 68 Mich. 555, 37 N. W. 21.

The above authorities are pointedly to the effect that this statute could not be sustained on any assumption that the power conferred upon resident owners would be exercised by them in a reasonable, neighborly, and patriotic manner. The natural assumption is that such power would be exercised selfishly and oppressively.

Harward v. St. Clair & M. Levee & Drainage Co. 51 Ill. 135; *Cooley*, Taxn. 2d ed. 364.

The guarantee of due process of law in the 14th Amendment to the Constitution of the United States protects private property against being taken or taxed for private use.

Re Tuthill, 163 N. Y. 138, 49 L. R. A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 501, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Robinson v. Swope*, 12 Bush, 22; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 158-166, 41 L. ed. 388-391, 17 Sup. Ct. Rep. 56.

A statute like the one in question which authorizes taxing the cost of paving a public street to adjacent lands only when a majority of the resident owners of such lands do not remonstrate against the improvement in its meaning and effect authorizes such taxation for the private use of such residents and for that reason violates the law of the land.

Re Tuthill, 163 N. Y. 133, 49 L. R. A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; *Davis v. St. Louis County*, 65 Minn. 310, 33 L. R. A. 432, 60 Am. St. Rep. 475, 67 N. W. 997; *Nickey v. Stearns Ranchos Co.* 126 Cal. 150, 58 Pac. 459; *Re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288; *Reeves v. Wood County*, 8 Ohio St. 333; *Atty. Gen. v. Eau Claire*, 37 Wis. 401; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350; *State, Kean, Prosecutor. v. Driggs Drainage Co.* 45 N. J. L. 91; *Dickey v. Tennison*, 27 Mo. 373; *Colon v. Lisk*, 153 N. Y. 196, 60 Am. St. Rep. 609, 47 N. E. 302.

It is impossible to say that property has been taken by "due process of law," unless the statutes provide expressly for every constitutional safeguard.

Re Powers, 29 Mich. 509.

Extreme cases are allowable to test a legal principle.

Com. v. Essex Co. 13 Gray, 253; *St. Louis*

use of Seibert v. Allen, 53 Mo. 55; *Colon v. Lisk*, 153 N. Y. 194, 60 Am. St. Rep. 609, 47 N. E. 302; *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 35, 46 L. ed. 420, 22 Sup. Ct. Rep. 277; *Collins v. New Hampshire*, 171 U. S. 33, 34, 43 L. ed. 61, 18 Sup. Ct. Rep. 768; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

The value of the protection afforded by this statute to resident owners is obvious.

(a) The nature of a public improvement might be such that the adjacent lands, or some of them, would be damaged, or, at least, not benefited equal to the cost. Neither of these consequences would be any defense to an assessment of the cost of such street improvement.

McQuiddy v. Smith, 67 Mo. App. 205; *Moherly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683; *Barber Asphalt Paving Co. v. French*, 158 Mo. 556, 54 L. R. A. 492, 58 S. W. 934, 181 U. S. 335, 45 L. ed. 886, 21 Sup. Ct. Rep. 625.

(b) The grade of a proposed improvement might be such as greatly to inconvenience or damage adjacent lands proposed to be used therefor; yet in states where there is no statute or constitutional provision creating a liability therefor there would be no right of action against a city for damage for any such authorized improvement.

Householder v. Kansas, 83 Mo. 492; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

To withhold from the nonresident owner the protection conferred upon the resident owner, as in the legislative act in question, is obviously a denial of the equal protection guaranteed by the Federal Constitution.

Anderton v. Milwaukee, 82 Wis. 279, 15 L. R. A. 830, 52 N. W. 95; *Utsey v. Hiott*, 30 S. C. 360, 14 Am. St. Rep. 910, 9 S. E. 338; *Sanders v. Venning*, 38 S. C. 502, 17 S. E. 134; *State v. Garbroski*, 111 Iowa, 498, 56 L. R. A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; *Shirk v. La Fayette*, 52 Fed. 857; *State v. Julow*, 129 Mo. 176, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Roby v. Smith*, 131 Ind. 342, 15 L. R. A. 792, 31 Am. St. Rep. 439, 30 N. E. 1093; *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 33 Am. St. Rep. 842, 24 Atl. 76; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255;

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Wiley v. Sinkler*, 179 U. S. 59, 45 L. ed. 85, 21 Sup. Ct. Rep. 17; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 500, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *State v. Loomis*, 115 Mo. 319, 21 L. R. A. 789, 22 S. W. 350; *State ex rel. Hoadley v. Insurance Comrs.* 37 Fla. 575, 33 L. R. A. 288, 20 So. 772; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 108, 46 L. ed. 92, 108, 22 Sup. Ct. Rep. 30; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345.

The resolutions and ordinances require the contractor to get the asphalt for the pavements from a particular place. They do not leave the contractor any liberty to buy, or supply and use, the like material coming from elsewhere.

Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082; *Piedmont Paving Co. v. Allman*, 136 Cal. 88, 68 Pac. 493; *King Hill Brick Mfg. Co. v. Hamilton*, 51 Mo. App. 120; *Taylor v. Carondelet*, 22 Mo. 110.

They therefore deprive the contractor of a right given to him by the commerce clause of the Constitution of the United States.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *State ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776.

The liberty of contract is one of the liberties protected in the guaranty of due process of law. The resolutions and ordinances for the pavements deprive the contractor of the liberty to buy and procure the like asphalt substance from any place in the world except from Trinidad lake, and therefore violate the constitutional guaranty aforesaid, and are void.

State v. Loomis, 115 Mo. 316, 21 L. R. A. 789, 22 S. W. 350; *Glover v. People*, 201 Ill. 549, 66 N. E. 820; *Adams v. Brennan*, 177 Ill. 194, 42 L. R. A. 718, 69 Am. St. Rep. 222, 52 N. E. 314; *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L. R. A. 154, 66 N. E. 895; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 67 N. E. 129; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257.

The commerce clause of the Constitution of the United States applies to state and municipal commerce with other states and countries.

People ex rel. Treat v. Coler, 166 N. Y. 144, 59 N. E. 776; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *Arnold v. Yanders*, 56

Ohio St. 417, 60 Am. St. Rep. 753, 47 N. E. 50.

This court has never felt it safe to concede or admit that state or municipal authorities had, or could have, any judgment, discretion, or liberty to make any rule in interstate or foreign commerce. The utmost that has been permitted to a state or city has been to make provision for quarantine against diseased persons or animals, or against any kind of danger from explosives, or the like, and such matters as come within the well-defined scope of police power; and even as to these matters the Federal courts have been vigilant and strict in denying state or municipal authorities any power that might hinder, obstruct, or interfere with interstate or foreign commerce.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 473, 474, 24 L. ed. 531; *Re Davenport*, 102 Fed. 543; *Crutcher v. Kentucky*, 141 U. S. 59, 60, 35 L. ed. 652, 653, 11 Sup. Ct. Rep. 851; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 490, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Smith v. Lowe*, 59 C. C. A. 185, 121 Fed. 753.

The supreme and entire power over foreign and interstate commerce is vested in the Congress of the United States, and the states have no concurrent power upon the subject.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 482, 31 L. ed. 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Leloup v. Port of Mobile*, 127 U. S. 647, 648, 32 L. ed. 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Georgia Packing Co. v. Macon*, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. 780; *State ex rel. Carr v. Woodruff Sleeping & Parlor Coach Co.* 114 Ind. 159, 1 Inters. Com. Rep. 798, 15 N. E. 814.

Congress could say, if it would, that no asphalt imported from any foreign country could be sold or used in any road improvement in the United States, or provide that no foreign asphalt except that from the island of Trinidad should be imported to or sold within the United States, or be used on a street or road improvement in any city of the United States. Thus, it could create a monopoly of the Trinidad lake asphalt here. This, though, only proves that the power is in nowise vested in the states; and that the exercise of this power by any state or municipality is un-

authorized and void, and violative of the commerce clause of the Federal Constitution.

Re Sanders, 18 L. R. A. 549, 4 Inters. Com. Rep. 305, 52 Fed. 802; *Hall v. De Cuir*, 95 U. S. 488, 489, 24 L. ed. 548; *Arnold v. Yanders*, 56 Ohio St. 417, 60 Am. St. Rep. 753, 47 N. E. 50; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *State v. The Constitution*, 42 Cal. 578, 10 Am. Rep. 303; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 490-494, 31 L. ed. 708-710, 8 Sup. Ct. Rep. 689, 1062; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Walling v. Michigan*, 116 U. S. 460, 29 L. ed. 695, 6 Sup. Ct. Rep. 454; *Webber v. Virginia*, 103 U. S. 350, 351, 26 L. ed. 567; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Henderson v. Wickham*, 92 U. S. 260-273, 23 L. ed. 543-549; *The Roanoke*, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491.

The commerce clause of the Federal Constitution operates as a part of the organic law of every state and city in this country to prohibit any state law or city ordinance excluding or preferring the purchase, sale, or use of the products of one state or country over the like products of other states and countries.

Muskogee Nat. Teleph. Co. v. Hall, 55 C. A. 208, 118 Fed. 382.

If a state legislative act should provide that all manufactured varnish, roofing, or cement of asphalt composition be made of Trinidad lake asphalt; or if such state legislative act should merely provide that all asphalt other than Trinidad lake asphalt, before it should be put to these uses, should undergo an inspection or be subject to a tax,—there could be no kind of doubt that such discrimination against the like asphalt from other places in the world would violate the commerce clause of the Constitution of the United States.

Higgins v. 300 Casks of Lime, 130 Mass. 1; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; *Scott v. Donald*, 165 U. S. 93, 94, 41 L. ed. 642, 643, 17 Sup. Ct. Rep. 265; *Collins v. New Hampshire*, 171 U. S. 31, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *State v. Santee*, 111 Iowa, 1, 53 L. R. A. 763, 82 Am. St. Rep. 222, 82 N. W. 445.

It would seem to be an axiomatic proposition that a legislative act which circumscribed or hampered state or municipal action with interstate or foreign commerce would come equally under the condemnation of the commerce clause of the Constitution of the United States, as would such a legislative act in hampering or interfering with commerce of the citizens of a state with other states or foreign countries.

People ex rel. Treat v. Coler, 166 N. Y. 144, 59 N. E. 776; *Arnold v. Yanders*, 56 Ohio St. 417, 60 Am. St. Rep. 753, 47 N. E. 50; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257.

Any act of the legislature, or any ordinance of a city, which prevents the free exchange of lawful articles of commerce between the states, contravenes the commerce clause of the United States Constitution.

Ex parte Kieffer, 40 Fed. 399; *Hall v. De Cuir*, 95 U. S. 488, 24 L. ed. 548; *Georgia Packing Co. v. Macon*, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. 774; *Spellman v. New Orleans*, 3 Inters. Com. Rep. 575, 45 Fed. 3; *Higgins v. 300 Casks of Linc*, 130 Mass. 1; *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 33 Am. St. Rep. 842, 24 Atl. 76; *Com. v. Snyder*, 182 Pa. 633, 38 Atl. 356; *State v. Santee*, 111 Iowa, 1, 53 L. R. A. 763, 82 Am. St. Rep. 222, 82 N. W. 445; *Brimmer v. Rehman*, 138 U. S. 78-82, 34 L. ed. 862-864, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 67, 35 L. ed. 640, 11 Sup. Ct. Rep. 855; *People ex rel. Treat v. Coler*, 166 N. Y. 150, 59 N. E. 776.

This Federal Constitutional provision protects foreign commerce from all state interference precisely to the same extent that it protects interstate commerce from such interference.

Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; *Henderson v. Wickham*, 92 U. S. 268, 23 L. ed. 547; *Crutcher v. Kentucky*, 141 U. S. 57, 58, 35 L. ed. 652, 11 Sup. Ct. Rep. 851; *Hall v. De Cuir*, 95 U. S. 490, 24 L. ed. 548.

Any state provision which prevents or obstructs a sale, demand, or use of an article of foreign or interstate commerce violates the Constitution of the United States.

People ex rel. Treat v. Coler, 166 N. Y. 144, 59 N. E. 776; *Brennan v. Titusville*, 153 U. S. 301, 302, 38 L. ed. 722, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Spellman v. New Orleans*, 3 Inters. Com. Rep. 575, 45 Fed. 3; *Ex parte Kieffer*, 40 Fed. 399; *Arnold v. Yanders*, 56 Ohio St. 417, 60 Am. St. Rep. 753, 47 N. E. 50; *People v. Hawkins*, 157 N. Y. 7, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *Re Davenport*, 102 Fed. 541; *Schollen-*

berger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Scott v. Donald*, 165 U. S. 58, 93, 94, 100, 41 L. ed. 632, 642, 643, 645, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercook Co.* 170 U. S. 439, 42 L. ed. 1101, 18 Sup. Ct. Rep. 674; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 499, 31 L. ed. 712, 1 Inters. Com. Rep. 823, 3 Sup. Ct. Rep. 689, 1062; *Collins v. New Hampshire*, 171 U. S. 31, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Tiernan v. Rinker*, 102 U. S. 126, 26 L. ed. 104; *State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co.* 120 Ind. 583, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778.

There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country; the one would be a necessary sequence of the other. No goods would be imported if none could be sold.

Brown v. Maryland, 12 Wheat. 439, 446, 447, 6 L. ed. 685, 688. See also *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 242, 243, 44 L. ed. 148, 20 Sup. Ct. Rep. 96; *People v. Hawkins*, 157 N. Y. 8, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257.

The freedom to use an article of interstate or foreign commerce is also protected by the commerce clause of the Constitution.

Scott v. Donald, 165 U. S. 100, 41 L. ed. 645, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercook Co.* 170 U. S. 439, 42 L. ed. 1101, 18 Sup. Ct. Rep. 674.

It was not necessary to the invalidity of the resolutions and ordinances that asphalt from another place than Trinidad lake should be in the city of Westport, or *in transitu* to that place, when the resolutions were adopted excluding any such asphalt from use in the pavements.

Hall v. De Cuir, 95 U. S. 488, 489, 24 L. ed. 548; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 10 Sup. Ct. Rep. 881.

A city can have no more right than a state to discriminate against articles of interstate or foreign commerce.

Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; *Ex parte Kieffer*, 40 Fed. 399; *Spellman v. New Orleans*, 3 Inters. Com. Rep. 575, 45 Fed. 3; *Brennan v. Titusville*, 153 U. S. 301, 302, 38 L. ed. 722, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Georgia Packing Co. v. Macon*, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. 774; *Keen v. Waycross*, 101 Ga. 592, 29 S. E. 42; *Atlanta v. Stein*, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932; *Kirkwood v. Meramec Highlands Co.* 94 Mo. App. 637, 68 S. W. 761; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18

Sup. Ct. Rep. 223; *State v. Santee*, 111 Iowa, 1, 53 L. R. A. 763, 82 Am. St. Rep. 222, 82 N. W. 445; *Diamond v. Mankato*, 89 Minn. 48, 61 L. R. A. 448, 93 N. W. 911; *Redersheimer v. Flower*, 52 La. Ann. 2089, 28 So. 299; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 200; *Lake View v. Tate*, 130 Ill. 247, 6 L. R. A. 268, 22 N. E. 791; *Fishburn v. Chicago*, 171 Ill. 338, 39 L. R. A. 482, 63 Am. St. Rep. 236, 49 N. E. 532; *Dill. Mun. Corp.* 4th ed. §§ 322, 325, 329, 362, 694, 695; *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617, 35 Am. St. Rep. 793, 26 Atl. 978.

If the legislature of the state of Missouri had stated in the charter of cities of the fourth class that such cities shall pave their streets with asphalt from Trinidad lake, it is clear such statute would violate the commerce clause of the Constitution of the United States because of the discrimination in favor of Trinidad lake asphalt against the like asphalt of Cuba, Mexico, Venezuela, and other foreign countries, and against the asphalt abounding in California, Utah, and Texas of our own country. This proposition is clear.

People ex rel. Treat v. Coler, 166 N. Y. 144, 59 N. E. 776; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; *Guy v. Baltimore*, 100 U. S. 443, 25 L. ed. 746.

It must, therefore, follow that the city of Westport, the creature of the state legislature, could not do, as against the asphalts of other places, what the state legislature could not do, or authorize in terms to be done.

Beach, Pub. Corp. § 506; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 230, 44 L. ed. 143, 20 Sup. Ct. Rep. 96; *Georgia Packing Co. v. Macon*, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. 779; *Greensboro v. Ehrenreich*, 80 Ala. 582, 60 Am. Rep. 130, 2 So. 725; *Sayre v. Phillips*, 148 Pa. 489, 16 L. R. A. 49, 33 Am. St. Rep. 842, 24 Atl. 76; *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 387, 68 S. W. 1043; *Adams v. Brenan*, 177 Ill. 194, 42 L. R. A. 718, 69 Am. St. Rep. 222, 52 N. E. 314.

Nor does it make any difference that a resolution or ordinance questioned affects only the pavement of a single street or a part of a street; it is void if it, in the smallest degree, exercises a function belonging to the Congress of the United States.

Brown v. Maryland, 12 Wheat. 439, 447, 6 L. ed. 685, 688; *Smith v. St. Louis & S. W. R. Co.* 181 U. S. 255, 45 L. ed. 850, 21 Sup. Ct. Rep. 603;

People v. Raymond, 34 Cal. 499; *State v. North*, 27 Mo. 480; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 489, 53 L. R. A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089; *Bailey v. Master Plumbers' Asso.* 103 Tenn. 114, 46 L. R. A. 561, 52 S. W. 853; *Nester v. Continental Brewing Co.* 161 Pa. 473, 24 L. R. A. 247, 41 Am. St. Rep. 894, 29 Atl. 102; *People ex rel. Hubbard v. Springwells Twp.* 25 Mich. 155; *Roberts v. Northern P. R. Co.* 158 U. S. 21, 39 L. ed. 880, 15 Sup. Ct. Rep. 756; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Guy v. Baltimore*, 100 U. S. 442, 25 L. ed. 746.

If a city could discriminate in its legislative capacity in favor of, or against, a particular paving material of one state over the like product of other states as to a single street pavement, but not as to all, in one legislative act, it could, by paving only one street at a time with the products of a specified state or nation, exclude the like products of all other states and nations until all of its streets were paved, and in that way evade the control and limitation of our Federal Constitution. A state or city cannot thus accomplish indirectly what is forbidden to be done by it directly. It is a sacred duty of the courts of the country to prevent the success of any evasive legislation.

Passenger Cases, 7 How. 458, 12 L. ed. 702; *Re Tibureio Parrott*, 6 Sawy. 350, 1 Fed. 481; *People v. Raymond*, 34 Cal. 492; *Gotcher v. Burrows*, 9 Humpl. 588; *Jarrolt v. Moberly*, 103 U. S. 585, 586, 26 L. ed. 493; *People v. Hawkins*, 157 N. Y. 8, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *Fishburn v. Chicago*, 171 Ill. 343, 39 L. R. A. 482, 63 Am. St. Rep. 236, 49 N. E. 532; *State v. North*, 27 Mo. 464.

The commerce clause of the Constitution of the United States was intended for the benefit of the purchasers and users, as much as for the importers and vendors, of any article of interstate or foreign commerce.

Minnesota v. Barber, 136 U. S. 326, 34 L. ed. 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Scott v. Donald*, 165 U. S. 98, 41 L. ed. 644, 17 Sup. Ct. Rep. 265; *People ex rel. Treat v. Coler*, 166 N. Y. 150, 59 N. E. 776.

The resolutions and ordinances in question are *ultra vires* and void, because they required contracts for the pavements which were in restraint of interstate and foreign trade and commerce contrary to the act of Congress of July 2, 1890.

State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155; *Bailey v. Master Plumbers' Asso.* 103 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289; *Lowry*

v. Tile, Mantle & Grate Asso. 106 Fed. 38, 63 L. R. A. 58, 52 C. C. A. 621, 115 Fed. 27.

The city resolutions, ordinances, and contracts for the asphalt street pavements which specified Trinidad lake asphalt for such pavements *pro tanto* excluded as commerce the asphalt from every place in the world except the Trinidad lake in the island of Trinidad; and where, as shown in this case the defendant has and had at the times in question a monopoly of Trinidad lake asphalt pavement in Westport, Missouri, such specification also excluded all other paving contractors of the entire world from getting or doing the pavements in question. Such specification of Trinidad lake asphalt, thus preventing competition in interstate and foreign trade and commerce, operated directly, and not remotely, upon such trade and commerce, and was, therefore, prohibited by the act of Congress.

United States v. Joint Traffic Asso. 171 U. S. 575, 577, 43 L. ed. 289, 290, 19 Sup. Ct. Rep. 25; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610; *Gibbs v. McNeeley*, 60 L. R. A. 152, 55 C. C. A. 70, 118 Fed. 120; *United States v. Swift*, 122 Fed. 529.

It is not necessary, however, that the effect of a law, ordinance, or contract should entirely prevent all competition in trade and commerce to make it void under the act of Congress.

United States ex rel. Griggs v. Chesapeake & O. Fuel Co. 105 Fed. 93, 53 C. C. A. 256, 115 Fed. 610; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 29 Am. St. Rep. 690, 19 S. W. 274; *Bailey v. Master Plumbers' Asso.* 103 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853.

All general grants of legislative authority are restricted with an implied limitation that such authority shall be exercised only in a reasonable manner, and that the exercise of such authority in any unreasonable or oppressive manner is essentially *ultra vires*.

Wilkinson v. Leland, 2 Pet. 657, 7 L. ed. 553; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Smith v. Lowe*, 59 C. C. A. 185, 121 Fed. 759; *State ex rel. Adamson v. Lafayette County Ct.* 41 Mo. 226.

The Federal courts of equity can and will set aside all unreasonable, arbitrary, and illegal acts and charges made under color of state authority.

Smith v. Lowe, 59 C. C. A. 185, 121 Fed. 753; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 397-399, 38 L. ed. 1023, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 159, 160, 1150

41 L. ed. 387, 389, 17 Sup. Ct. Rep. 56; *White v. Tacoma*, 109 Fed. 32.

The necessity required by the Westport charter to authorize the board of aldermen to improve a street is a public necessity. The Missouri legislative act must be thus construed to save it from conflict with the Constitution.

Morrison v. Morey, 146 Mo. 562, 48 S. W. 629; *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 158, 166, 41 L. ed. 388, 391, 17 Sup. Ct. Rep. 56; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 501, *sub nom. Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87.

With such constitutional protection, it must follow that an abutting landowner, charged with the cost of a repavement, has the right to prove that there was no color of public necessity for such repavement.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 159, 160, 41 L. ed. 388, 389, 17 Sup. Ct. Rep. 56.

The public necessity for a street pavement cannot be forestalled nor foreclosed against the owner of private property taxed for the street pavement beyond question, by any fiction or presumption of law, nor even by the fiat of the state legislature itself.

Re Jacobs, 98 N. Y. 111, 50 Am. Rep. 636; *Smith v. Lowe*, 59 C. C. A. 185, 121 Fed. 753; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 159, 160, 41 L. ed. 388, 389, 17 Sup. Ct. Rep. 56; *Cooley, Const. Lim.* 6th ed. 606, 607; *White v. Tacoma*, 109 Fed. 32; *Yick Wo v. Hopkins*, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Cummings v. Missouri*, 4 Wall. 325, 18 L. ed. 363.

The question of benefit to complainant's property is a wholly immaterial issue. If the municipal paving proceedings were authorized the tax bills would be valid, although the pavement was not one cent of benefit to the property charged.

McQuiddy v. Smith, 67 Mo. App. 205; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Barber Asphalt Paving Co. v. French*, 158 Mo. 556, 54 L. R. A. 492, 58 S. W. 934, 181 U. S. 335, 45 L. ed. 886, 21 Sup. Ct. Rep. 625.

No promise of complainant to pay for the unauthorized pavements can be implied because of any supposed, or even real, benefit of the pavements to complainant's property.

Hedges v. Dixon County, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; *Berlin Iron Bridge Co. v. San Antonio*, 62 Fed. 882; *Wheeler v. Poplar Bluff*, 149 Mo. 36,

49 S. W. 1088; *Hawthorne v. East Portland*, 13 Or. 282, 10 Pac. 342.

Mr. William C. Scarritt argued the cause, and, with *Messrs. John K. Griffith, Elliott H. Jones, and Edward L. Scarritt*, filed a brief for the Barber Asphalt Paving Company:

To this court an appeal will lie by either party to such a suit as the one at bar.

Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Holder v. Aultman, M. & Co.* 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269.

It will not do for the complainant to urge that the construction or application of the Constitution and the validity of a state statute are not involved in this appeal because the opinion of the trial judge, filed in the case, indicated that he based that part of the decree of which the paving company complains upon a reason other than those involving a Federal question, for he might have passed the same judgment in this case, and been persuaded thereto by reason of a violation of a Federal right. The reason or ground of a decision is not a property right. A litigant will not be allowed a hearing upon appeal merely because he complains of the reason or ground upon which the appeal is based, and not of the judgment itself.

New Orleans v. Ensheimcr, 181 U. S. 153, 45 L. ed. 794, 21 Sup. Ct. Rep. 584.

It is elementary that a judgment or decree which is upon the record for the right party will not be reversed for errors in declarations or conclusions of law on the part of the trial court.

Moore v. Lindell R. Co. 176 Mo. 528, 75 S. W. 672; *Haven v. Missouri R. Co.* 155 Mo. 223, 55 S. W. 1035; *Ellerbe v. National Exch. Bank*, 109 Mo. 445, 19 S. W. 241.

It will not do for us to assume, in determining what is involved in the paving company's appeal in this case, that the complainant has no confidence in the Federal questions which he urges with such vehemence and apparent candor as the basis of his own appeal.

Having jurisdiction of the case under the provisions of the judiciary act, this court will consider and determine all questions presented by the record.

United States v. Sayward, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522.

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In the city of Westport, acting in its legislative capacity, and not in the courts, was vested by the sovereign state of Missouri the authority and power to determine the necessity, expediency, and the time when and the material with which its streets should be paved.

Keating v. Kansas, 84 Mo. 415; *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; 2 Dill. Mun. Corp. 3d ed. §§ 949, 951; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440.

Of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, is the judge.

2 Dill. Mun. Corp. 3d ed. § 686; *Elliott, Roads & Streets*, p. 335; *Kansas use of Adkins v. Richards*, 34 Mo. App. 521; *St. Louis v. Henrich*, 6 Mo. App. 591, Appx.; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026; *Heman v. Ring*, 85 Mo. App. 231; *Sheehan v. Owen*, 82 Mo. 464; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Cole v. Skrainka*, 105 Mo. 309, 16 S. W. 491; *Gibson v. Owens*, 115 Mo. 258, 21 S. W. 1107; *Morse v. West Port*, 110 Mo. 502, 19 S. W. 831; *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

The powers of the legislative authorities of the city of Westport in the enactment of the ordinance to pave Wyandotte street, and, indeed, in the enactment of each of the improvement ordinances now in contest, were exercised within the bounds of reason and apparent necessity.

Morse v. West Port, 110 Mo. 502, 19 S. W. 831, 136 Mo. 276, 37 S. W. 932.

Complainant should not now be heard to say that the tax bills for paving Wyandotte street are void on the ground that the ordinance authorizing the work was unreasonable or the work unnecessary.

2 Dill. Mun. Corp. 3d ed. § 810; *Hilgert v. Barber Asphalt Paving Co.* (Mo. App.) 81 S. W. 496; *Heman v. Ring*, 85 Mo. App. 231; *Huling v. Bandera Flag Stone Co.* 87 Mo. App. 360; *Gill v. United States*, 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322; *Sheehan v. Owen*, 82 Mo. 464.

The constitutionality of the general law of Missouri relative to cities of the fourth class in respect to improving streets (2 Mo. Rev. Stat. 1899, §§ 5982-5989) cannot be successfully challenged on the ground of not affording nonresidents of the city the equal protection of the laws.

Buchan v. Broadwell, 88 Mo. 31; *Tuggart v. Claypool*, 145 Ind. 590, 32 L. R. A. 586, 44 N. E. 18; *Fidelity Mut. L. Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Magoun v. Illinois Trust*

& *Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911; *Lehew v. Brummell*, 103 Mo. 546, 11 L. R. A. 828, 23 Am. St. Rep. 895, 15 S. W. 765; *People ex rel. King v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232; *State ex rel. Garnes v. McCann*, 21 Ohio St. 198; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Roberts v. Boston*, 5 Cush. 198; *Cameron v. Chicago, M. & St. P. R. Co.* 63 Minn. 384, 31 L. R. A. 553, 65 N. W. 652; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Missouri v. Lewis*, 101 U. S. 22, *sub nom. Bowman v. Lewis*, 25 L. ed. 989; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284.

The privilege and immunity clause of the 14th Amendment does not guarantee a citizen of a state against laws of his own state. Its purpose is to guarantee the privileges and immunities of citizens in other states than their own.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Bradwell v. Illinois*, 16 Wall. 130, 21 L. ed. 442.

Interstate commerce is not involved, nor unlawfully restrained.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Whitwell v. Continental Tobacco Co.* 60 C. C. A. 290, 125 Fed. 454; *Phillips v. Iola Portland Cement Co.* 125 Fed. 593.

City authorities may select, designate, and use materials for street-paving purposes, although the same are patented, and although the supply may be subject to the control of a monopoly.

Barber Asphalt Paving Co. v. Hunt, 100 Mo. 22, 8 L. R. A. 110, 18 Am. St. Rep. 530, 13 S. W. 98; *Warren v. Barber Asphalt Paving Co.* 115 Mo. 572, 22 S. W. 490; *Vardin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

Mr. Justice **Day** delivered the opinion of the court:

These cases are appeals from the decree

of the circuit court of the United States for the western district of Missouri. *Rich- [619] ard H. Field, as owner of certain lands abutting on Main street, Baltimore avenue, and Wyandotte street, in Westport, Missouri, which city was then a suburb and has since become a part of Kansas City, filed a bill of complaint against the paving company. The relief sought was against certain tax bills, issued to pay for the paving of the above-named streets, held by the defendant company, and to have the same declared void because (1) the act under which they were assessed violated the 14th Amendment to the Constitution of the United States; (2) that the paving in question was unnecessary, and the contract for the same was the result of undue and illegal influence on the part of the agents of the defendant company, exercised upon the board of aldermen of the city of Westport; (3) that the contracts for the paving required the same to be constructed of Trinidad Lake asphalt, thereby cutting off competition with other kinds of asphalt suitable for street paving; (4) that the proceedings and agreements by which such asphalt was designated in the resolutions, ordinances, and rules for the construction of said pavements were in violation of the interstate commerce clause of the Constitution of the United States (art. 1, § 8); and (5) that the said resolutions, ordinances, and contracts, and the action of the defendant company in securing the same, were in violation of the Federal anti-trust act of July 2, 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200].

Upon the trial, the circuit court held against the prayer of the complainant for relief upon the Federal grounds alleged, but, holding that the paving of Wyandotte street was unnecessary, granted the prayer of the bill as to the tax bills issued for work done on that street, and dismissed the bill as to the other two streets.

From so much of the decree as held the tax bills for the work done on Wyandotte street invalid the paving company also appealed. (Case No. 202.)

A motion was filed by the appellant to dismiss the appeal of the paving company, which was postponed to the hearing of these appeals upon the merits. An examination of the motion, and a consideration of the briefs filed and arguments made in support of and in opposition to the same, leads us to the conclusion that it cannot be sustained. The appellant appealed directly to this court; for while there was an allegation of diverse citizenship in the bill, jurisdiction was also invoked on the constitutional grounds above stated. This made the case appealable directly to this court under § 5

of the act of March 3, 1891 ([26 Stat. at L. 827, chap. 517] U. S. Comp. Stat. 1901, p. 549), as one which "involves the construction or application of the Constitution of the United States."

The contention is that the prayer of the complainant on the constitutional grounds having been denied, the appeal of the respondent should have been to the circuit court of appeals. But we cannot agree to this view. There was no cross bill filed in the case, and none was required. The bill of complaint contained allegations sufficient to make a case of alleged violation of constitutional rights. It is well settled that in such cases the entire case may be brought to this court by the appeal. In *Holder v. Aultman, M. & Co.* 169 U. S. 81-88, 42 L. ed. 669-671, 18 Sup. Ct. Rep. 269, discussing the act of March, 1891, Mr. Justice Gray said:

"Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to [621] the constitutional question, but *includes the whole case. *Whitten v. Tomlinson*, 160 U. S. 231, 238, 40 L. ed. 406, 410, 16 Sup. Ct. Rep. 297; *Penn Mut. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223." *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

See also *Chappell v. United States*, 160 U. S. 499-509, 40 L. ed. 510-513, 16 Sup. Ct. Rep. 397; *Horner v. United States*, 143 U. S. 570-577, 36 L. ed. 266-269, 12 Sup. Ct. Rep. 522.

If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case, the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal the correctness of the decision as against him will be presumed. *New Orleans & B. S. Mail Co. v. Flanders*, 12 Wall. 130, 20 L. ed. 249; *Chittenden v. Brewster*, 2 Wall. 191-196, 17 L. ed. 839-841.

The motion to dismiss the cross appeal must be denied.

Coming to the merits of the case, the grounds of Federal relief will first be considered. It is claimed that certain sections of the act of the general assembly of Missouri, which make the tax bills levied to pay the contract price for the paving, a lien

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upon the complainant's real estate, deprive him of his property without due process of law, and deny to him the equal protection of the laws. This argument is predicated on § 5989 of the Revised Statutes of Missouri.

The exact point of objection is that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to nonresident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the 14th Amendment, as has been frequently held, to prevent the states from classifying the subjects of legislation, and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all *per[622] sons similarly situated are treated alike in privileges conferred or liabilities imposed. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject-matter, and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the nonresidents, whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. It has been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners. *Buchan v. Broadwell*, 88 Mo. 31. If the legislature saw fit to give to those most directly interested, and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution.

Further objection on Federal grounds is urged, in that the specification of Trinidad Lake asphalt for this improvement is in violation of the interstate commerce clause of the Constitution of the United States, and of the so-called Sherman act of July, 1890. The right to provide for this paving was vested by the Missouri statute in the board of aldermen. The right to select the material for the paving was vested in that

body; they saw fit to choose Trinidad Lake asphalt for the paving. Their right so to do, under the charter powers of such cities as Westport, notwithstanding competitive bidding is thereby rendered impossible, has been sustained by the supreme court of Missouri. *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22, 8 L. R. A. 110, 18 Am. St. Rep. 530, 13 S. W. 98; *Warren v. Barber Asphalt Pav. Co.* 115 Mo. 572, 22 S. W. 490; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52. With the wisdom of this choice the courts have nothing to do; and in this case we are only concerned to inquire as to the alleged violation of Federal rights

[623] in *such selection. The argument is that Trinidad Lake asphalt, being a product of a foreign country, and brought into Missouri, and there being other deposits in other states within the United States from which suitable asphalt could be had, the specification of this kind of asphalt is an interference with, and a regulation of, interstate commerce, in violation of the exclusive right of Congress conferred by the Constitution. It is unnecessary to cite largely from cases in this court which hold that only such acts as directly interfere with the freedom of interstate commerce are prohibited to the states. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, in which case, Mr. Justice Lamar, speaking for the court, said (p. 23, L. ed. 351, Inters. Com. Rep. p. 237, Sup. Ct. Rep. p. 11): "As has been often said 'legislation [by a state] may, in a great variety of ways, affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution.'" *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, ante, 268, 24 Sup. Ct. Rep. 132, and cases cited in the opinion. The right of a state, in the exercise of the police power, to make regulations which indirectly affect interstate commerce, has been frequently sustained. In the present case it may be that the use of this kind of asphalt, under municipal authority conferred by the state will, in a limited degree, affect interstate commerce; but it certainly is not one of those direct interferences with the power over, and express control of, the subject given by the Constitution to Congress. In this day of multiplied means of intercourse between the states there is scarcely any contract which cannot, in a limited or remote degree, be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation.

The attempt to invoke the provisions of the Sherman act in this case is equally unavailing. That act has been recently con-

sidered in the *Northern Securities Cases*, decided at this term, and its construction and the nature of the remedies under it determined. It is not intended to affect contracts which have a remote and indirect bearing upon commerce *between the states. [624] *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

In addition to the ground by which Federal jurisdiction was established in the courts below, it is alleged that the tax bills should be held void because they were obtained by undue influence of the agents of the paving company, improperly exercised to obtain the needed municipal action. The court below held, and an examination of the testimony has brought us to the same conclusion, that there was nothing in the case to establish the charges of fraud and corruption, although the record does show that an agent of the defendant company was active and perhaps influential in obtaining signatures to the petition which specified Trinidad Lake asphalt for this improvement; yet, in the absence of proof of fraud or corruption, we do not think the contract and resulting levies can be set aside for this reason. It is one thing to disapprove of such measures as a matter of propriety of action, but quite another to set aside a contract, especially after the full performance of its terms.

Upon the cross appeal, the learned judge in the court below held that the Wyandotte street tax bills were void, because that street had been previously paved with macadam in the years 1892-1893, four or five years before the asphalt paving was laid, which macadam he found to be in good condition, and but little worn. The effect of this decree was, while finding against complainants as to the allegations of fraud and collusion in obtaining the contract, to hold that, in the opinion of the trial judge, the repaving of Wyandotte street was unnecessary. We think this conclusion overlooks the fact that the power to construct, improve, and pave streets was vested by the law of Missouri, as it generally is, in the board of aldermen. Mo. Laws 1895, 65, § 85 to § 95, inclusive. The necessity of such improvements is a matter of which they are the exclusive judges, and their judgment is not to be interfered with by the courts, except in cases of fraud or gross abuse of power. This power of the city board is a continuing *one, and the mere fact that a [625] pavement has been once laid does not require the interference of the courts when the governing body of the city, in the exercise of its judgment, has determined that the necessity for repaving has arisen. The

law has vested this power in the representatives of the city, and the courts are not at liberty to determine whether the judgment is exercised wisely or unwisely. If this were not so, a contractor, who acts under the direction, and because of the action, of the city authorities in determining the necessity of an improvement, must lose his compensation if, upon the suit of a property owner, the courts shall take a different view of the necessity of the improvement. In other words, the contractor, though acting in good faith and complying in all respects with his agreement, lawfully made, must abide the judgment of the courts as upon appeal from the tribunal solely empowered by law to pass upon the necessity of the improvement, and to make the necessary contracts to carry it out.

As we have said, there may be cases of fraud or arbitrary abuse of power, when the courts will intervene. Under other circumstances the municipality and property owners interested are bound by the acts of their agents. The authorities amply sustain this view. 2 Dill. Mun. Corp. 4th ed. § 686; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026; *Warren v. Barber Asphalt Pav. Co.* 115 Mo. 580, 22 S. W. 490.

Applying the principles settled by the authorities to the facts disclosed in this case, we do not find such evidence of fraud or gross abuse of power as would warrant the setting aside of the tax bills for this improvement. The testimony tends to show that the macadam was considerably worn; its replacement, to the extent of laying an asphalt pavement on top of it, was deemed necessary by the city authorities. It does

not appear that any protest or objection was made during the progress of the work. A majority of the resident owners of lots abutting upon the part of the street to be improved had petitioned for the asphalt pavement. There is considerable *testimony[626] tending to show that the value of abutting property was enhanced by the improvement. These and kindred matters were before the board. It is not our province to review their judgment, and we do not think the courts are authorized to interfere with the discretion vested in them in making the improvement under the circumstances shown. To hold otherwise would be, as we have said, to substitute the judgment of the court as to the expediency or necessity of making such improvement for that of the body delegated by law with the power and responsibility of action in the premises.

The court below, having properly held that the case alleged must fail on the other grounds, should have regarded the judgment of the board of aldermen as to the necessity of repaving Wyandotte street as conclusive upon it. The conclusion reached renders it unnecessary to consider whether the complainant, having failed to protest or object to the work before it was begun or during its progress, can be heard in a court of equity to object to the tax bills assessed for the benefit of the contractor, after the work is completed in compliance with the contract.

We think the court below erred in adjudging the tax bills on Wyandotte street to be void, and so much of the decree is reversed with costs; the decree as to the other streets is affirmed, and the case remanded to the court below, with instructions to dismiss the bill.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

CHARLES L. RAWSON *et al.*, *Petitioners*, v. WESTERN SAND BLAST COMPANY *et al.* [No. 168.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 55 C. C. A. 403, 118 Fed. 575.

Messrs. James H. Raymond and Otto R. Barnett for petitioners.

Mr. John W. Munday for respondents.

[628] April 11, 1904. *Decree affirmed, with costs, by a divided court, and cause remanded to the circuit court of the United States for the northern district of Illinois. Announced by Mr. Justice Harlan. Mr. Chief Justice Fuller did not sit in this case or take any part in its decision.

PHOEBE R. E. E. LINTON *et al.*, *Plaintiffs in Error*, v. FRED HEYE *et al.* [No. 508.]

In Error to the Supreme Court of the State of Nebraska.

Mr. Joseph H. Blair for plaintiffs in error.

Messrs. John C. Watson and John V. Morgan for defendants in error.

April 11, 1904. Judgment affirmed, with costs, on the authority of *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; *Richardson v. Louisville & N. R. Co.* 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268; *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623. (See *Lantry v. Wolff*, 49 Neb. 374, 69 N. W. 494; *Murphy v. J. H. Evans City Steam Laundry Co.* 52 Neb. 593, 72 N. W. 960; *Linton v. Heye* [Neb.] 95 N. W. 1040.)

CARRIE M. WARD, *Plaintiff in Error*, v. CLEVELAND TRUST COMPANY *et al.* [No. 728.]

In Error to the Supreme Court of the State of Ohio.

No counsel for plaintiff in error.

Mr. James Rudolph Garfield for defendants in error.

May 31, 1904. Docketed and dismissed, with costs, on motion of Mr. James Rudolph Garfield for the defendants in error.

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ST. LOUIS MERCHANTS' BRIDGE TERMINAL RAILWAY COMPANY, *Plaintiff in Error*, v. THOMAS CALLAHAN. [No. 203.]

In Error to the Supreme Court of the State of Missouri.

See same case below, 170 Mo. 473, 60 L. R. A. 249, 94 Am. St. Rep. 746, 71 S. W. 208.

Messrs. J. E. McKeighan, John H. Dc-vall, M. F. Watts, and Robert A. Holland, Jr. for plaintiff in error.

Mr. Wm. F. Woerner for defendant in error.

April 18, 1904. Judgment affirmed, with costs, on the authority of *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 351, 44 L. ed. 192, 194, 20 Sup. Ct. Rep. 136, and cases cited.

HAMBURG-AMERICAN STEAMSHIP COMPANY, *Plaintiff in Error*, v. MARY W. LENNAN, as Executrix of the Last Will and Testament of John M. Lennan, Deceased. [No. 622.]

In Error to the Court of Appeals of the State of New York.

Mr. Everett P. Wheeler for plaintiff in error.

Messrs. William Lindsay and J. Culbert Palmer for defendant in error.

April 18, 1904. Dismissed for the want of jurisdiction. *Staten Island R. Co. v. Lambert*, 131 U. S. Appx. ccxi, and 24 L. ed. 615; *Weatherby v. Bowie*, 131 U. S. Appx. ccxv, and 25 L. ed. 606; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Egan v. Hart*, 165 U. S. 188-191, 41 L. ed. 680-682, 17 Sup. Ct. Rep. 300; *Hannibal & St. J. R. Co. v. Missouri River Packet Co.* 125 U. S. 260, 272, 31 L. ed. 731, 736, 8 Sup. Ct. Rep. 874; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *New Orleans Water Works Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691. And see *Lennan v. Hamburg-American S. S. Co.* 73 App. Div. 357, 77 N. Y. Supp. 60; *The Alene*, 116 Fed. 57.

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MARGARET BREWSTER *et al.*, Plaintiffs in Error, *v.* JOHN D. CAHILL *et al.* [No. 216.]

In Error to the Supreme Court of the [629]*State of Illinois.

See same case below, 199 Ill. 309, 65 N. E. 233.

Mr. Fred T. Beers for plaintiffs in error.

Mr. Thos. N. Haskins for defendants in error.

April 18, 1904. *Dismissed*, for the want of jurisdiction, *nunc pro tunc* as of April 7, 1904, on the authority of *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Central Land Co. v. Laidley*, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80, and cases cited; *Chapin v. Fyc*, 179 U. S. 127, 129, 45 L. ed. 119, 121, 21 Sup. Ct. Rep. 71; *New Orleans Water Works Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

STATE OF GEORGIA, Complainant, *v.* STATE OF TENNESSEE *et al.* [No. 14.]

Motion for Leave to File Amended Bill Herein, for Leave to Dismiss as to the Defendant the State of Tennessee, and for Leave to File Stipulation as to Further Proceedings.

[630] Messrs. John C. Hart and *Ligon Johnson for complainant.

Messrs. Charles T. Cates, Jr., Howard Cormick, and John H. Frantz for defendants.

April 18, 1904. Motions *granted*, and bill and amended bill *dismissed*.

BERLIN IRON BRIDGE COMPANY, Plaintiff in Error, *v.* WILLIAM BRENNAN. [No. 249.]

In Error to the Supreme Court of Errors of the State of Connecticut.

See same case below, 75 Conn. 393, 53 Atl. 779.

Messrs. Seymour C. Loomis and Edwin A. Jones for plaintiff in error.

Messrs. Wm. Kennedy, John O'Neill, and Susan C. O'Neill for defendant in error.

May 16, 1904. *Dismissed* for the want of jurisdiction, on the authority of *Wabash R. Co. v. Flannigan*, 192 U. S. 29, *ante*, 328, 24 Sup. Ct. Rep. 224; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

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NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW YORK, Plaintiff in Error, *v.* G. R. FARNHAM, Executor, *etc.* [No. 227.]

In Error to the Supreme Court of the State of Mississippi.

See same case below, 81 Miss. 364, 33 So. 2.

Messrs. A. S. Bozeman, J. S. Sexton, and Marcellus Green for plaintiff in error.

Messrs. J. C. Bryson and L. W. Magruder for defendant in error.

April 25, 1904. Judgment *affirmed*, with costs and interests, on the authority of *National Mut. Bldg. & L. Asso. v. Brahan*, 193 U. S. 635, *ante*, 823, 24 Sup. Ct. Rep. 532.

*CHARLES B. KIMBALL *et al.*, Appellants, *v.* [631] CHICAGO HYDRAULIC PRESS BRICK COMPANY *et al.* [No. 258.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 55 C. C. A. 162, 119 Fed. 102.

Mr. Edmund Harvey Smalley for appellants.

Messrs. Edward Cunningham, Jr., and Edward C. Eliot for appellees.

May 16, 1904. *Dismissed* for the want of jurisdiction, on the authority of *Arbuckle v. Blackburn*, 191 U. S. 405, *ante*, 239, 24 Sup. Ct. Rep. 148; *Continental Nat. Bank v. Buford*, 191 U. S. 119, *ante*, 119, 24 Sup. Ct. Rep. 54; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

LENA S. WALTON *et al.*, Petitioners, *v.* WILD GOOSE MINING & TRADING COMPANY. [No. 574.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. J. W. Hughes, D. W. Burchard, and John M. Thurston for petitioners.

Messrs. Chas. Page, E. J. McCutchen, and A. B. Browne for respondent.

April 11, 1904. *Denied*.

DENTER, HERTON, & Co., Bankers, Petitioners, *v.* LONDON & SAN FRANCISCO BANK, Limited. [No. 614.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Wm. E. Humphrey for petitioners.

Messrs. Charles E. Shepard and Thomas R. Shepard for respondent.

April 11, 1904. *Denied*.

UNITED STATES TO USE OF J. EDWARD CHAPMAN, *Petitioner, v. CITY TRUST, SAFE DEPOSIT, & SECURITY COMPANY, OF PHILADELPHIA.* [No. 626.]

[632] Petition for a *Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Charles H. Merillat for petitioner.
No opposition.

April 11, 1904. *Denied.*

MORNING JOURNAL ASSOCIATION, *Petitioner, v. JAMES H. DUKE.* [No. 629.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Clarence J. Shearn for petitioner.

Messrs. A. J. Rose and A. C. Petté for respondent.

April 11, 1904. *Denied.*

F. AUGUSTUS HEINZE *et al.*, *Petitioners, v. BUTTE & BOSTON CONSOLIDATED MINING COMPANY.* [No. 634.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. John J. McHatton for petitioners.

Messrs. John A. Garver and James M. Beek for respondent.

April 11, 1904. *Denied.*

NATIONAL RAILROAD COMPANY OF MEXICO, *Petitioner, v. G. A. O'LEARY.* [No. 635.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Thomas W. Dodd for petitioner.

No opposition.

April 11, 1904. *Denied.*

HERMAN R. MURRAY, *Petitioner, v. ISAAC C. WILSON, Trustee, etc.* [No. 637.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Vincent A. Sheehy for petitioner.

Mr. Thomas D. Rambaut for respondent.

April 11, 1904. *Denied.*

J. RAYMOND SMITH, *Petitioner, v. STEAMSHIP ONEIDA, etc.* [No. 638.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Wilhelmus Mynderse for petitioner.

Mr. Henry G. Ward for respondent.

April 11, 1904. *Denied.*

*NEDERLAND LIFE INSURANCE COMPANY, [633]

Limited, *Petitioner, v. MARY MEINERT.* [No. 624.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. George W. Wickersham for petitioner.

Mr. Albert J. Beveridge for respondent.

April 11, 1904. *Granted.*

GREAT WESTERN MINING & MANUFACTURING COMPANY, ETC., *Petitioner, v. CHARLES A. HARRIS et al., Executors, etc., et al.* [No. 632.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Harlan Cleveland for petitioner.

Messrs. Julien T. Davies and Brainard Tolles for respondents.

April 11, 1904. *Granted.*

HENRY P. BOOTH, Surviving Partner, etc., *Petitioner, v. NORWEGIAN BARK ELIZA LINES, etc., et al.* [No. 627.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Lewis S. Dabney and Frederic Cunningham for petitioners.

April 11, 1904. *Granted.*

ATLANTIC LUMBER COMPANY, *Petitioner, v. L. BUCKI & SON LUMBER COMPANY.* [No. 641.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. R. H. Liggett for petitioner.

Messrs. H. Bisbee and George C. Bedell for respondent.

April 11, 1904. *Granted.*

MANHATTAN LIFE INSURANCE COMPANY, *Petitioner, v. FRANK B. ALBRO, Executor, etc.* [No. 642.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Artemas H. Holmes and Edward S. Rapallo for petitioner.

Mr. John W. Cummings for respondent.

April 25, 1904. *Denied.*

*BOARD OF TRADE OF THE CITY OF CHICAGO, [634]

Petitioner, v. CHRISTIE GRAIN & STOCK COMPANY et al. [No. 648.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Henry S. Robbins for petitioner.

Messrs. James H. Harkless, Clifford Histed, W. H. Rossington, and Charles Blood Smith for respondents.

April 25, 1904. *Granted.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Petitioner*, v. WEST COAST NAVAL STORES COMPANY. [No. 649.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. W. A. Blount and A. C. Blount, Jr., for petitioner.

Mr. John C. Avery for respondent.

April 25, 1904. *Granted*.

GLOBE-WERNICKE COMPANY, *Petitioner*, v. FRED MACEY *et al.* [No. 326.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 56 C. C. A. 304, 119 Fed. 696.

Messrs. Edward Taggart and Arthur C. Denison for petitioner.

Mr. Fred L. Chappell for respondents.

May 2, 1904. *Denied*.

WILLIAM H. HANLEY *et al.*, *Petitioners*, v. UNITED STATES. [No. 644.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Joel M. Marx for petitioners.

The Attorney General and Solicitor General Hoyt for respondent.

May 2, 1904. *Denied*.

JOHN SEBECK, *Petitioner*, v. PLATT-DEUTSCHE VOLKSFEST VEREIN. [No. 647.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Clarence P. Moser for petitioner.

Mr. Rudolph F. Rabe for respondent.

May 2, 1904. *Denied*.

[635]*JOHN E. KERR *et al.*, *Petitioners*, v. UNION MARINE INSURANCE COMPANY, Limited. [No. 662.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Wilhelmus Mynderse for petitioners.

Mr. Albert A. Wray for respondent.

May 16, 1904. *Denied*.

HELEN HACKLEY LITTELL, *Petitioner*, v. CHARLES H. HACKLEY *et al.* [No. 665.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Morse Ives for petitioner.

Mr. Willard Kingsley for respondents.

May 16, 1904. *Denied*.

WILLIAM J. BRAKE, as Administrator, *Petitioner*, v. N. A. CALLISON. [No. 666.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. James E. Padgett, H. Bisbee, and Geo. C. Bedell for petitioner.

Mr. C. D. Rinehart for respondent.

May 16, 1904. *Denied*.

W. L. WELLS COMPANY, *Petitioner*, v. GASTONIA COTTON MANUFACTURING COMPANY. [No. 661.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Charles W. Tillett and Murray F. Smith for petitioner.

Mr. Charles Price for respondent.

May 31, 1904. *Granted*.

CALIFORNIA REDUCTION COMPANY *et al.*, *Petitioners*, v. SANITARY REDUCTION WORKS OF SAN FRANCISCO. [No. 699.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Charles Page, E. J. McCutchen, and Garret W. McEnerney for petitioners.

May 31, 1904. *Granted*.

*MEXICAN CENTRAL RAILWAY COMPANY, [636] Limited, *Petitioner*, v. H. A. ROBINSON. [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Aldis B. Browne, Alex. Britton, and Eben Richards for petitioner.

Mr. Millard Patterson for respondent.

May 31, 1904. *Denied*.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, *Petitioner*, v. BULLOCK ELECTRIC MANUFACTURING COMPANY. [No. 664.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Drury W. Cooper, Frederic H. Betts, and Thomas B. Kerr for petitioner.

Messrs. John R. Bennett and Arthur Stem for respondent.

May 31, 1904. *Denied*.

ROY M. ARRIGHI, *Petitioner, v. DENVER & RIO GRANDE RAILROAD COMPANY.* [No. 671.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Harvey Riddell for petitioner.

Messrs. E. O. Wolcott and Joel F. Vaile for respondent.

May 31, 1904. *Denied.*

ANDREW L. EATON, *Petitioner, v. E. J. LEWIS.* [No. 673.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. John H. Hazelton and Geo. C. Hazelton for petitioner.

Mr. Seabury C. Mastick for respondent.

May 31, 1904. *Denied.*

CITY OF JOHNSON CITY, TENNESSEE, *Petitioner, v. MUNICIPAL TRUST COMPANY, Limited.* [No. 680.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. H. H. Carr for petitioner.

Mr. Horace B. Hord for respondent.

May 31, 1904. *Denied.*

[637]*INSURANCE COMPANY OF NORTH AMERICA, *Petitioner, v. NORWICH & NEW YORK TRANSPORTATION COMPANY* [No. 681]; SECURITY INSURANCE COMPANY OF NEW HAVEN, *Petitioner, v. NORWICH & NEW YORK TRANSPORTATION COMPANY* [No. 682]; FIREMAN'S FUND INSURANCE COMPANY OF SAN FRANCISCO, *Petitioner, v. NORWICH & NEW YORK TRANSPORTATION COMPANY* [No. 683]; PERCY CHUBB *et al.*, *Petitioners, v. NORWICH & NEW YORK TRANSPORTATION COMPANY.* [No. 684.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Lawrence Kneeland for petitioners.

Mr. Wilhelmus Mynderse for respondent.

May 31, 1904. *Denied.*

WORLD MARINE INSURANCE COMPANY, Limited, *et al.*, *Petitioners, v. LACKAWANNA TRANSPORTATION COMPANY et al.* [No. 692.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Wilhelmus Mynderse for petitioners.

Messrs. John G. Milburn and Harvey D. Goulder for respondents.

May 31, 1904. *Denied.*

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FIDELITY MUTUAL LIFE INSURANCE COMPANY, *Petitioner, v. PAUL RIGGS et al.*, Executors, etc. [No. 685]; NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, *Petitioner, v. PAUL RIGGS et al.*, Executors [No. 686]; AMERICAN CENTRAL LIFE INSURANCE COMPANY, *Petitioner, v. PAUL RIGGS et al.*, Executors, etc. [No. 687]; HARTFORD LIFE INSURANCE COMPANY, *Petitioner, v. PAUL RIGGS et al.*, Executors, etc. [No. 688.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Stephen S. Brown and John E. Dolman for petitioners in Nos. 685, 686, 688, and same with *Mr. Augustin Boice* in No. 687.

Mr. Kendall B. Randolph for respondent.

May 31, 1904. *Denied.*

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner, v. *STEAMSHIP WESTMINSTER,* [638] etc. [No. 694.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Horace L. Cheyney and John F. Lewis for petitioner.

Mr. J. Parker Kirlin for respondent.

May 31, 1904. *Denied.*

JOHN C. FETZER *et al.*, Receivers, etc. *et al.*, *Petitioners, v. DAVID A. KOHN et al.* [No. 697]; JOHN C. FETZER *et al.*, Receivers, etc. *et al.*, *Petitioners, v. JACOB MILLER et al.* [No. 698.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. John S. Miller, Henry Crawford, and Charles H. Aldrich for petitioners.

Messrs. T. A. Moran and Levy Mayer for *Kohn et al.*

Mr. Horace K. Tenney and Henry R. Platt for *Miller et al.*

May 31, 1904. *Denied.*

EDWARD S. CAMPBELL, As Ancillary Receiver, etc., *Petitioner, v. NATIONAL BROADWAY BANK.* [No. 700.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Geo. W. Wickersham and Walter D. Davidge for petitioner.

Mr. W. J. Curtis for respondent.

May 31, 1904. *Denied.*

N. A. CALLISON, *Petitioner, v. WILLIAM J. BRAKE, Administrator, etc.* [No. 701.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. C. D. Rinehart and E. P. Axtell for petitioner.

Messrs. H. Bisbee and Geo. C. Bedell for respondent.

May 31, 1904. *Denied.*

KIMBALL STEAMSHIP COMPANY, *Petitioner, v. ELLA M. WEISSHAAR, Administratrix, etc.* [No. 705.]

[639] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Edward M. Cleary for petitioner.

Mr. N. A. Acker for respondent.

May 31, 1904. *Denied.*

AMERICAN WATER WORKS & GUARANTY COMPANY, *Appellant, v. CITY OF LITTLE ROCK et al.* [No. 248.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

See same case below, 115 Fed. 171.

Mr. J. M. Moore for appellant.

Messrs. W. L. Terry and M. M. Cohn for appellees.

April 8, 1904. *Dismissed*, with costs, on authority of counsel for the appellant.

JAMES F. CUNNINGHAM, *Plaintiff in Error, v. JOSEPHUS MORRIS.* [No. 237.]

In Error to the Supreme Court of the Territory of Oklahoma.

Mr. S. H. Harris for plaintiff in error.

No counsel for defendant in error.

April 12, 1904. *Dismissed*, with costs, on the authority of counsel for plaintiff in error.

NORA ARMSTRONG, *Plaintiff in Error, v. BOARD OF CONTROL OF THE STATE PUBLIC SCHOOLS et al.* [No. 236.]

In Error to the Supreme Court of the State of Minnesota.

Mr. J. A. Sawyer for plaintiff in error.

Mr. W. A. Sperry for defendants in error.

April 18, 1904. *Dismissed*, with costs, pursuant to the tenth rule.

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NEW YORK & PORTO RICO STEAMSHIP COMPANY, *Plaintiff in Error, v. J. OCHOA Y HERMANO, etc.* [No. 241.]; NEW YORK & PORTO RICO STEAMSHIP COMPANY, *Plaintiff in Error, v. SUCCESSORS OF M. LOMBA & Co., etc.* [No. 242.]

In Error to the District Court of the United States for the *District of Porto Rico.

Messrs. Joseph K. McCammon, James H. Hayden, John G. Carlisle, and F. Kingsbury Curtis for plaintiff in error.

Messrs. Frederic D. McKenney and F. H. Dexter for defendants in error.

April 20, 1904. *Dismissed*, with costs, on motion of *Mr. James H. Hayden* for the plaintiff in error.

CHARLES WEIL *et al.*, *Plaintiffs in Error, v. EMANUEL W. BLOOMINGDALE, as Assignee, etc., et al.* [No. 251.]

In Error to the Supreme Court of the State of Washington.

Messrs. Louis D. Brandeis and John G. Palfrey for plaintiffs in error.

Mr. Daniel P. Hays for defendants in error.

April 21, 1904. *Dismissed*, with costs, pursuant to the tenth rule.

AUGUST A. BUSCH *et al.*, *Appellants, v. G. P. WEBB et al.* [No. 260.]

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

See same case below, 122 Fed. 655.

Messrs. A. G. Mcseley and Louis B. Epstein for appellants.

Mr. Amos L. Beaty for appellees.

April 27, 1904. *Dismissed*, with costs, on authority of counsel for appellants.

ATLANTIC, GULF, & PACIFIC COMPANY, *Plaintiff in Error, v. UNITED STATES.* [No. 729.]

In Error to the District Court of the United States for the Northern District of California.

No counsel for the plaintiff in error.

The Attorney General and Solicitor General Hoyt for the defendant in error.

May 31, 1904. Docketed and *dismissed*, on motion of *Solicitor-General Hoyt* for the defendant in error.

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APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1903.

ORDER.

Ordered that the clerk of the court be, and he is hereby, authorized and directed to procure a new seal for the court. Said seal shall be the arms of the United States, with these words in the margin, "Seal of the Supreme Court of the United States," engraved on a circular piece of steel not exceeding two and one fourth inches in diameter.

May 31, 1904.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1903.

ORDER.

Whereas J. C. Baneroft Davis, the former reporter of this court, resigned his office on September 11, 1902, to take effect at once, which resignation was accepted; and whereas Charles Henry Butler was appointed his successor December 4, 1902, and was charged by the order appointing him with the duty of reporting all the decisions of October term, 1902, and has accordingly reported all decisions delivered prior to December 4, during October term, 1902; it is—

Ordered, that the order of December 4, 1902, appointing Charles Henry Butler reporter of this court, be given effect *nunc pro tunc* as of the first day of October term, 1902, to wit, October 13, 1902.

May 31, 1904.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1903.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of by the court, be, and the same are hereby, continued until the next term of the court.

May 31, 1904.

Ref 348.73 Un35
United States. Supreme
Court.
Cases argued and decided in
the Supreme Court of the

For Reference

Not to be taken from this room

PHILLIPS ACADEMY



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